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ON

INDIAN CONTRACT

AND

SPECIFIC RELIEF ACTS

WITH A COMMENTARY CRITICAL AND EXPLANATORY

TENTH EDITION

By

JEEVAN LAL KAPUR, M.A., LL.B. (Cantab.)

Of the Inner Temple, Barrister-at-Law
Retired Judge of the Supreme Court of India
Ex-Chairman of the Law Commission of India

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PREFACE TO THE TENTH EDITION

It is normally the privilege of the revising editor to write the Preface to a work of this kind. Unfortunately Mr. Justice J. L. Kapur, who had revised the earlier edition also, passed away very shortly after the manuscript was completed, and this task now falls to the publishers.

It is customary to include in the Preface acknowledgements and thanks to the various persons who have been involved in the writing of the book. The publishers wish to pay their tribute to the late Justice J.L. Kapur, a judge of vast learning, a social reformer, a perfect gentleman and a true Indian.

The publishers acknowledge with thanks the assistance rendered to Justice Kapur by Mr. P.V.S. Murthy, M.A. (Madras), M.A. (Columbia), M.Phil. (Columbia). Mr. Murthy was greatly helpful to the learned editor in the preparation of the manuscript, particularly during the later stages when age and failing eyesight were a deterrent to him. Mr. Murthy is also responsible for the revised and improved subject index provided in this edition.

To Mr. Dileep Dalal, Advocate, High Court, Bombay the publishers are thankful for the Addenda, which attempts to incorporate the latest case-law decided since the manuscript went to the printers.

When this book was first written over eighty years ago, the decisions of the British courts took up considerable space, and this influence continued in successive editions. Even after independence, Judges in Indian courts took notice of the comments in earlier editions. It is now acknowledged that judgements of the Supreme Court of India constitute the law of the land. However decisions of law courts in Australia, Canada and the United States have also been inducted into this work where considered useful and necessary.

PUBLISHERS

Bombay, July 1986

PREFACE TO THE NINTH EDITION

One of the learned authors in the preface to the first edition said that the characteristic of the Indian Contract Act is that it is a code of English Law, which view was reflected in the commentary by the learned authors and in the editions that followed. The present edition also has endeavoured to maintain that characteristic. Further on the abolition of the appeals to the Privy Council, its common tie for the homogeneous development of the common law throughout the Commonwealth was broken and that link has now to be provided by the text-books as observed by Denning L.J. (now Lord Denning M.R.). It is for these reasons that the relevant decided cases from various jurisdictions where the common law is administered, whether English courts, Australian courts, Canadian courts or Pakistan courts, were studied and wherever found relevant and helpful, incorporated under relevant sections.

The courts of independent India have, properly, it is submitted, continued to refer to cases from the courts of other Commonwealth countries and the law reports bear ample testimony to the advisability of applying the common law wherever appropriate or necessary and of keeping it as a link between Indian Law of Contract and English Law, and the interpretation of the sections of the Act has been enriched by "principles and doctrines embodied" in the decisions of the various Commonwealth courts outside India. While doing so, the editor has not ignored the decision of the Supreme Court that the Act to the extent that it deals with a particular subject, is exhaustive upon the same and that it would be incorrect to say that where these sections are not applicable, recourse can be had to principles of English Law which may have a persuasive value and are helpful in showing how those courts have decided cases under similar circumstances. (*Satyabrata Gose* v. *Mugneeram & Co.*, 1954 S.C.R. 310).

Amongst the subjects, which have assumed importance in modern times and are discussed in this edition, it may be permissible to mention a few, the law relating to aircraft and the right of airlines to claim exemption from liability under the common law, the law applicable to contracts, *lex loci* or *lex situs,* the doctrine of promissory estoppel, fundamental breach and fundamental or essential condition; contract *inter praesentes* and *inter absentees,* error as to the person and the subject-matter of the contract. The contracts made on the telephone or by telex have also been discussed. (*Bhagwandas* v. *Girdharilal* (1966) 1 S.C.R. 656, so also the law relating to payment in foreign currency and gold coin and gold clause).

Cases dealing with the principle of *in pari delicto* decided by the Privy Council and by the Supreme Court have also been studied and quoted. (*Sajan Singh* v. *Sardara Ali,* 1960 A.C. 167 and *Palaniappa* v. *Arunachalam* (1962) A.C. 294; both referred to in *Suraibalani* v. *Phanindra* (1965) 1 S.C.R. 861; similarly *Sheikh Bros.*

v. *Ochsner* (1957) A.C. 136, where the difference between Ss. 20 and 56 was pointed out by the Privy Council).

The portion dealing with Consideration has been expanded and enlarged particularly on account of the controversy as to the essentiality of consideration and the rights of third parties. (*Beswick* v. *Beswick*, 1968 A.C. 58; and *Coulls case* (1967) A.L.J.R. 471 which was referred to by the House of Lords in *Beswick's case)*. Reference has also been made to the observations of Denning L.J. that sanctity is not now attached to contracts (*British Movietones Ltd.* v. *London & District Cinemas Ltd.* (1951) 1 K.B. 190, 201) which was not accepted by the House of Lords and was referred to by the Supreme Court in *Boothlinga Agencies case* (1969) 1 S.C.R. 65.

All the Indian cases decided since the last edition were studied and those that were considered helpful in the exposition of the principles governing the law of contract have been embodied. Care has been taken to exclude those cases the value of which was considered to be little. Most of the Supreme Court cases declaring the Law of the Contract and of Specific Relief have been included, notably cases on Frustration beginning with *Satyabrata Ghose* v. *Mugneeram,* 1954 S.C.R. 310 and on unjust enrichment. (*Alopi Prasad* v. *Union of India* (1960) 2 S.C.R. 793).

The controversy as to the applicability of Ss. 65, 70 to cases of contracts with the Union or the States if they are in contravention of S. 175(3) of the Government of India Act and now of Art. 299(1) of the Constitution has been set at rest by the pronouncement of the Supreme Court on the application of S. 70, i.e. by treating the obligation as arising under a *quasi* contract and consequently being claimable. (*Mulamchand* v. *State of Madhya Pradesh* (1968) A.S.C. 1218).

The Specific Relief Act of 1963 which has adopted many of the suggestions by the learned authors of this book has practically been rewritten and the repealed sections and decisions dealing with them have been omitted as unnecessary. The law has been classified as to mutuality in the matter of Specific Relief in S. 12 and again in S. 20(4). A case on Specific Relief which has reference to unfair advantage is *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221 and the ones dealing with personal service are discussed under S. 14, a notable case being *Dr. S. Dutt's case* (1959) S.C.R. 1236.

In the end the editor wishes to express his gratitude to Mr. K. S. Shavaksha, who unfortunately died recently, for the valuable help given by him, particularly in rewriting the portion relating to Specific Relief Act.

J.L.K.

12 Ashoka Road
New Delhi
August 1972

PREFACE TO THE FIRST EDITION

The Indian Contract Act is in effect, and for the reasons explained in our commentary on the first section, a code of English law. Like all codes based on an existing authoritative doctrine, it assumes a certain knowledge of the principles and habits of thought which are embodied in that doctrine. But, unlike European codes, it has to be applied in practice by magistrates and pleaders to whom the materials and surroundings of its own system are unfamiliar. It seems proper, therefore, that editors of an Anglo-Indian Code should give a pretty full exposition of those fundamental notions in the Common Law which are concisely declared, with or without modification, by the text. How far they have in fact been modified, and whether by deliberate design or by accident in the execution, is a question of interpretation depending not on the text alone, but on its relations to the English authorities which the framers of the code had before them, and to the subsequent development of English law. My first object has been to make those relations as clear as possible. For this purpose I have given more elementary explanation than would be required in a treatise addressed only to English lawyers or to practitioners in the High Courts, while I have endeavoured to avoid entering on details of procedure and other purely English technical matters beyond what was necessary for understanding the substance of the authorities.

We also have by this time a considerable number of reported Indian decisions on the Act. As it did not seem to me possible for an English lawyer who had not practised in India to deal adequately with these, I consented to undertake this edition only on the terms of the Indian cases being collected and digested by a competent person within the jurisdiction. Accordingly this task was entrusted to Mr. D. F. Mulla, who has performed it, so far as I can judge, completely and faithfully. I do not profess to have verified all his references, but I have verified and considered enough of them to be satisfied that his work is trustworthy. With the form of it I have interfered as little as might be, though some rearrangement and recasting was needful in order to combine Mr. Mulla's portion with my own in continuous whole. The result is that Mr. Mulla, while he is answerable for the inclusion of all Indian reported cases which ought to be cited for the use of practitioners, is not necessarily answerable for the distribution of them as appropriate to this or that section, or for the opinions expressed. At the same time I have seldom found occasion to differ with Mr. Mulla. Much oftener I have been able to strengthen his conclusions by the analogy of recent English dotrine, and to state them with increased confidence.

The present commentary is critical as well as explanatory. The criticism unavoidably follows the Act section by section, and is therefore broken up into many comments on details. In order to give a general notion beforehand of the causes which have made it necessary, and the spirit, I trust no captious one, in which

it was undertaken, I now repeat the words I used in an unsigned review of Dr. Whitley Stokes's "Anglo-Indian Codes" on the publication of the first volume in 1887: "Every written law which goes beyond mere regulation of details is a work of art: it can no more afford to dispense with unity of design and continuity of execution than a monumental building. It should proceed from one mind, or from very few minds working in intimate association, and it should be framed, if not by one hand, at least under uniform general direction and by hands trained in one school. Where these conditions cannot be satisfied in the first instance, the next best thing is to secure a certain measure of uniformity by careful authoritative revision in the final stage. In England even this is seldom attainable.... The Government of India is less hampered, though not quite so free as might be supposed, and it may be said to have made good progress in founding a school of legislative composition. The results obtained are, on the whole, worthy of the succession of distinguished men whose services in the Governor-General's Council are commemorated by Mr. Whitley Stokes; and we must add that no small share of the labour and the credit belongs to Mr. Stokes himself. Still there has been in some cases a want of continuity. Measures long held in suspense, perhaps by excessive scruples, have been finished and passed in something like haste. Not only the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect.... Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything, than the average badness of the whole—were most unfortunately adopted in the Indian Contract Act. Whenever this Act is revised everything taken from Mr. Dudley Field's code should be struck out and the sections carefully recast after independent examination of the best authorities." In fact, the Contract Act passed through not less than three distinct stages. First, there was the draft prepared in England by the Indian Law Commission, uniform in style and possessing great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago. By the courtesy of the India Office I have had the use of this draft, and it is often referred to in the commentary for comparision with the final text of the Act. Next, this was revised and in parts elaborated by the Legislative Department in India. The borrowing from the New York draft Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision, and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work. Evidently this process could not satisfy the conditions of a model code. It is much to the credit of the workmen that the result, after allowing for all drawbacks, was a generally sound and useful one.

In many of the arguments and some of the judgments in the reports of the Indian High Courts there appears, if I mistake not, a tendency to follow English authorities too literally (though in any case they are not positively binding on Indian Courts), considering only what the Courts actually decided in England, and not what they would have decided if their office had been to apply the principles of the Common Law to the facts of Indian society. The best way to counteract such a tendency is not to neglect the letter of English judgments, which is not practicable and would not be useful, but to enter more fully into their spirit and distinguish their permanent from their local and accidental elements. To this object I have endeavoured, within the bounds of my undertaking, to contribute.

F.P.

LINCOLN'S INN,
May, 1905

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A.A.	A.I.R. Allahabad	A.M.P.	A.I.R. Madhya Pradesh
A.A.P.	,, Andhra Pradesh	A.M.	,, Madras
A. Asm. or As.	,, Assam	A.My.	,, Mysore
A.B.	,, Bombay	A.P.	,, Patna
A.Cal.	,, Calcutta	A.Pep.	,, Pepsu
A.De.	,, Delhi	A.Pesh.	,, Peshawar
A.F.C.	,, Federal Court	A.P.C.	,, Privy Council
A.Guj.	,, Gujarat	A.Punj.	,, Punjab
A.J.&K.	,, Jammu & Kashmir	A.Raj.	,, Rajasthan
A.K.	,, Kerala	A.R.	,, Rangoon
A.Kutch	,, Kutch	A.S.	,, Sindh
A.L.	,, Lahore	A.S.C.	,, Supreme Court
A.N.	,, Nagpur	A.T.C.	,, Travancore-Cochin
A.O.	,, Oudh	P.L.D.	All Pakistan Legal Decisions
A.Or.	,, Orissa		

PERIODICALS

A.L.J.	Australian Law Journal
,, R	Australian Law Journal Reports
Camb. L.J.	Cambridge Law Journal
Can. Bar Rev.	Canadian Bar Review
Har. L.J.	Harvard Law Journal
L.Q.R.	Law Quarterly Review
Mod.L.R.	Modern Law Review
A.L.J.R.	Australian Law Journal Reports
C.L.R.	Commonwealth Law Reports
N.S.W.S.R.	New South Wales State Reports
Q.S.R.	Queensland State Reports
S.A.S.R.	South Australian State Reports
T.S.R.	Tasmanian State Reports
V.L.R.	Victorian Law Reports
V.R.	Victorian Reports
W.A.L.R.	Western Australian Law Reports
W.A.R.	Western Australian Reports
G.L.R.	Gazette Law Reports (N.Z.)
N.Z.L.J.R.	New Zealand Law Journal Reports
N.Z.L.R.	New Zealand Law Reports
D.L.R.	Dominion Law Reports

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ADDENDA

(Up to date to May 1986)

P. 7, after text corresponding to fn. 50:

The custom or usage of a trade cannot modify the express term which is clear and not ambiguous (*M/s Magnum Films* v. *M/s Golcha Properties Pvt. Ltd.*, AIR 1984 Delhi 162 at 164).

P. 8, add in fn. 52:

See, also, *M/s Magnum Films* v. *M/s Golcha Properties Pvt. Ltd.* AIR 1984 Delhi 162 at 164.

P. 25, after text corresponding to fn. 99:

See, however, *Subhash Chandra* v. *Nagar Palika, Kanpur,* AIR 1984 All 228, where it was held that undertaking by the Nagar Palika to pay a token sum of Rs. 100/- per mensem as maintenance to the person who gave the property to it did not amount to 'consideration' and did not defeat the gift.

P. 25, add in fn. 99:

See, also, *Subhash Chandra* v. *Nagar Mahapalika, Kanpur* AIR 1984 All. 228.

P. 28, after text corresponding to fn. 25:

Where, by a deed, *A* conveyed his property to *B* and, on the same day *B,* by another deed, agreed to reconvey the property to *A* and *C* or any one of them alone, and the said second deed was not signed by *A* or *C,* the Allahabad High Court held that there was an agreement enforceable at law and decreed specific performance thereof (*Prag Datt* v. *Saraswati Devi,* AIR 1982 All 37).

P. 32, add in fn. 68:

See also, *Fatehchand Murlidhar & etc.,* v. *M.S.E.B.,* AIR 1985 Bom 71 at 74.

P. 38, add in fn. 22:

See, also, *Fatechand Murlidhar and etc.* v. *Maharashtra State Electricity Board,* AIR 1985 Bom 71 at 74.

P. 57, add in fn. 77:

See also *H.G. Krishna Reddy & Co.* v. *M.M. Thimmiah & anr,* AIR 1983 Mad 169.

P. 59, add at bottom:

Negotiation of terms. Unless the terms of the contract are arrived at after due negotiation, they cannot be held binding merely because a ticket is later issued, containing the said terms. There must also be proof that the terms were meant to be contractual. The said terms must have been brought to the notice of the contracting party at or before the time when the contract was entered into. If the printed terms on the ticket do not, as stated above, become part of the contract, they cannot be enforced unilaterally, for otherwise, it will amount to an alteration of the terms of the original contract (*The Special Secretary to Government of Rajasthan (Finance), Jaipur, Rajasthan & others* v. *Veaakantara Venkataramana Seshaiyer & others,* AIR 1984 A.P. 5).

P. 71, after text corresponding to fn. 99:

Where the material containing terms of contract was in small print on the reverse side of a lottery ticket and there was no evidence to show that the printed matter on the reverse side of the ticket was part of any negotiation or that the attention of the purchaser was drawn to such matter at or before the time when he paid the purchase price of the lottery ticket or that he had perused the printed matter at or before the time of contract, the court held in *The Special Secretary to the Govt. of Rajasthan* v. *Vedakantara Venkataramana Seshaiyer,* AIR 1984 A.P. 5, that such printed terms were not binding on the purchaser of the lottery ticket. It was further observed by the court that unless the terms of contract are arrived at after due negotiation, they cannot be held binding merely because a ticket is later issued containing the said terms. There must also be proof that the terms were meant to be contractual. The said terms must have been brought to the notice of the contracting party at or before the time when the contract was entered into. If the printed terms on the ticket do not, as aforementioned, become part of the contract, they cannot be enforced unilaterally, for otherwise, it will amount to an alteration of the terms of the original contract.

P. 79, add in fn. 59:

See also, *American Pipe Co.* v. *State of U.P.,* AIR 1983 Cal 186 at 192.

P. 83, add in fn. 99:

See also, *American Pipe Co.* v. *State of U.P.,* AIR 1983 Cal 186 at 192.

P. 83, after the paragraph "Withdrawal of bid by telegram", add the following paragraph:

Concluded contract and promissory estoppel. Where contractual relationships between the parties have been established under a completed contract, there is no scope for the application of the principle of promissory estoppel (*C.V. Enterprises* v. *M/s Braithwaite and Co. Ltd. and Ors.* AIR 1984 Cal 306 at 310).

P. 95, add in fn. 92:

See also, *H G Krishna Reddy & Co.* v. *M M Thimmaiah & another,* AIR 1983 Madras 169.

P. 97, after text corresponding to fn. 15:

In *L.I.C. of India* v. *R. Vasireddy,* AIR 1984 SC 1014 the Supreme Court, however, held that the mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance. It further observed that though in certain human relationships silence to a proposal might convey acceptance, in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offeror. The general rule is that contract of insurance will be conclued only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or the insurer, however, depends simply on the way in which negotiations for an insurance have progressed (vide AIR 1984 SC at 1018).

P. 111, after text corresponding to fn. 11:

In the case of insurance, the mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance (*L.I.C. of India* v. *R. Vasireddy* AIR 1984 SC 1014 at 1018).

P. 118, after text corresponding to fn. 8:

On a comparison of the language used in sections 10, 13 & 14 two conclusions are inescapable. In order to constitute a contact, both the parties must consent to the agreement. Even if both the parties have consented to the agreement, consent of one of them may not be said to be free if the same had been obtained by coercion, undue influence etc. The distinction between the total lack of consent and a tainted consent is real. It is only in those cases in which a tainted consent has been obtained or procured from one of the parties that a contract at his instance shall be held to be voidable and may be set aside (*Deo Nandan* v. *Chhote,* AIR 1983 All 9 at 11).

P. 118, after the text corresponding to fn. 8:

A lawful agreement of lease is a contract. When such contract was not made in accordance with Article 299 of the Constitution of India, it was not a valid or binding document (See *Sri Narayan Gosain & Ors.* v. *Collector, Cuttack & Ors.* AIR 1986 Orissa 46).

P. 122, after text corresponding to fn. 41, add new para:

Transfer by de facto guardian. A transfer of a minor's property by a de facto guardian is in the nature of an ultra vires act and it is open to the minor when he attains majority to repudiate it if it was not for his benefit or for his necessity. He can repudiate it by merely refusing to accept the transfer and continue to enjoy and possess the property so transferred in his own rights or by claiming recovery of possession thereof if he had been dispossessed. It is not necessary to have a judicial rescission of such a transfer because the transfer in substance being by an unauthorised person is not rendered valid except upon ratification (*Hari Satya Banerjee & Others* v. *Mahadev Banerjee & Others,* AIR 1983 Cal 76 at 81).

P. 127, add in fn. 93:

See also, *Hari Satya Banerjee & others* v. *Mahadev Banerjee & others,* AIR 1983 Cal. 76.

P. 129, after text corresponding to fn. 18:

A quondam minor challenging the transfer of an immoveable property through his natural guardian in contravention of section 8(1) and 8(2) of the Hindu Minority and Guardianship Act, 1956 and seeking possession of the property, can bring the suit only within the prescribed period of three years after attaining majority under Article 60 of the Indian Limitation Act 1963 (*Surta Singh* v. *Pritam Singh,* AIR 1983 P & H, 114 at 132).

P. 131, after text corresponding to fn. 38, add:

Contract on behalf of a private deity. A deity is not a perpetual minor and a contract for sale of immoveable property belonging to a private deity is specifically enforceable when it is for legal necessity (*Durga Thakurani Bije Nijigarh & others* v. *Chintamani Swain & others,* AIR 1982 Orissa 158 at p. 162).

P. 133, add in fn. 49:

See, also *Mrs. Clara Auroro de Braganca & ors* v. *Mrs. Sylvia Angela Alvares,* AIR 1985 Bom 372.

P. 138, add in fn. 89:

See also, *Deo Nandan (deceased, by L.R.S.)* v. *Chhote,* AIR 1983 All. 9.

P. 145, after the words "was not free", add:

See *Deo Nandan* v. *Chhote,* AIR 1983 All 9 at 11.

P. 146, after the last sentence:

'Caused'. Even if there be undue influence or coercion, but if it does not appear that it was instrumental in making the promisor to do the act in question, the existence of coercion, etc. would be of no avail. The word "cause" is not a term of art, but it is a term of science. Nothing can be said to be the cause of a particular effect, unless it is the proximate and immediate cause of that effect. When a particular effect is said to be caused by a particular factor, it must be clearly and cogently established that the effect is the direct outcome of that particular cause. If the alleged cause is remote and not proximate, is distant and not immediate, such a cause cannot be said to be the cause in legal parlance (*Vijaysingh Mohansingh Solanki* v. *Transport Manager, Ahmedabad Municipal Transport Service, Ahmedabad and anr.,* AIR 1982 Gujarat 307).

P. 147, before Section 15:

Consent is said to be free when it is not caused by coercion, undue influence, fraud misrepresentation or mistake. Consent can be regarded as informed when it is an act of reason accompanied with deliberation of a mind which knows the right and wrong, good and evil and it postulates an active will on the part of the person giving consent to permit the doing of the act complained of with full knowledge of the nature of the act that is being done and the rights and obligations of the parties involved in the commission of the act, where consent was given on the strength of a representation which, when made, was not intended to be really acted upon it was held to have been obtained upon a misrepresentation (*Nokhia & Ors* v. *State of H.P.* AIR 1985 H.P. 88 at 90).

P. 157, after the sentence following the text for fn. 36:

Where, however, an illiterate old woman gifted her valuable immoveable property to her advocate, the court held that the relationship was fiduciary and that it could be presumed that the advocate was in a position to dominate the will of the woman and as the transaction appeared to be unconscionable, the court, in the circumstances of the case, further held that the gift deed was the result of undue influence excercised by the donee — advocate (*Smt. Takri Devi* v. *Smt. Rama Dogra & Ors,* AIR 1984 H.P. 11 at pp. 15 & 18).

P. 161, after text corresponding to fn. 67:

Where, however, a person, long after the death of his only son and being illtreated by his son's widow and her brothers, left his own house and while residing with his nephews, executed for consideration a sale deed in favour of his nephews, and stated in the mutation proceeding that he had executed the sale-deed of his own free will and volition and later sought to set aside the sale-deed, it was held that, in absence of proof of lack of rational judgement or of mental incapacity, the sale-deed could not be set aside (*Ram Chandra Singh* v. *Basdeo Singh and anr.* AIR 1982 All. 437).

P. 162, add in fn. 76:

See also, *Alok Kumar Aich* v. *Asoke Kumar Aich & Ors.* AIR 1982 Call. 599; *Hajra Bai & others* v. *Jadhavbai* AIR 1986 M.P. 106.

P. 169, after fn. 35:

Followed in *Miti Bewa* v. *Daitari Nayak & Ors.* AIR 1982 Orissa 174.

P. 171, add in fn. 44:

See also, *Mahabir Saha* v. *Haripada Saha & Ors,* AIR 1982 Cal. 353.

P. 171, after text corresponding to fn. 48:

The principles mentioned above should also apply to males who by reasons of their apparent physical or mental incapacity or infirmity or being placed in circumstances where they are greatly amenable to the overpowering influence of another person are induced to enter into conveyance and transactions relating to their property (*Daya Shankar* v. *Bachi,* AIR 1982 All. 376 at 381-2).

P. 172, after text corresponding to fn. 58:

The burden of proof. The law presumes, prima facie, in favour of the deeds being duly executed. So ordinarily, the person who challenges the validity of a transaction on the ground of fraud, undue influence, etc. and charges his opponent with bad faith has to discharge the burden of proof which rests on him. But the major exception to this rule is that the initial burden would not shift to the party who challenges the transaction and will instead be cast on the person who relies on such deed if a relationship of "active confidence" or fiduciary relationship subsists between the contracting parties, such as guardian and ward, agent and principal, doctor and patient, spiritual adviser and disciple, trustee and cestui que trust etc. The underlying principle of engrafting such exception to the general rule is that on account of existence of such relationship, one of the parties is in a position to exert undue influence or 'dominate' over the other and extort benefit from him. In such cases justice demands that the burden of proving good faith of the transaction must be thrown upon the dominant party i.e. the party who is in a position of "active confidence". The probability of dominating over the will of another party arises either directly from the very nature of the relationship existing between the parties or sometimes from a peculiar handicap or disability from which the other party suffers. Thus section 111 of the Indian Evidence Act has to be read along with the provisions of section 16 of the Indian Contract Act (*Daya Shankar* v. *Bachi,* AIR 1982 Allahabad 376 at 379).

P. 172, after the text corresponding to fn. 58:

Difference between Sub-Section (1) & Sub-Section (3). Sub-section (1) and sub-section (3) cover two different fields, though at times, one may overlap the other. To attract sub-section (1) two things should be established, namely, (a) one of the parties was in a position to dominate the will of the other and (b) he used that position and obtained an unfair advantage over the other, while to attract sub-section (3), (a) the person was in a position to dominate the will of the other and (b) the transaction appeared on the face of it or evidence adduced to be unconscionable. There is another vital difference between sub-section (1) and sub-section (3). In subs-section (3), if the two ingredients are established, the burden of proof that contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. This presumption is absent in sub-section (1). The word "shall" found in 16(3) indicates that the presump-

tion is mandatory..... The concomitant position is that, if the burden is not discharged, the presumption shall prevail (*Andalammal* v. *Rajeshwari Vedachalam (deceased by L.R.) and others* AIR 1985 Mad 321 at 331).

P. 173, after the text corresponding to fn. 61:

Where the sum of Rs. 12000/- was found to be unconscionably inadequate as sale price of land with a four-storeyed building, the Court in the facts of the case, found that the transaction was one of loan and dismissed the suit based on title (*Vinayakappa Suryabhanappa Dahenkar* v. *Dulichand Hariram Murarka* AIR 1986 Bom 193).

P. 174, after text corresponding to fn. 73:

However, unless a case under this section of undue influence is made out, it is not possible to strike down the transaction merely because it appears to be unconscionable (*Deota Prasad* v. *Tribhuwan & Ors.* AIR 1983 All. 139 at 144).

P. 174, after text corresponding to fn. 74:

Where it is proved to the satisfaction of the court either that the bargain on the face of it was unconscionable or the executant was the victim of physical or mental handicap or that he was subdued by the complexity of circumstances in which another person had an upper hand, the burden must be cast squarely on the person enjoying the dominating position to show that he secured the deed in good faith (*Daya Shankar* v. *Bachi,* AIR 1982 All 376 at 382).

P. 181, after text corresponding to fn. 20:

A person, intending to sell his property, executed a lease for a period of ten years two days before the sale. The lessee was aware of the intended sale. The transaction of lease was fraudulent and the transferee-purchaser was not bound by the lease. (*Hukum Chand* v. *Hazra Begum & Ors,* AIR 1982 All 215 at 217).

P. 181, after text corresponding to fn. 20:

Where the lessor, knowing that two days after executing a lease in favour of her husband, she would cease to be the lessor and the lessee also knew the same, she executed the lease for a period subsequent to her ceasing to be the lessor, the transferee is not bound by such lease which was outcome of a fraud (*Hukum Chand* v. *Hazra Begum,* AIR 1982 All. 215 at 217).

P. 181, after text corresponding to fn. 22:

However, where the fact of annulment of her earlier marriage on ground of unsoundness of mind was concealed from the bridegroom, his consent was held to have been induced by fraud, and was not free. The marriage was accordingly annulled by the court. (*Kiran Bala Asthana and anr.* v. *Bhaire Prasad Srivastava,* Air 1982 All. 242 at 246).

P. 181, after the text corresponding to fn. 26:

The mere fact that the plaintiff was an old and illiterate lady, by itself would not lead to an inference that the transaction was vitiated by undue influence or fraud or misrepresentation as the burden was on the plaintiff to prove all necessary facts. Even if the relations were friendly or close, it could not from that fact be readily inferred that the defendants were in a dominating position or that they were trying to take undue ad-

vantage of her position and wanted to practice fraud upon her. There was no satisfactory evidence that at the relevant time of the said transaction she was indisposed to such an extent and that she was physically and mentally so upset that she was incapable of understanding what she was doing (*Hajra Bai and others* v. *Jadavbai* AIR 1986 M.P. 106).

P. 185, after text corresponding to fn. 58:

In a contract of insurance, the non-disclosure which may entitle insurer to repudiate liability must relate to material fact. The test to determine materiality is whether the fact has any bearing on risk undertaken by the insurer. In other words, without proof of bearing on insurability, policy cannot be invalidated. Non-disclosure of fact of lapsed policies was held not to have bearing on the risk and did not amount to fraudulent misrepresentation as no undue advantage was sought by concealment of the fact. The insurer was thus bound to pay under the policy (*Bhagwani Bai* v. *L.I.C. of India,* AIR 1984 M.P. 126 at 130).

P. 200, after text corresponding to fn. 99:

Where the fact of annulment of earlier marriage on the ground of unsoundness of mind was concealed from the bridegroom, the marriage was annulled under section 12(1) (c) of the Hindu Marriage Act 1955 (*Kiran Bala Asthana & Ors.* v. *Bhaire Prasad Srivastava,* AIR 1982 All 242 at 246).

Where a husband sought annulment of marriage, alleging that illegitimacy of his wife was not brought to his notice and that had it been brought to his notice he would not have married her, it was found that, in law, she was not illegitimate and held that the husband was not entitled to the relief. (*Smt. Mandakini Pundalik Salkar* v. *Chandrasen Raiker* AIR 1986 Bom. 172).

P. 200, Add in fn. 5:

See also *Hajrabai & others* v. *Jadavbai* AIR 1986 M. P. 106.

P. 208, add in fn. 69:

See, also, *Amar Krishna Mukherjee* v. *Smt. Asha Rani Ghosh & others* (AIR 1985 Cal 398).

P. 209, after the text corresponding to fn. 83:

Where the sum of Rs. 12000 was found to be unconscionably inadequate as sale price of land with four-storeyed building, the Court, in the facts of the case, found that the transaction was one of loan and dismissed the suit based on title (*Vinayakappa Suryabhanappa Dahenkar* v. *Dulichand Hariram Murarka* AIR 1986 Bom. 193).

P. 209, after text corresponding to fn. 85:

Non- disclosure of lapsed policies was held not to be a fraudulent misrepresentation (*Bhagwani Bai* v. *L.I.C. of India,* AIR 1984 M. P. 126 at 130).

P. 223, after the text corresponding to fn. 4:

Courts are not without power to grant relief where, as a result of common mistake, substantial injustice has been done, particularly when interests of third parties are adversely affected. In any such case the court may on such terms as it thinks just, intervene to set aside the contract and render justice. Another case where the Court may intervene to set right a common mistake is where it may rectify a written contract or

deed which has not accurately recorded the agreement between the parties. In all other cases equity follows the law and the parties must accept the position which they brought about by their agreement, albeit by a common mistake.

Different considerations apply in the case of a unilateral mistake or even a mutual mistake where the evidence is so conflicting that a definite agreement cannot be imputed to the parties. Except in such circumstances or where fraud or unfair practice is alleged or in transactions between the parties having a fiduciary relationship and cases of the kind, the Court does not interfere with the terms of contract agreed between the parties at arm's length (*A. P. Kochudevassy* v. *State of Kerala* AIR 1982 Kerala 90 at p. 93).

P. 232, add in the fn. 59:

See, also, *Firm Durga Prasad Magniram* v. *Dr. Ganesh Prasad* AIR 1982 M. P. 219 at 224.

P. 232, after text corresponding to fn. 61:

The court looks at the real intention of the parties to an agreement and not merely at the description of it by the parties. And if the intention of the parties is to defeat the provisions of law, the court will not enforce it. Where by merely styling a document as a mortgage, the landlord was really collecting one year's rent in advance which was prohibited by law, the agreement was held to be illegal and not enforced (*M/s Tip Top* v. *Indramani Devi,* AIR 1982 Patna 190 at 197).

P. 235, add in fn. 85:

See also, *Chennuru Ramarao* v. *Gowri Sankar Talkies, Tekkali & others* AIR 1986 A. P. 84.

P. 242, after the text corresponding to fn. 57:

Where a transfer of land was made without permission of Collector required under section 5 of M. P. Ceiling on Agricultural Holdings Act, 1960 it was held that the transfer was void. It was held that there was a public policy behind section 5 and that therefore the provision was mandatory and that the transfer would defeat the provisions of the Act and the public policy underlying it. (*State* v. *Board of Revenue, Gwalior* AIR 1983 M. P. 111 at 120).

P. 245, add in fn. 91:

See, also, *Kuppannagari Sreeramamurthy and others* v. *Pydi Andarao & others* AIR 1985 A. P. 336.

P. 246, Add in fn. 2:

See, also, *Ramswarup Prasad* v. *Budhdeo Sao & ors.* AIR 1983 Patna 266.

P. 246, after the text corresponding to fn. 7:

However, in a later case, the Allahabad High Court held that the interdict against the letting and occupation of an accommodation after coming into force of U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 was express and absolute: "Letting or occupation otherwise than under an order of allotment after the commencement of the Act is totally forbidden by law and, further, these acts are of such a nature that, if countenanced, they would without doubt be opposed to public

policy, frustrate the declared and basic object of the Act". The Court held that the contract of tenancy in that case was clearly void and ineffectual in law under section 23 of the Contract Act. (*Naveen Chandra Sharma* v. *6th Additional District and Sessions Judge, Meerut*. AIR 1983 Allahabad 116 at 119 and 120).

P. 248, after the paragraph headed "Breach of Exchange Control Act":

Carriers Act-defeating provisions of. Where a Way Bill issued by a carrier provided that no suit would lie against the carrier in respect of any consignment without a claim made in writing in that behalf and preferred within thirty days from the date of booking or from the date of arrival at the destination, the Supreme Court held that the object of such provision was to defeat the provisions of section 10 of the Carriers Act and that therefore such provision was void under section 23 of the Contract Act (*M/s. M. G. Brothers Lorry Service* v. *M/s. Prasad Textiles* AIR 1984 SC 15 at 18).

P. 248, add before the paragraph headed Rules of Hindu and Mahomedan Law:

Violation of Motor Vehicles Act. Enforcement of agreement by which a permit as well as vehicle covered by it is transferred without requisite permission under section 59 is violative of section 59 of Motor Vehicles Act. Section 23 of Contract Act forbids enforcement of a contract which will defeat the provisions of any law (*Khawaz Bux* v. *Mirza Mohammad Ismail* AIR 1984 All 83 at 86).

P. 248, add in the fn. 28:

See, also, *Abdul Jabbar* v. *Abdul Muthaliff* AIR 1982 Mad 12.

P. 256, before the para headed 'Compromise between some partners':

A contract which involves injury to property of other persons in void and cannot be enforced. A claim for damages based on breach of such unlawful contract is not sustainable (*K. Abdulkhadar* v. *The Plantation Corporation of Kerala* AIR 1983 Kerala 1).

P. 256, after the text corresponding to fn. 7:

However, a contract for which the consideration is past cohabitation which is not adulterous is not void (*Subhashchandra* v. *Narbadabai* AIR 1982 M.P. 236 at 238).

P. 265, after the text corresponding to fn. 97:

However, it was held that there being a public policy behind section 5 of M.P. Ceiling on Agricultural Holdings Act, the requirement of permission of the Collector must be construed as mandatory and transfers made in contravention of that requirement must be held to be void for all purposes (*State* v. *Board of Revenue, Gwalior* AIR 1983 M.P. 111 at 120).

P. 265, after the text corresponding to fn. 97:

Government granted certain land to defendant under H.P. Nantor Rules which had the force of law. The grant was for cultivation of land and to provide 'subsistence' to the grantee who was obliged to render the land fit for cultivation within a certain period and use it for cultivation. On his failure to do so, the land could be taken back by the Government and handed over to landless person. The defendant agreed to handover substantial portion thereof to the plaintiff and handed over possession to the plaintiffs. The Plaintiffs by a suit sought to restrain the defendant from disturbing their possession. The defendant contended that the said agreement was void as being forbidden by law. It was held that the agreement was void as being against the public policy of helping

the poor and landless persons by giving them land for their subsistence (*Chet Ram and Others* v. *Sawanu Ram & Ors* AIR 1985 H.P. 97).

P. 266, after the text corresponding to fn. 4:

Sub-section (1A) of Section 60 of the Code of Civil Procedure declares that agreement by which a person agrees to waive the benefit of any exemption from attachment is void. It was held by the Andhra Pradesh High Court that the protection afforded by proviso (c) to Section 60 is based upon high public policy of State and cannot be waived (*Duggirala Balarama Krishnayya* v. *Arokapudi Jagannadha Rao* AIR 1983 A.P. 136 at 139).

P. 266, after the text corresponding to fn. 4:

Where A & B agreed not to outbid each other with the understanding that A would convey half of the property in favour of B in case A's bid was accepted and sale deed was duly executed in his favour, it could not be said to be against any public policy (*Sujan Singh Sadhana* v. *Mehkam Chand Jain (deceased by L.R.'s) and others* AIR 1983 P & H 180 at p. 185; see, also *K.S.R. Chakrapani Chettiar* v. *S. Guruswami Reddiar* AIR 1984 Mad 194 at 198).

P. 267, after the text corresponding to fn. 17:

Where a tenant had paid mutually agreed illegally enhanced rent, there was no right to automatic adjustment against subsequent defaults in the payment of monthly rent (*Gulab Chand Prasad* v. *Budhwanti and another,* AIR 1985 Patna 327 at 336-7).

P. 267, add in fn. 22:

Followed in, *Abdul Jabbar* v. *Abdul Muthaliff* AIR 1982 Madras 12.

P. 271, after text corresponding to fn. 54:

Raffle. A raffle itself is not illegal nor is it opposed to public policy. A collateral contract of agency for the purpose of sale of raffle tickets is therefore perfectly valid and enforceable in law (*T.T. Augustine* v. *Changanacherry Municipality* AIR 1982 Kerala 307 at 309).

P. 300, add in fn. 42:

See also, *Ram Dass & others* v. *Krishna Dev and another* AIR 1986 H.P. 9.

P. 304, after the text corresponding to fn. 77:

It is not necessary that the promissory note should mention that it is in lieu of a time barred debt or that the person promising should be conscious of the fact that the debt has become time barred (*Bishambhar Dayal* v. *Vishwanath* AIR 1985 All. 12 at 16).

P. 309, after text corresponding to fn. 28:

See also, *Ram Chandra Singh* v. *Basdeo Singh,* AIR 1982 All. 437 at 438.

P. 339, add in fn. 16:

See also, *Rajasthan Handicrafts Emporium* v. *Pan American World Airways and Others* AIR 1984 Delhi 396.

P. 341, add in fn. 35:

See also, *Patel Roadways Pvt. Ltd.* v. *Bata India Ltd.* AIR 1982 Cal. 575 at 577.

P. 341, add in fn. 35:

See also, *All Bengal Transport Agency and Others* v. *Hare Krishna Banik* AIR 1985 Gauhati 7.

P. 342, add in fn. 35:

M/s Frick India Ltd. v. *M/s Sharma Cold Storage & Ice Factory* (P) Ltd. AIR 1986 Pat. 94.

P. 342, after the text corresponding to fn. 37:

An ouster clause which applies to suit also precludes application under arbitration agreement (*Sm. Kumud. Agarwalla* v. *Fertilizer Corporation of India Ltd.* AIR 1985 Cal. 89 at 91).

P. 342, add in fn. 40:

See, however, *Ganpatrai Agarwall* v. *The Fertilizer Corporation of India* AIR 1984 Cal. 35 (where ouster clause was held to be binding and not oppressive— balance of convenience could not be considered).

P. 342, add in fn. 41:

See, also *M/s Patnaik Industries Pvt. Ltd.* v. *Kalinga Iron Works & another* AIR 1984 Orissa 182.

P. 343, add in fn. 42:

See, also, *M/s Patel Roadways Pvt. Ltd.* v. *The Republic Forge Co. Ltd.* (AIR 1985 A.P. 387).

P. 345, add in fn. 61:

See, also *Uttam Singh Dugal and Co. Pvt. Ltd.* v. *Hindustan Steel Ltd.* AIR 1982 M.P. 206.

P. 345 after the text corresponding to f.n. 61:

A contract can become void under the section only when its terms cannot be made certain. Mere vagueness or uncertainty which can be removed by proper interpretation cannot make a contract void. In dealing with commercial and business contracts which have been acted upon by the parties, the Court should be very slow in finding defects and to reject them as meaningless. This should be done only in extreme cases. (*Uttam Singh Dugal & Co. Pvt. Ltd.*.v. *Hindustan Steel Ltd.* AIR 1982 M.P. 206 at 215).

P. 349, after the text corresponding to fn. 5:

Where in an agreement for sale of land, the name of the land was mentioned but its Survey Number and area were not given, it was held that the agreement was not void (*Mithu Khan* v. *Pipariyawali,* AIR 1986 M.P. 39).

P. 350, before Section 30:

In *M/s Jamna Auto Industries* v. *UOI & Others* AIR 1984 Delhi 235 at 240, it was held, on interpretation of clause of delivery schedule, that there was no vagueness.

P. 383, after the text corresponding to fn. 57:

Specific performance of or contract (to sell land) is not wholly personal On death of a

promissor, the obligation vests in the legal representatives (see *Smt. Manni Devi* v. *Ramayan Singh* AIR 1985 Patna 35 at 37).

P. 430, after the text corresponding to fn. 57:

In *L.N. Gupta & Others v. Smt. Tara Mani,* the Delhi High Court, however, held that the rule that the debtor must find the creditor is applicable to promissory notes payable on demand in which the place of payment is not specified or where alternative places are mentioned. (AIR 1984 Delhi 49 at 53).

P. 432, after the text corresponding to fn. 72:

Where the defendant agreed to keep in cold storage the plaintiff's apple boxes and it was agreed that upon payment of hire charges, the plaintiff could lift the goods, and the plaintiff failed to make payment, it was held that the plaintiff had committed breach of contract and that the defendant was justified in refusing to deliver the boxes to the plaintiff (*Himachal Fruit-Growers Co-operative Marketing and Processing Society Ltd.* v. *Upper India Food Preservers and Processors (P) Ltd.* AIR 1984 H.P. 18).

P. 434, add in fn. 91:

For an instance of readiness and willingness to perform the obligations under a contract, see *Raminder Singh and anr.* v. *Sham Lal and another* AIR 1984 P & H 145.

P. 438, before Section 55, add the following:

Where no reciprocal promises. Where there is an agreement to provide finances to an industrial concern, the contract does not consist of reciprocal promises and section 54 is not applicable (*Industrial Finance Corporation of India and anr.* v. *M/s Sehgal Papers Ltd & Others,* AIR 1986 P & H 21).

P. 438, add in fn. 24:

See also, *M/s Vankateswara Minerals, Firm and another* v. *Jugalkishore Chiranjitlal, Firm* AIR 1986 Karnataka 14.

P. 440, after the text corresponding to fn. 31:

Where, in a contract for supply of albumin, the Court found that time was of the essence of the contract and also found that the seller failed to supply the entire quantity in instalments even within reasonable time of purchaser's notice, it was held that the purchaser was justified in rescinding the contract and that he was entitled to damages. (See *Andard Mount (London) Ltd.* v. *Curewel (India) Ltd.* AIR 1985 Delhi 45. The authorities are elaborately discussed in the case).

P. 440, after the text corresponding to fn. 36:

Where one clause of a contract provided for damages for delayed completion and another clause provided for extension of time in certain circumstances, it was held that time was not of the essence of the contract of work. (*K Abdulkhadar* v. *Plantation Corporation of Kerala* AIR 1983 Kerala 1 at 8).

P. 440, add in fn. 37:

See, also *Ved Prakash Gupta* v. *Shishu Pal Singh* AIR 1984 Allahabad 288.

P. 444, add in the fn. 74:

See, also, *American Pipe Company* v. *State of Uttar Pradesh* AIR 1983 Cal. 186 at 191.

P. 446, add in fn. 99:

See, also *N. V. Chowdary* v. *Hindustan Steel Works Constr. Ltd.* AIR 1984 A. P. 110.

P. 447, after the text corresponding to fn. 5:

Where, despite the expiry of dates specified for delivery of goods, the purchaser continued to insist upon the supply being made by the seller, it was held that time was not of essence to the contract. (*Bazpur Cooperative Sugar Factory Limited* v. *Surendra Mohan Agarwal* AIR 1984 Allahabad 174 at 176).

P. 447, after the text corresponding to fn. 6:

In absence of agreement between the parties, there can be no extension of time for performance of contract (*M/s Venkateshwara Minerals, Firm & Anr.* v. *Jugalkishore Chiranjitlal, Firm* AIR 1986 Karnataka 14).

P. 448, before Section 56:

M was entrusted by H with carrying out drainage work. The work under the contract had to be completed within one year. Due to financial difficulties, H requested M to spread over the work for two years more. M was agreeable on condition that extra payment would have to be made for increased rates. H did not intimate to M that no such extra payment would be made. M completed the work during the spread over period and demanded extra payment. The Supreme Court held that M was entitled to extra payment. (*Hyderabad Municipal Corporation* v. *M. Krishnaswami Mudaliar and anr.* AIR 1985 SC 607 at 608).

P. 448, add before Section 56:

Limitation: for suit for specific performance. The principle that time stipulated in a contract for sale of immovable property is not the essence of the contract has nothing to do with the period of limitation within which a suit for specific performance of contract has to be filed. One touches on the right to enforce the contract and the other touches on the period within which that right has to be enforced. By ignoring the period stipulated in the contract or by holding that the time stipulated in a contract for sale of immovable property is not the essence of the contract in a given case, the period of limitation stipulated in the Act, can neither be ignored nor extended by courts (*K. Kallaiah* v. *Ningegowda* AIR 1982 Karnataka 93 at 98).

P. 466, after the text corresponding to fn. 92:

A party agreed to supply milk containers to the Union of India. Under the contract, the containers had to be coated with "hot dip tin coating". It was known to the parties at the time of entering into the contract that tin ingots were required for "hot dip tin coating" of the cans. Tin ingots were a canalised item and could not be procured from the open market without a release order. In the circumstances the condition of supply of tin ingots can be implied from the nature of the contract. The supplier repeatedly asked the Director General of Supplies and Disposals to obtain the necessary quota of tin ingots but the Director General of Supplies and Disposals failed to obtain the release of the necessary quota of tin ingots. It was held that the contract became impossible of performance because of the non-availability of the tin ingots and this was beyond the control of the promisor (*Punj Sons Pvt. Ltd.* v. *U.O.I.* AIR 1986 Delhi 158).

P. 474, add in fn. 83:

See, also *Kunjukrishnan* v. *State of Kerala* AIR 1983 Kerala 73.

P. 481, after the text corresponding to fn. 48:

Where, however, the loan on transfer was temporary and even during that period the transfer could be made with permission of competent authority and where the defendant despite repeated requests from the plaintiff to obtain the permission, never took any steps to obtain the necessary permission, it was held that the contract was not discharged by frustration (*Ved Prakash Gupta* v. *Shishu Pal Singh* AIR 1984 All 288 at 292 and 293). See, also, *Ram Swarup Gaur and anr.* v. *Ratiram* AIR 1984 Allahabad 369.

P. 487, add in fn. 48:

See, also, *State Bank of India* v. *M/s Quality Bread Factory* AIR 1983 P & H 244 at 251.

P. 493, after the text corresponding to fn. 62:

Where a tenant, who had to pay arrears of rent and other amounts, paid two sums to the landlord and gave evidence that they were paid as rent and when there was no evidence by landlord that they were appropriated towards other amounts, the tenant was held not to have been in arrears of rent so as to incur ejection (*Gantok Auto Works Pvt. Ltd. & Ors.* v. *Tobgyal Wangchuk Tenzing Namgyal and Ors.* AIR 1985 Sikkim 23).

P. 493, add in fn. 63:

See, also, *M/s Kharavela Industries Pvt. Ltd.* v. *Orissa State Financial Corporation & Ors.* AIR 1985 Orissa 153.

P. 499, add in fn. 19 & 21:

Followed in *Vipinbhai R Parekh* v. *General Manager, Western Railways* AIR 1984 Gujarat 41 (where 'no claim' certificate was issued by contractor who, thereafter, sought to invoke arbitration clause in the contract).

P. 502, add in fn. 48:

See also *Magnum Films* v. *M/s Golcha Properties Pvt. Ltd.* AIR 1984 Delhi 162.

P. 504, after the text corresponding to fn. 66:

Where a subsequent pronote was for an amount representing the total of two sums under two earlier pronotes and was found to be insufficiently stamped and where endorsements on two earlier pronotes amounted to acknowledgement of liability for the amount, a suit was maintainable on the earlier two pronotes (See *PL CT SP Subramaniam Chettiar* v. *Muthiah Chettiar & Ors.* AIR 1984 Mad. 215).

P. 515, after the text corresponding to fn. 64:

The award of damages for breach of a contract is not the same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original terms thereof (*I.T. Commissioner, Bombay* v. *M/s Shantilal Pvt. Ltd.*, AIR 1983 SC 952 at 953).

P. 517, after the text corresponding to fn. 84:

Where, however, the refund of earnest money was accepted under protest, there was no bilateral intention to repass the property and the rights under the contract could be exercised on repayment of such money. (See *Mohd. Usman* v. *U.O.I. and Ors.* AIR 1984 Raj. 156 at 166).

P. 530, add in fn. 99:

See also, *M/s Venkateswara Minerals, Firm and anr.* v. *Jugalkishore Chiranjitlal,* Firm AIR 1986 Karnataka 14.

P. 537, after the text corresponding to fn. 45:

However, where money was advanced on the basis of pronote and not independently, and when it was found that such pronote had become void under section 87 of the Negotiable Instruments Act by reason of material alteration made without consent of the defendant, the plaintiff could not invoke section 65 of the Contractor Act or original contract (*Suresh Chandra* v. *Satish Chandra* AIR 1983 All 81 at 83).

P. 537, before the paragraph beginning with the words "There was a partnership...":

Where a suit is based on a promissory note and there is no alternative allegation and the promissory note is held to be void under Section 87 of the Negotiable Instruments Act 1881, Section 65 of the Contract Act cannot be invoked. (*Jayantilal Goel* v. *Smt. Zubeda Khannum* AIR 1986 A.P. 120).

P. 537, add in fn. 46:

See, also, *M/s Malik Abdul Ahad Shah Jahl Ahmed Akhtar* v. *State of Jammu & Kashmir* AIR 1982 J & K 16 at 19.

P. 538, after the text corresponding to fn. 48:

It is not as if Sec. 65 works in one direction only. If one party to the contract is asked to disgorge the advantage received by him under a void contract so too the other party to the void contract may ask him to restore the advantage received by him. The restoration of advantage and payment of compensation has necessarily to be mutual (*State of Rajasthan* v. *Associated Stone Industries (Kotah) Ltd.* AIR 1985 S.C. 466 at p. 469).

P. 539, add in fn. 59:

See also, *Haji Fatma Bee* v. *Prahlad Singh* AIR 1982 M.P. 1.

P. 541, after the text corresponding to fn. 79:

Where, however, a sub-tenancy was held to be void as it was prohibited by law, a suit was decreed against a sub-tenant for arrears of rent which were not time-barred (See *Firm Durga Prasad Magniram* v. *Dr. Ganesh Prasad* AIR 1982 M.P. 219).

P. 541, add in the fn. 79:

See, also, *Jagannath Tewar* v. *Dr. Gopal Prasad* AIR 1983 Patna 50 at 53.

P. 549, add the following after the text corresponding to fn. 65:

When contract is frustrated. It is well-settled that if a contract stands frustrated, the party who has received benefit under the contract is liable to return it to the other (*Industrial Finance Corporation of India and another* v. *M/s Sehgal Papers Ltd. & Others* AIR 1986 P & H 21).

P. 577, after the text corresponding to fn. 33:

The three essential conditions for invoking section 70 are:

(1) The goods are to be delivered lawfully or something has to be done for another person lawfully;

(2) The thing done or the goods delivered must be done or delivered without intention to do so gratuitously;

(3) The person to whom goods are delivered enjoys the benefit thereof.

When all the above three ingredients are pleaded and established in a case, Section 70 can be invoked. Where, in the facts of a case, the second condition was not fulfilled, the Kerala High Court held that section 70 could not be invoked (*C.I. Abraham* v. *K.A. Cheriyan* AIR 1986 Kerala 60).

P. 580, after the text corresponding to fn. 58:

Voluntary acceptance of the benefit of the work done or the thing delivered is the foundation of the claim under Section 70. If once the benefit of the work done or thing delivered is accepted, it can be presumed that the said work was done or thing was delivered without intention to do so gratuitously. Similarly, it can as well be presumed that the person who has accepted the work done or thing delivered has enjoyed the benefit also. Sec. 70 deals with cases where there is no valid contract. However, it is possible to infer from the circumstances of a given case that a lawful relationship is born between the two and such a relationship is recognised under the provisions of Section 70. (*Haji Abdulla Haji Adam Sait Dharuvasthaparam* v. *T. V. Hameed* AIR 1985 Kerala 93 at 96).

P. 585, after the text corresponding to fn. 15:

A co-owner can compel the other co-owners to contribute to the expenses of improvements if his case comes under section 70 and is made out (*Jethruse D'Souza & Ors.* v. *Catherine D'Souza* AIR 1983 Karnatak 14 at 16).

P. 587, after the text corresponding to fn. 69:

No implied term can be read into a contract by recourse to the provisions of Section 70. (*A.P. Kochudevassy* v. *State of Kerala* AIR 1982 Kerala 90 at 95).

P. 587, add in fn. 48:

See, also, *Paidi Laxmayya* v. *Indian Bank Ltd.* AIR 1982 Karnataka 338.

P. 588, add in fn. 52:

Affirmed by the Supreme Court in *Modi Sugar Mills Ltd.* v. *U.O.I.* AIR 1984 SC 1248.

P. 588, after the text corresponding to fn. 54:

Section 70 applies to a case where there is no subsisting or valid contract and the liability of the defendant arises on the basis of equitable doctrine of unjust enrichment. If the act is one which is relatable in any manner to any subsisting or valid contract, no claim founded on section 70 can be sustained. In the execution of any contract if any act is done in any particular manner or following any particular method which is more arduous or expensive according to the plaintiff a claim solely on that ground cannot be entertained under Section 70 because it cannot be said that the defendant derived any 'benefit' from the manner or method according to which the act was performed. In such cases, the Court has to look into the terms and objects of the contract to find out whether the defendant had derived any 'benefit' which was more than what the parties had contracted for and further that the "benefit" accrued as a result of some work done by the plaintiff which was not related to the terms and objects of the contract (*Oil & Natural Gas Commission & Ors.* v. *M/s Shyam Sunder Agarwalla & Co.* AIR 1984 Gauhati 11 at 14).

P. 590, after the text corresponding to fn. 80:

A person whose contract is void for non-compliance with Art. 299(1) of the Constitution is entitled to compensation under this section. It is, however, his duty to account to the other party for what he has received in the transaction before his right to restitution arises. If he fails to do so his claim for compensation or refund for deposit will be dismissed. An accounting by the plaintiff is a condition of restitution from the defendant (*Nanalal Madhavji Varma* v. *State of Andhra Pradesh,* AIR 1982 Cal 167 at 172 and 173. See also, *M/s Malik Abdul Ahad Shah Jalil Ahmad Akhtar* v. *State of Jammu & Kashmir* AIR 1982 J & K 16).

P. 593, after the text corresponding to fn. 9:

Pursuant to works order issued by the Government, certain work was carried out by a contractor. No contract under Article 299 of the Constitution was executed. Section 70 was applied and the Government was held liable to compensate the contractor. It was held that as the Government's purpose was achieved, it could not be contended that the Government had failed to derive any benefit out of it (*Mir Abdul Jalil* v. *State of West Bengal* AIR 1984 Cal 200 at 202).

P. 593, add in fn. 9:

See, also, *Assar Alikhan & another* v. *Baijnath Prasad* AIR 1983 All 197 at 199.

P. 594, add in the fn. 16:

See, also, *State of Qrissa* v. *Ananda Prasad Mandal* AIR 1985 Orissa 142.

P. 597, after the text corresponding to fn. 38:

Limitation: Suit for compensation claimed under Section 70 is governed by the residuary Article 113 of Limitation Act 1963. The right to sue accrues when there is refusal to pay price or compensation. See *Jadavendra Narayan Choudhury* v. *State of West Bengal & Ors.* AIR 1985 Calcutta 215.

P. 602, after the text corresponding to fn. 90:

Where an auction purchaser of a property sold in execution proceedings found that the judgement-debtor had no saleable interest in the property and filed a suit against the decree holder for recovery of purchase price, it was held that he had no cause of acition against a decree holder under this section or in equity (*Vishwanath Maharudra Matkari* v. *Jan Mohammed and anr.* AIR 1982 Bom. 30).

P. 614, after the text corresponding to fn. 4:

A claim for compensation is not a claim for such sum which is instantly due and payable (*Mirza Javed Murtaza* v. *U.P. Financial Corporation* AIR 1983 All 234 at 240).

P. 615, after the text corresponding to fn. 9:

In order to succeed in an action for damages the buyer has to prove the market price. The market price is the buying price at which the buyer can obtain equivalent goods. It is the current price at the contractual time of delivery when the buyer can obtain identical goods in an available market. The buyer has not to prove that he actually bought the goods after the seller had failed to deliver. Buying is not essential. All that has to be proved is the buying price at which he can obtain substitute goods (*U.O.I.* v. *M/s Commercial Metal Corporation and anr.* AIR 1982 Delhi 267 at 269-70).

P. 615, after the text corresponding to fn. 9:

Sec. 54 of Sale of Goods Act and Section 73 of Contract Act: Section 73 contains the general principles with regard to fixing up of damages. Whereas Section 54 speaks of specific case of moveable property sold. Section 54 is more specific whereas Section 73 is general in nature. Therefore, Section 54 prevails over Section 73 though both the sections are based on the same general principles (*Mysore Sugar Co. Ltd.* v. *Manohar Metal Industries* Air 1982 Karnataka 283 at 287).

P. 615, after the text corresponding to fn. 9:

Where there is neither averment in the pleading nor evidence to the effect that on the date of breach, the market price was higher than the contract price, the plaintiff cannot succeed in claim for damages for breach of contract to supply goods (*Bazpur Cooperative Sugar Factory Ltd.* v. *Surendra Mohan Agarwal,* AIR 1984 All 174).

P. 615. add in fn. 14:

See, also, *S.K.A.R.S.M. Ramanathan Chettiar* v. *National Textile Corporation Ltd.* AIR 1985 Kerala 262.

P. 616, after the text corresponding to fn. 17:

What the buyer is deprived of in the usual course of things by non-delivery is the value of the goods at the time and place of the delivery, less price payable by him under the contract. This loss of value is the only natural result of the breach, the only kind of damage that ensues in the usual course of things. The quantum of damages on account of the breach of such contract would be the difference between the contract price and the market price of the goods in question at the time when the contract is broken. The provisions of Sec 73 do not envisage that the buyer must resort to actual purchase and suffer loss before claiming damages. If there is no evidence of market price at the place of breach, the market price at the nearest place may be taken into consideration (*M/s Saraya Distillery* v. *U.O.I. & anr,* AIR 1984 Delhi 360).

P. 616, after the text corresponding to fn. 17:

Difficulty in assessment of damages. The mere fact that it is somewhat difficult to assess the damages with certainty or precision does not relieve the defendant of paying adequate damages to the plaintiff so as to fairly compensate him for the loss suffered. See *Andard Mount (London) Ltd., England* v. *Curewel (India) Ltd.,* AIR 1985 Delhi 45 at 66.

P. 619, after para (c):

The Supreme Court recently upheld the decision of High Court where it had awarded increased rates to a contractor when, due to financial difficulties of the government, the work had to be spread over a further period of two years. (*Hyderabad Municipal Corporation* v. *M. Krishnaswami Mudaliar & anr,* AIR 1985 SC 607).

P. 625, after the text corresponding to fn. 66:

In a works contract, where a party entrusting works commits breach of the contract, contractor's claim for damages under the head of loss of expected profit is certainly admisible (*M/s A.T. Brij Paul Singh & Bros.* v. *State of Gujarat* AIR, 1984 SC 1703 at 1706 and 1707).

P. 635, after the text corresponding to fn. 62:

Loss of Profit: Works Contract — In a works contract, where a party entrusting the

works commits breach of the contract, contractor's claim for damages under the head of loss of profits is certainly admissible (*M/s A.T. Brij Paul Singh & Bros* v. *State of Gujarat* AIR 1984 SC 1703).

P. 635, before paragraph (r):

Kerala High Court, however, recently opined that Section 73 allows as damages the loss of reasonable profits arising from a breach of contract. It further held that courts are bound to try to get at that sum of money which would put the wronged party in the same position as that in which it would have been, if he had not sustained the wrong which entitles him to claim damages (*State of Kerala* v. *K. Bhaskaran,* AIR 1985 Kerala 49 at 53 and 55).

P. 653, after the text corresponding to fn. 28:

The defendant is liable only for reasonably foreseeable losses — those that a normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probably consequences of future breach. (*State of Kerala* v. *K. Bhaskaran* AIR 1985 Kerala 49 at p. 53).

P. 666, add in fn. 38:

See, also, *Andard Mount (London).Ltd.* v. *Curewel (India) Ltd.* AIR 1985 Delhi 45 at 67.

P. 675, after the text corresponding to fn. 29:

Where a compromise decree provided that in the case of default in payment of instalments the tenant would pay double the rent, the court held that the clause was penal and would not be legally enforced. The Court held that, as Rent Control Act was not applicable, and as no evidence was led by the landlord of amounts he would have received with ordinary diligence on account of rent, he was entitled to a decree on the basis of agreed rate of rent (*Harbilas* v. *Roshan Lal* AIR 1983 P & H 256 at 258-9).

P. 676, after the text corresponding to fn. 38:

Suit for damages. If a debtor has failed to pay interest on or instalment of loan advanced to him by a creditor, he cannot, in a suit by the creditor for payment of dues, seek adjustment of claim for damages for failure by the creditor to make advances as agreed. The debtor may file a suit for damages and, on obtaining decree, claim adjustment (*Industrial Finance Corporation of India and another* v. *M/s Sehgal Papers Ltd. and Others* AIR 1986 P & H 21).

P. 676, add before section 74:

The award of damages for breach of a contract is not the same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original terms thereof (*C.I.T.* v. *M/s Shantilal & Co. Pvt. Ltd.* AIR 1983 SC 952 at p. 953).

P. 678, add in fn. 47:

See, however, *Himachal Pradesh State Forest Corporation* v. *Harichand* (AIR 1984 H.P. 51).

P. 678, after the text corresponding to fn. 48:

To attract the provisions of section 74 it is not necessary that the entire contract should

come to an end; the breach of each term thereof can be visualised in advance and taken care of by providing an adequate clause for liquidated damages so that the parties to the contract can proceed to work out the contract in future and settle the question of damages that have accrued on the basis of the rate that has been put as a preestimate at the commencement of the contract. (*Indian Drugs & Pharmaceuticals Ltd.* v. *Industrial Oxygen Co. Ltd.* AIR 1985 Bombay 186 at 188).

P. 678, add in fn. 49:

See also, *State of Gujarat* v. *M/s M.K. Patel & Co.* AIR 1985 Guj. 179.

P. 680, add in fn. 60:

See, also, *N. Kullayyappa and anr.* v. *N. Dastagiri Saheb,* AIR 1982 A.P. 154.

P. 680, add in fn. 62:

See, also *Mehru* v. *Mohan Lal & Ors.* AIR 1985 P & H 143.

P. 684, after the text corresponding to fn. 2:

Even if it is found that the charging of compound interest is penal per se, even then the mortgagee has to be compensated for deprivation of compound interest; and such compensation can extend up to the amount which would be payable if compound interest is charged (*Mallavarapu Suryanarayana Murthy & Ors.* v. *Buddaraju Suryanarayana Raju & Ors.* AIR 1982 A.P. 313 at 315).

P. 690, after text corresponding to fn. 57:

A larger bench of the Supreme Court, however, has now taken a different view and held that the phrase did not contemplate the amount due and that it was beyond the purview of clause (b) of Sec. 41 of the Arbitration Act 1940, to grant an injunction to restrain the claimant from withholding payment to the other party. (*M/s. M K Ansari* v. *U.O.I.,* AIR 1984 SC 29 at 36).

P. 690, add in fn. 57:

See, also, *Mirza Javed Murtaza* v. *U.P. Financial Corporation* AIR 1983 All 234 at 239, 240.

P. 702, add in the fn. 45:

See, also, *Rahat Jan* v. *Hafiz Mohammad Usman and Ors.* (AIR 1983 Allahabad 343 at 347).

P. 710, after the text corresponding to fn. 12:

Where, in a contract for sale of land, the vendor did not prove any special damages on account of vendee's breach of agreement, the deposit could not be forfeited, despite provision for forfeiture in the agreement (*Sabina D'Costa* v. *Joseph Anthony Noronha* AIR 1984 Karnataka 122).

P. 710, add after the text corresponding to fn. 12:

One cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage pro-

vided of course he establishes the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage. The proof of this basic requirement is not dispensed with by section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from section 73 and 75. Section 74 is only supplementary to section 73 and it does not make any departure from the principle behind section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of section 73. The words in section 74 "Whether or not actual damage or loss is proved to have been caused thereby" have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law and also to emphasise that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Sec. 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation (*State of Kerala & Ors.* v. *M/s United Shippers & Dredgers Ltd.* AIR 1982 Kerala 281).

P. 714, after the text corresponding to fn. 44:

The claim for compensation under section 75 is maintainable when the right of repudiation of the contract has been exercised under either of the sections, 39, 53, 54 or 55 of the Act (*Mirza Javed Murtaza* v. *U. P. Financial Corporation* AIR 1983 All 234 at 241).

P. 717, after the text corresponding to fn. 23:

The benefit secured by an insurance policy forms part of the estate of the deceased policy holder (*Shaikh Dawood & Ors.* v. *Mahmooda Begum & Ors.* AIR 1985 A. P. 321 at 324).

P. 720, in fn. 45, add the following:

For example, see *Smt. Manda Suryakanthamma* v. *District Registrar of Assurance, Srikakulam* AIR 1986 A. P. 3.

P. 721, after the text corresponding to fn. 50:

A contract of guarantee involves three parties, the creditor, the surety and the principal debtor. A contract of guarantee must therefore involve a contract to which all those three parties are privy. Their express participation or implied assent to have such a contract must be proved by the person who wants to rely on it. (*H. Mohamed Khan (deceased by L. R. S.) and Ors.* v. *Andhra Bank Ltd.*, AIR 1983 Karnataka 73 at 76).

P. 722, add in fn. 60:

See, also, *United Commercial Bank* v. *Hanuman Synthetics Ltd.* AIR 1985 Cal. 96. and *Alliance Mills (Lessees) Pvt. Ltd. and anr.* v. *Union of India & Ors.* AIR 1985 Cal. 112.

P. 722, add in fn. 61:

See, also, *Vinay Engineering* v. *Neyveli Lignite Corporation Ltd.* AIR 1985 Mad. 213.
See, also, *Pesticides India* v. *State Chemicals and Pharmaceuticals Corporation of India Ltd. & Ors.* AIR 1982 Delhi 78.

P. 722, add in fn. 61:

See also, *M/s Banwari Lal Radhe Mohan* v. *Punjab State Cooperative Supply & Marketing Federation Ltd.* AIR 1982 Delhi 357.

P. 722, after the text corresponding to fn. 62:

It is sufficient that there is substantial compliance with the terms of the guarantee in the notice and if the bank has understood the purport of the notice, the bank is bound to honour its commitment under the guarantee (*D. T. H. Construction (P) Ltd.* v. *Steel Authority of India Ltd.* AIR 1986 Cal. 31).

P. 722, after the text corresponding to fn. 62:

Bank guarantee, for all purposes, should be taken to be a credit note issued by the bank in favour of the person in whose favour the bank guarantee has been issued and it should be encashable just like a credit note ordinarily, unless the intention of the parties is otherwise (*M/s Basant Rhymers, Alwar* v. *State Chemical Pharmaceuticals Corporation of India Ltd. & anr.* AIR 1986 Rajasthan 1).

P. 722, after the text corresponding to fn. 62:

Where, however, the bank guarantee was demanded by the Union of India not as a part of commercial transaction but in exercise of its statutory or executive power as a Government, and where the Government acted arbitrarily or mala fide in invoking the bank guarantee, the Court could examine the action of the Government and prevent enforcement of a bank guarantee (*M/s Bottle Glass Pvt. Ltd.* v. *U. O. I.* AIR 1985 Delhi 400).

P. 722, add in fn. 62:

See, also, *National Project Construction Corporation Ltd.* v. *M/s G. Ranjan,* AIR 1985 Cal. 23; *Alliance Mills (Lessees) Pvt. Ltd. and anr.* v. *Union of India & Ors.* AIR 1985 Cal. 112; *ACC Babcock Ltd.* v. *Straw Products Ltd,* AIR 1985 Delhi. 237 and *Vinay Engineering* v. *Neyveli Lignite Corporation Ltd.* AIR 1985 Madras 213.

P. 724, after the text corresponding to fn. 71:

The Calcutta High Court has differed from the view of the Delhi High Court to the effect that a bank guarantee should be invoked in an exact and punctillious manner setting out the entire case of the beneficary under the guarantee in the same way as setting out a cause of action in a plaint. The Calcutta High Court has held that a bank guarantee is a commercial document and is neither a statutory notice nor a pleading in a legal proceeding. A bank guarantee may be invoked in a commercial manner. The invocation would be sufficient and proper if the bank concerned understands that the guarantee is being invoked by the beneficiary in terms of the guarantee (*Road Machines (India) Pvt. Ltd* v. *The Projects & Equipment Corporation of India Ltd & Ors.,* AIR 1983 Calcutta 91 at pp. 94-95).

P. 724, after the text corresponding to fn. 71:

There are two types of performance guarantees. The first are the ones which are absolute and they are encashable on the very demand of the beneficary and the demand according to the terms of the guarantee is conclusive. In such types of guarantees the beneficary is the sole judge or arbiter as to whether there is any breach of underlying or primary contract on the part of the other party and as to how much amount is due to the former. The other type is where guarantee is not encashable without proof of breach of underlying contract. However, in both types of guarantees, bank issuing performance guarantee is not concerned with the underlying contract. The duties of a bank in such

guarantee are created by the document itself which in other words is "independent" and autonomous and is not concerned with the underlying contract unless the guarantee itself says that it will be enforceable on the proof of breach of the primary underlying contract. There is, however, only one exception which is stated in the leading case decided by the Supreme Court (*United Commercial Bank* v. *Bank of India* AIR 1981 SC 1426).

The exception is the clear case of fraud of which the banks have notice. The fraud contemplated, however, has direct connection with the contract of guarantee in respect of its coming into existence, continuance etc.

The contract for guarantee is independent of the underlying contract and is autonomous. The necessary corollary of such independence and autonomy is that one is not to go beyond that contract and has not to look to any other contract including the underlying or primary one. Performance of underlying contract comes into picture only if guarantee itself makes its encashment subject to proof of performance of former contract. If scrutiny is commenced in respect of the performance of the underlying contract, obviously 'autonomy' and 'independence' of the contract of an absolute guarantee will be lost and the enforcement of the same will acquire 'dependence' upon the result of the inquiry relating to the former (underlying) contract (*Banwari Lal Radha Mohan* v. *The Punjab State Co-operative Supply and Marketing Federation Ltd.* AIR 1983 Delhi 86 at 88).

P. 724, after the text corresponding to fn. 71:

While discussing whether injunction should be issued to restrain a bank from making payment under a bank guarantee, the Delhi High Court observed: "A Bank guarantee is a contract between the issuing bank and the person in whose favour the guarantee has been furnished. Though the bank guarantee may have been issued by the banker at the instance of its client, as far as the bank guarantee is concerned, it is a bilateral contract between the banker and the party in whose favour the guarantee has been furnished. The party at whose instance the guarantee has been furnished is, in a way, a stranger to the said contract of bank guarantee. The person in whose favour the bank guarantee has been issued has a right to ask the bank to fulfil its obligations in terms of the bank guarantee. If the terms of the bank guarantee entitle a party to ask the payment of money from the bank then that right cannot be interfered with merely for the reason that there exists a dispute between that party and the client at whose instance the bank guarantee had been issued" (*M/s. Harprashad & Co. Ltd.* v. *M/s. Sudarshan Steel Rolling Mills & Ors.* AIR 1983 Delhi 128 at 133).

P. 726, after the text corresponding to fn. 87:

Forbearance from legal action against the principal debtor is consideration for guarantee (*State Bank of India* v. *M/s Premco Saw Mills* AIR 1984 Gujarat 93).

P. 728, add in fn. 1:

See, also, *M.S.E.B. Bombay* v. *Official Liquidator High Court, Ernakulam & another* AIR 1982 SC 1497.

P. 728, add in fn. 2:

See, also, *Punjab National Bank* v. *Mehra Brothers (P) Ltd., (in Liqn.)* AIR 1983 Cal 335.

P. 728, add in fn. 2:

See, also *Orissa Agro Industries Corporation Ltd. and Ors.* v. *Sarabeswar Guru and Ors.* AIR 1985 Orissa 270 where surety was held to be liable despite dismissal of the suit against the principal debtor for default under Order 9 Rule 5 of the Code of Civil Procedure 1908.

P. 729, after text corresponding to fn. 3:

Where, however, a bank unequivocally and unconditionally agreed to pay to Electricity Board within 48 hours on demand in writing from the Electricity Board any amount upto Rs. 50,000/- on behalf of a company and where the company was ordered to be wound up, the bank was held bound to pay the amount due under letter of guarantee when demanded by the Board. The Board was not under any obligation to prove any default on the part of the company in liquidation (*Maharashtra State Electricity Board, Bombay* v. *The Official Liquidator, High Court Ernakulam & Anr.* AIR 1982 SC 1497).

P. 732, after the text corresponding to fn. 39:

Continuing guarantee would only mean a guarantee which extends to a series of transactions. Therefore, continuing guarantee speaks of continuous transactions, not the period of such transactions. In the facts of the case before it, the Calcutta High Court held that the guarantee was confined to a series of transactions which were restricted or limited to one year (*The Eastern Bank Ltd.* v. *Parts Services of India Ltd.* AIR 1986 Cal. 61).

P. 738, add in fn. 71:

See, however, *Citibank N.A.*, v. *Jaggilal Kamalpat Jute Mills Co. Ltd.* AIR 1982 Delhi 487, where the court held that the rights conferred on the surety under sections 133, 135 or 141 could be waived by specific agreement in the deed of guarantee. As a matter of fact, such an agreement would amount to consent within the meaning of those sections.

P. 740, after the text corresponding to fn. 84:

A surety is not discharged merely because the demand made under a surety-bond is set aside. Reduction in the amount of arrears mentioned in a surety-bond is not a variation and does not discharge a surety (*N. Sulochana* v. *State of A.P.* AIR 1984 A.P. 173).

P. 743, after text corresponding to fn. 7:

A surety is no doubt discharged under section 134 of the Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor but a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a Company) does not absolve the surety of his liability (*Maharashtra State Electricity Board, Bombay* v. *The Official Liquidator, High Court Ernakulam & Anr.* AIR 1982 SC 1497 at 1500).

P. 743, add in fn. 7:

See, also *Maharashtra State Electricity Board, Bombay* v. *The Official Liquidator, High Court, Ernakulam and anr.* AIR 1982 SC 1497.

P. 747, after the text corresponding to fn. 44:

Filing a suit by the creditor against the principal debtor and obtaining a decree for the full amount would not by any stretch of imagination amount to 'composition' resulting

in discharge of liability of the surety. It would not make the slightest difference if the decree is a consent decree especially when the creditor by way of consent decree got 100% relief (*Citibank N.A. New Delhi* v. *Juggilal Kamalpat Jute Mills Co. Ltd.* AIR 1982 Delhi 487 at p. 500).

P. 748, after the text corresponding to fn. 48:

A bank obtained a decree against the principal debtor and the surety. The bank, however, in execution proceedings, granted instalments to the principal debtor. The legal representative of the original surety not being a party thereto, claimed that his liability as surety was discharged. It was held that the surety's liability was discharged. It was observed that right of surety under Sections 140 and 141 continues even if the decree is passed and the relationship between him and the principal debtor continues as principal debtor and the surety (*Maharashtra Apex Corporation Ltd.* v. *Poovappa Salian and Anr.* AIR 1985 Karnataka 116).

P. 751, before section 137:

In *Punjab National Bank* v. *Mehra Bros (P) Ltd. (in Liqn)* AIR 1983 Calcutta 335, where the debtor had admitted its liability and the creditor did not wish to pursue its remedy against the principal debtor, it was held by the Calcutta High Court that the creditor was entitled to proceed against the guarantors.

P. 751, before Section 138:

Surety is not discharged even if the suit against the principal debtor is dismissed under Order 9 Rule 5 of the Code of Civil Procedure 1908 (*Orissa Agro Industries Corporations Ltd.* v. *Sarbeswar Guru and Ors.* AIR 1985 Orissa 270 at 273).

P. 757, after the text corresponding to fn. 9:

Where it was found that the securities were lost on account of negligence or inaction of the bank, the surety stood discharged from his liability (*State Bank of India* v. *M/s. Quality Bread Factory, Batala & Ors.* AIR 1983 P & H 244 at 250).

P. 759, before the paragraph headed 'Joint Promisors':

Where the plaintiff-creditor, a mortgagee, had enforced his right by getting a part of the machinery and plant sold, it could not be said that the plaintiff-creditor had lost or parted with its right in respect of the security. The plaintiff creditor by the act had not impaired in any way the remedy of the defendant-surety against the principal debtor (*Citibank N.A. New Delhi* v. *Juggilal Kamalpat Jute Mills Co. Ltd.* AIR 1982 Delhi 487 at p. 501).

P. 767, add in fn. 72:

See, also, *Cochin Port Trust* v. *Associated Cotton Traders Ltd.*, AIR 1983 Kerala 154.

P. 770, after text corresponding to fn. 97:

Insurer held to be a bailee. A insured his car against accident, loss or damage with N. The car suffered damage in an accident. The car was taken to repairing workshop. N was duly informed. Estimate prepared by the repairer was accepted by N and repairer was asked by N to proceed with repairs. While the car was in custody of the repairer, it was destroyed by fire. A sued N for recovery of loss. A alleged that N was a bailee and had failed to take care of the car and was therefore liable. The Supreme Court, constru-

P. 728, add in fn. 2:

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in discharge of liability of the surety. It would not make the slightest difference if the decree is a consent decree especially when the creditor by way of consent decree got 100% relief (*Citibank N.A. New Delhi* v. *Juggilal Kamalpat Jute Mills Co. Ltd.* AIR 1982 Delhi 487 at p. 500).

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Where it was found that the securities were lost on account of negligence or inaction of the bank, the surety stood discharged from his liability (*State Bank of India* v. *M/s. Quality Bread Factory, Batala & Ors.* AIR 1983 P & H 244 at 250).

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P. 767, add in fn. 72:

See, also, *Cochin Port Trust* v. *Associated Cotton Traders Ltd.*, AIR 1983 Kerala 154.

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Insurer held to be a bailee. A insured his car against accident, loss or damage with N. The car suffered damage in an accident. The car was taken to repairing workshop. N was duly informed. Estimate prepared by the repairer was accepted by N and repairer was asked by N to proceed with repairs. While the car was in custody of the repairer, it was destroyed by fire. A sued N for recovery of loss. A alleged that N was a bailee and had failed to take care of the car and was therefore liable. The Supreme Court, constru-

ing the terms of the policy and in absence of evidence of care by N, held that N was a bailee and the repairer was a subs-bailee and decreed the claim in the suit (*N.R. Srinivasa* v. *New India Assurance Co. Ltd.*, AIR 1983 SC 899 at 905).

P. 778, add in fn. 72:

See also, *Shah Jugaldas Amritlal* v. *Shah Harilal Talakchand* AIR 1986 Guj. 88.

P. 781, after the text corresponding to fn. 90:

The onus is on the Railways to show that no loss, destruction, deterioration or damage had taken place not only during the period of transit, but also during the subsequent period of transit, but seven days after the termination of transit. On failure of Railways to establish that, they could not claim protection under Section 77(2) of the Railways Act and were held liable. They were held to be bailees in respect of the goods in question (*Raman & Co.* v. *U.O.I. and anr.* AIR 1985 Mad. 37).

P. 784, after the text corresponding to fn. 22:

Insurer held to be a liablee. (vide commentary under the head under Section 148 in addendum) See *N.R. Srinivasa* v. *New India Assurance Co. Ltd.* AIR 1983 SC 899 at 905.

P. 785, add in fn. 31:

On the question of burden of proof see, also, *Cochin Port Trust* v. *Associated Cotton Traders Ltd.*, AIR 1983 Kerala 154.

P. 787, add in fn. 48:

See, also, *State Bank of India* v. *M/s Quality Bread Factory* AIR 1983 P & H 244 at 251.

P. 789, after the text corresponding to fn. 71:

The onus is on the railways to show that no loss, destruction, deterioration or damage had taken place not only during the period of transit, but also during the seven days after the termination of transit. On failure of Railways to establish that, they could not claim protection under Section 77(2) of the Railways Act and were held liable. They were held to be bailees in respect of the goods in question (*Raman & Co.* v. *U.O.I. & anr.* AIR 1985 Mad. 37).

P. 794, after the text corresponding to fn. 94:

The onus is on the Railways to show that no loss, destruction, deterioration or damage had taken place not only during the transit but also within seven days subsequent to the termination of transit. On failure of Railways to establish that they were not entitled to protection under section 77(2) of the Railways Act and were held liable. They were held to be bailees in respect of the goods in question (*Raman & Co.* v. *U.O.I. & anr.* AIR 1985 Madras 37).

P. 801, after the text corresponding to fn. 45:

Where, however, there is a counter-guarantee in favour of bank that has issued a bank-guarantee the bank cannot exercise any general lien under section 171 in respect of the amount claimable for payment made under the bank guarantee. (*See Krishna Kishore Kar* v. *United Commercial Bank and anr.* AIR 1982 Cal. 62).

P. 803, after the text corresponding to fn. 73:

Where the goods which were pledged against cash credit facility were destroyed by fire

and the bank recovered an amount from the insurer, it was held that the bank should give credit for the said amount only in the cash credit account. (*Gurbax Rai & Ors.* v. *Punjab National Bank* AIR 1984 SC 1012).

P. 804, after the text corresponding to fn. 89:

As the Major Port Trusts Act is a special statute providing for statutory rights and liabilities, the provisions of Section 171 of the Contract Act which confers a general lien on the wharfinger cannot be resorted to by the Board. It was further held that there was no agreement or contract of bailment between the Board and consignee of goods under the Major Port Trusts Act, and that Section 171 of the Contract Act was not available to the Board (*Board of Trustees, Bombay Port and Ors.* v. *Mrs. Sriyansh Knitters* AIR 1983 Bom. 88 at pp 99 & 102).

P. 808, add in the fn. 22:

See, also, *Ideal Bank Ltd.* v. *Pride of India Pictures Ltd.*, AIR 1983 delhi 546.

P. 808, add in fn. 23:

See, also, *State Bank of India* v. *Quality Bread Factory, Batala,* AIR 1983 P & H 244.

P. 809, after the text corresponding to fn. 37:

Unlike a mortgage, a pledge on hypothecation does not have the effect of transferring any "interest" in the property in favour of the pledgee or the hypothecatee. The pledge and hypothecation, however create a special property in the good in favour of the pledgee or the hypothecatee. In the case of pledge, the special property is to keep possession of the pledged goods and to dispose them of for the realisation of the debt for which it is held as security. In the case of hypothecation, possession remains with the hypothecator but the hypothecatee has the right to take possession of the hypothecated property and to sell it for the realisation of the debt secured by the hypothecation. Where a bank chose to seek a simple money decree without seeking to enforce the security of hypothecated goods, it was held that the bank would be deemed to have waived its right as hypothecatee (*Syndicate Bank* v. *Official Liquidator, M/s Prashant Engineering Co. (P) Ltd.* AIR 1985 Delhi 256).

P. 810, after the text corresponding to fn. 40: & P. 812, after the text corresponding to fn. 53:

Nature of Pawnee's right. If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor a reasonable notice of sale. In the case of a pledge, however, the legal title to the goods pledged would not vest in the pawnee. The pawnee has only a special property. A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense a pledge differs from a mortgage. A pawnee of shares in a company cannot be treated as the holder of the shares pledged in his favour and the pawnor continues to be the member of the company in respect of the said shares and can exercise his rights under Section 169 of the Companies Act 1956 (*Balkrishan Gupta and Ors.* v. *Swadeshi Polytext Ltd.* AIR 1985 SC 520 at 536; Relied on in *T.S. Kotagi* v. *Tahsildar Gadag & Others,* AIR 1985 Karnataka 265).

P. 812, after the text corresponding to fn. 51:

Section 176 creates two rights in the pawnee (pledgee)

1) To bring a suit against the pawnor upon the 'debt' or promise.

2) Sell the thing pledged on giving the pledger reasonable notice of sale.

If he chooses to file the suit on the 'debt' or promise, he can retain the pledged articles as collateral security. The right to sue, on the debt, assumes that he is in a position to redeliver the goods on payment of debt. The section does not contemplate any notice prior to the institution of the suit. The pledgee can also bring a suit to sell the goods pledged. However, a suit to recover the debt by sale of pledged articles must be preceded by notice. Similarly, if pledgee wants to sell articles, without the intervention of the Court, he can do so, only after issuing a notice of sale to the pledger. Sale without notice is void, and a vendee without notice of the pledge, takes only the limited rights or interest of the pledgee, in other words, he steps into the shoes of the pledgee (*T.S. Kotagi* v. *Tahsildar, Gadag & Others,* AIR 1985 Karnataka 265 at 267).

P. 812, after the text corresponding to fn. 53:

A bank chose to seek a simple money decree without seeking to enforce the security of goods hypothecated to it. It was held that the bank would be deemed to have waived its right as hypothecatee (*Syndicate Bank* v. *Official Liquidator, M/s Prashant Engineering Co. (P) Ltd.* AIR 1985 Delhi 256).

P. 812. add in fn. 53:

See also, *Kuri Lal Rungta* v. *Smt. Banarasi Devi & Ors.* AIR 1986 All. 94.

P. 812, add in fn. 56:

See, also, *State Bank of India* v. *Quality Bread Factory, Batala,* AIR 1983 P & H 244.

P. 812, add in fn. 56:

Distinguished on facts in *M/s Prestolite of IndiaLtd.*v. *Union Bank of India & Others* AIR 1986 P&H 64 where pledge was not denied and the suit was held to be maintainable.

P. 828, add in fn. 91:

See, also, *Sm. Umarani Sen & Ors* v. *Sudhir Kumar Datta & Ors.* AIR 1984 Cal. 230.

P. 832, add in fn. 21:

See, also, *Varsha Engineering Pvt. Ltd.* v. *M/s Vijay Traders & Ors.* AIR 1983 Gujarat 166 (No Agency).

P. 848, add in fn. 92:

See, also, *Syndicate Bank* v. *I. K. Amitha and Ors.* AIR 1985 Karnataka 213.

P. 859, after the text corresponding to fn. 23:

Where there is no averment of fraud or wilful wrong, the agent and not the sub-agent is responsible to the principal (See *Shah Jugaldas Amritlal* v. *Shah Harilal Talakchand,* AIR 1986 Guj. 88).

P. 872, after the text corresponding to fn. 48:

Where the plaintiff was only to get commission after the accrual of the collection, he cannot (prima facie) be said to have any interest in the prints of the picture (*Subhash Chandra Jain* v. *Feroze Khan & Ors.* AIR 1982 Delhi 114).

P. 872, after the text corresponding to fn. 48:

However, where the interest created in favour of the agent for payment of either his dues or his remuneration is in the product arising out of the exercise of the power, the agency is not irrevocable (*M. John Kotaiah* v. *A. Divakar & Ors.* AIR 1985 A. P. 30 at 35).

P. 884, after the next corresponding to fn. 34:

An agent has duty, irrespective of any contract to that effect, to produce vouchers by which items of disbursement are supported as part of the obligation to render proper accounts to the principal on demand (*M/s S. Paul & Co.* v. *State of Tripura & Ors* AIR 1984 Cal. 378 at 383).

P. 887, after the text corresponding to fn. 50:

However, when it is shown that the principal was acquainted with the material facts and there was no material on record to show that the principal was kept in the dark about the agent having created a lease in favour of his son, the transaction could not be avoided (*Smt. Munni* v. *Atma Ram* AIR 1983 H. P. 32 at 34 & 35).

P. 896, add in fn. 27:

See, also, *Saraswati Devi* v. *Moti Lal.* AIR 1982 Raj. 108.

P. 908, add before para commencing with "Intimation to the agent....":

The Calcutta High Court, however, has held that the notice received by the agent must be in course of the business transacted by him for the principal. If receiving such a notice is not within the agent's authority, and his lack of authority in this regard is known to the person giving notice, then such person cannot rely upon service of notice on such an agent as service on the principal (*State of Orissa* v. *Goenka Investment & Mining Industries Pvt. Ltd. & Ors.* AIR 1983 Cal. 438.

P. 909, after the text corresponding to fn. 45:

This section, however, provides that no sooner a notice is served upon an agent it shall have same legal consequences as if it had been given to the principal. It does neither expressly nor by necessary implication defer the legal consequence until the expiry of a reasonable time needed for the agent to communicate to the principal (*State of Orissa* v. *Goenka Investment & Mining Industries Pvt. Ltd.* AIR 1983 Cal. 438).

P. 913, after the text corresponding to fn. 93:

When agent not liable. The second para of the section deals with liabilities of an agent where an agent has entered into the contract and not where the principal has entered into the contract directly with the third party. The second para does not deal with any case of enforcement of the contract by the third party where the contract has been entered into by him with the principal (*Union of India and anr.* v. *Chinoy Chablani & Co.* AIR 1982 Cal. 365).

P. 914, after the text corresponding to fn. 6:

Where the plaintiff, in a suit against a foreign ship owner and its agent in India, did not show that by an express contract, the agent made itself liable for the contract of carriage, the court allowed the deletion of the agent's name from the title of the plaint. (*Steel Authority of India Ltd.* v. *Transworld Marine Ltd. & another* AIR 1982 Cal. 161).

P. 935, add at bottom:

In the course of business. Where dealers (agents) in pumps, committed, in combination with a bank's employees, fraud upon the bank by falsely claiming to have supplied pumps to agriculturists under a scheme evolved by the bank, and wrongfully obtained funds from the banks without actually effecting supplies or sales under the scheme, it was held that they were not acting in the course of their business as manufacturer's agents and that the manufacturers-principals could not be penalised or held responsible for the same. (*M/s Shriram Refrigeration Industries Ltd. and anr.* v. *State Bank of India and anr.* AIR 1983 Patna 203).

SPECIFIC RELIEF ACT

P. 949, after the text corresponding to fn. 50, add the following:

Powers of Court. A civil Court seized of jurisdiction of a civil dispute under Section 6 has ample powers under Order 39, Rules 1 and 2 of the Code of Civil Procedure, read with Section 37 of the Specific Relief Act to pass appropriate orders to ensure that the property in dispute is not alienated, altered, demolished, changed, removed and destroyed during the pendency of the suit (*Hari Shankar and Ors.* v. *Satya Prakash & anr.* AIR 1982 Raj. 183).

P. 950, after the text corresponding to fn. 58:

A tenant in possession of the leasehold property after the termination of lease cannot be dispossessed by force except under due authority of law and the position is not different in the case of a tenancy under the Government; even if forcible possession had been taken by the Government as a quondam lessor, the quondam tenant is entitled to get back possession of the property under this section (*M.R.S. Ramakrishnan* v. *The Assistant Director of Ex-Servicemen Welfare* (District Soldiers, Sailors & Airmen Board) *Tiruchirapalli, & Others* AIR 1982 Mad 431).

P. 951, after the text corresponding to fn. 74:

The word 'dispossessed' equally includes within its sweep any flagrant and contumacious violation of symbolical possession duly delivered in the course of law. (*Kumar Kalyan Prasad and anr.* v. *Kulanand Vaidik and others,* AIR 1985 Patna 374).

P. 951, after the text corresponding to fn. 78:

Though the possession of a quondam-lessee, who continues in possession without there being a bilateral, consensual act of holding over is not "lawful possession", but is merely "juridicial possession", however, the landlord with the best of title cannot resort to forcible dispossession. Law in India does not recognise in the landlord a right of extra-judicial re-entry (*M/s Patil Exhibitors (Pvt.) Ltd.* v. *The Corporation of the City of Bangalore* AIR 1986 Karnataka 194).

P. 952, after the text corresponding to fn. 84:

Once it is decided by the Court that the suit is under Section 6, the scope of the suit becomes very limited. The Court will have to decide the question regarding possession and will have to decide as to who was in possession of the property within six months immediately proceeding the date of filing of the suit. The question of title and other issues are not to be gone into by the Court when the suit is under Section 6. (*Mahomedsharif Kasamji Rangawala* v. *Amibai Allabux Rangawala and Anr.* AIR 1984 Gujarat 90).

P. 953, add in fn. 91:

See, also, *Mohammad Hussain Suleman Shaikh and Anr.* v. *Batukbhai Valjibhai and others,* AIR 1984 Gujarat 66.

P. 954, add, after the last sentence, the following:

In a recent case, *Smt. Sobhabati* v. *Lakshmi Chand & Ors.* AIR 1984 Orissa 171, the High Court dismissed a Revision petition, holding that there was an effective remedy by way of a suit for declaration of title and possession. See, also, *M/s. Industrial & Mining Equipment Co. Pvt. Ltd. Delhi* v. *N.L. Kanodia & Ors.* AIR 1986 Delhi 36.

P. 962, after the text corresponding to fn. 28:

Where a suit for specific performance of an agreement is dismissed, the said agreement cannot be used as a defence to a suit for specific performance of a later agreement (*Raminder Singh and anr.* v. *Sham Lal & anr.* AIR 1984 Punjab & Haryana 145).

Specific performance could not be decreed against a person who was shown not to have signed or entered into the agreement (*Bhanwar Singh* v. *Raghubir Nanwa Singh & Ors.* AIR 1985 All. 331.

P. 965, add the following after the text corresponding to fn. 42:

A contract by a guardian of a Hindu minor. A contract entered into by a guardian of a Hindu minor for purchase or sale of immovable property is specifically enforceable by or against the minor (*Roomal & Ors.* v. *Siri Niwas,* AIR 1985 Delhi 153).

Urban Land (Ceiling and Regulation) Act, 1976 and decree for Specific Performance. A conditional decree for Specific performance subject to exemption being obtained under section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 is permissible (*Shah Jitendra Nanalal* v. *Patel Lallubhai Ishverbhai,* AIR 1984 Gujarat 145).

P. 965, add in fn. 42:

See, also, *Ramvinder Singh and Anr.* v. *Sham Lal and anr.* AIR 1984 P & H. 145.

P. 966, after the text corresponding to fn. 57:

In a later case, however, the same Court held that coal ash was not easily available in the market and came within the term "where the property is not an ordinary article of Commerce" and granted relief accordingly. The Court further held that it was "potential property" and that on its coming into existence, was covered by Cl. (ii) (b) of Explanation of this Section in the facts of the case (*U.P. State Electricity Board, Lucknow* v. *Ram Barai Prasad and anr.* AIR 1985 Allahabad 265).

P. 966, add in fn. 57:

See, also, *Gujarat Electricity Board, Gandhinagar* v. *M/s Mahesh Kumar & Co.* AIR 1982 Gujarat 289.

P. 967, add the following after the text corresponding to fn. 66:

Damages for breach of contract and claim for specific performance. By claiming damages for breach of contract, the plaintiff disentitles himself, on account of his own election to treat the contract as at an end, from claiming specific performance of the same contract as an alternative case either originally or subsequently by way of amendment. Such conflicting claims are not permitted under order VII R. 7 of C.P.C. (*Indian Iron & Steel Co. Ltd.* v. *M/s C.G. Engineering Pvt. Ltd.* AIR 1983 Calcutta 6).

Premature Suit. Where it was agreed that conveyance would be executed after partition of the property, but the suit was filed for specific performance before the partition, it was contended that the suit was premature. In the meantime, however, the partition decree became final. The Allahabad High Court held that, in the circumstances, the suit could not be dismissed on the technical ground that it was premature. The fact that the plaintiff had filed the suit prematurely could at the best disentitle him from claiming costs and render him liable to pay costs of the defendants (*Ram Niwas* v. *Smt. Omkari and anr.* AIR 1983 Allahabad 310).

Amendment of plaint. Where the conduct *pendente lite* of the defendant is such as renders specific performance of agreement impossible, the plaintiff is entitled to claim compensation by amending the plaint (*Gopal Debjibhai Patel* v. *Rishal Singh and anr.* AIR 1982 Orissa 242).

P. 971, add the following before the paragraph headed "Explanation":

There is no duty in the Court of *suo motu* grant benefit under Section 12(3) Sub-clause (ii) requires the party who claims benefit of this sub-section to relinquish all claims to performance of the remaining part and all right to compensation for the deficiency or for the loss or damage occasioned through the default of the defendant. Unless the plaintiff conveys it to the Court that he is prepared to make such a relinquishment, it is under no legal duty to consider the desirability of allowing benefit of this sub-section to him.

There is nothing in Section 12 or any other provision of the Act which requires that the facts relevant to the applicability of these provisions should be pleased in the plaint or be set out in an application. Moreover the relinquishment of the claim for the performance of remaining part can be made at any stage of the litigation including the appellate stage. And delay, unless it has caused prejudice to the defendants should not by itself be taken as sufficient to disentitle the plaintiff to the relief (*Ram Niwas* v. *Smt. Omkari and anr.* AIR 1983 Allahabad 310).

The words 'unable to perform' suggest that the sub-section is applicable only when the party cannot for any reason perform the whole of what he has promised. The inability may arise by any cause whatsoever including statutory limitations. The inability to perform may arise by

(i) deficiency in quantity of the subject-matter, or
(ii) variance in quality, or
(iii) defect in title, or
(iv) some legal prohibition, or
(v) other causes.

The expression 'Considerable part' implies that the part which will be left unperformed is either large as regards quantity or as regards quality. In other words, it is material and not insignificant, so that a reasonable objection can be taken by the promises to accept performance. The phrase 'does not admit of compensation' implies that there are no data for ascertaining a fair and reasonable amount as the money value of the difference between what can be performed and the express subject-matter of the contract. The amount need not be mathematically accurate. If a reasonable estimate of the amount as the money value can be made it will not be a case where the compensation is unascertainable (*Ram Niwas* v. *Smt. Omkari and anr.* AIR 1983 Allahabad 310).

P. 975, after the text corresponding to fn. 3:

Urban Land (Ceiling and Regulation) Act, 1976 and decree for specific performance. A conditional decree for specific performance subject to exemption being obtained under section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 is permissible (*Shah Jitendra Nanalal* v. *Patel Lallubhai Ishverbhai,* AIR 1984 Gujarat 145).

P. 982, add in fn. 45:

For another case where the Court held that compensation in money would afford adequate relief, see *M/s Urmila & Co. Pvt. Ltd.* v. *J. M. Baxi & Co. Ltd.* AIR 1986 Delhi 336.

P. 983, after the text corresponding to fn. 52:

Where it was found that the plaintiff could be compensated in terms of money in a contract for sale of coal ash, it was held that injunction restraining the defendants from selling coal ash to other parties could not be granted (*Gujarat Electricity Board, Gandhinagar* v. *M/s Mahesh Kumar & Co.,* AIR 1982 Guj. 289).

P. 983, add in fn. 57 and in fn. 59:

See, also, *Smt. Usha Das (Roy)* v. *Smt. Arati Kar (Maiti)* AIR 1982 Cal. 174.

P. 984, after the text corresponding to fn. 71:

Contract of Service and Forced labour — enforceability. Even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration, he cannot be forced, by compulsion of law or otherwise, to continue to perform such service, as that would be forced labour within inhibition of Article 23 of the Constitution of India. This Article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by a person obligated to provide labour or service. The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him (*People's Union for Democratic Rights & others* v. *Union of India* AIR 1982 Supreme Court 1473).

P. 990, add in fn. 17:

See, also, *M/s Urmila & Co. Pvt. Ltd.* v. *J. M. Baxi & Co. Ltd.* AIR 1986 Delhi 336.

P. 991, add in fn. 34:

See, however, *Sujan Singh Sadhana* v. *Mehkam Chand Jain* (deceased by L.R.s) *and others* AIR 1983 P & H 180, where the plaintiff was held not entitled to even compensation when the land was acquired by the government.

P. 997, after the text corresponding to fn. 73:

Section 16(c) is prohibitory and a duty is cast on courts by a public statute that specific performance of a contract cannot be granted in favour of a person unless be avers and proves his readiness and willingness to perform his part of the contract. That being the nature of the statute, it would be the duty of the court to see whether the person who seeks to enforce the contract satisfies the mandatory provisions of Section 16 (*H.G. Krishna Reddy & Co.* v. *M.M. Thimmiah & anr.* AIR 1983 Madras 169).

The averment of readiness and willingness is required to be made only in case in which the plaintiff has already performed his part of the contract. When there remains nothing for the plaintiff to perform towards the contractual obligation, failure on his part to express his willingness to perform his obligation is of no legal consequence (*Trimbak Shankar Tidke* v. *Nivratti Shankar Tidke* AIR 1985 Bombay 128). (See, also, *Mithu Khan* v. *Ms. Pipariyawali & Ors.* AIR 1986 M.P. 39).

P. 997, add in fn. 73:

See, also *Palthur Hunnur Saheb* v. *Bopanna Annapumamma & others* AIR 1986 Karnataka 109 (Case law discussed); also *Raminder Singh and Anr.* v. *Sham Lal & anr.* AIR 1984 P & H. 145.

P. 998, after the text corresponding to fn. 74:

The words "ready" and "willing" imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The terms of a contract performable by the plaintiff may be of two kinds (1) those that have to be performed before the other side can be called upon to fulfil his promise; and (2) others that may have to be subsequently performed. The actual performance of, or a readiness to perform, the former must be shown and an offer to perform the latter must be made (*K. Sambasiva Rao* v. *P. Bangaru Raju* AIR 1985 A.P. 393).

P. 998, add in fn. 75:

See, also, *Dhian Singh* v. *Tara Chand and anr.* AIR 1984 Allahabad 4 and *Shafiq Ahmad* v. *Smt. Syeedan* AIR 1984 All. 140.

P. 998, after the text corresponding to fn. 88:

Sec. 16(c) requires that a party must aver that he has performed or has always been ready and willing to perform his part of the contract. If there is no such averment, then no amount of evidence can help the plaintiff in getting a decree in his favour. An amendment of plaint to introduce the averment after the close of the defendant's case was not allowed by the Patna High Court in *Ramswaroop Singh & others* v. *Bijoy Kumar Singh* AIR 1986 Patna 60.

P. 998, add in fn. 88:

See, also, *Ram Singhasan Choubey & Ors.* v. *Sudama Prasad Sah* (AIR 1982 Patna 200); also, *Bhanwar Singh* v. *Raghubir Nanwa Singh & others* AIR 1985 All. 331.

P. 1000 after the text corresponding to fn. 99:

The plaintiff does not have to go about jingling money to demonstrate his capacity to pay the purchase price. Thus, even where the plaintiff had stated that she did not have the means to pay the court-fees but did in fact pay the full court-fees before the time for claiming specific performance expired, the court held that it could not be said that she was not ready and willing to perform her obligation. C1(1) of Explanation to Section 16(c) clearly enacts that money need be produced only when directed by the Court (*Ganesh Prasad* v. *Saraswati Devi and others* AIR 1982 Allahabad 47).

P. 1000, add in fn. 1:

See, however, *Diwali Lal & Ors* v. *Sardar Baldev Singh and anr.* (AIR 1985 Patna 344).

P. 1000, after the text corresponding to fn. 5:

The compliance of the requirements of Section 16(C) is mandatory and in the absence of necessary averments in this respect in the plaint even in the presence of proof that the plaintiff had been ready and willing to perform his part of the contract, the plaintiff cannot hope to succeed in the suit. Even where there is complete absence of a plea in defence on this point, it is the duty of the Court to feel satisfied on these twin mandatory requirements of law. Mere proof of readiness and willingness where the essential ingredients are absent in the pleadings must be deemed to be an exercise in vain. Proof in such cases cannot be regarded as substitute for averments which were absent in the pleadings (*Bijai Bahadur and Others* v. *Shri Shiv Kumar and anr.* AIR 1985 Allahabad 223).

Where a purchaser falsely claimed that he had paid the vendor a certain sum and offered the balance purchase price, the Court held that he had violated an essential term of the contract and also held that he was not ready and willing to perform his part of the contract and refused decree for specific performance (*Mst. Sahida Bibi* v. *S.K. Golam Mohammad* AIR 1983 Calcutta 216).

The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The plaintiff cannot add any additional condition for the performance of his part of the contract. Where the plaintiff, inconsistently with the contract, insisted that he would pay the agreed sum only after he was put in possession, was held not to be ready and willing to perform his part of the contract (*Rahat Jain* v. *Hafiz Mohammad Usman,* deceased by LRs and others, AIR 1983 Allahabad 343).

P. 1001, after the text corresponding to fn. 8:

While "willingness" is merely mental process, "readiness" is something to do with translating that will into action and is preceded by necessary preparation for being in a position to be ready. In other words, while 'willingness' may be something to do mainly with a person's mental process to do an act, his readiness implies close proximity of such willingness and its ultimate physical manifestation. 'Readiness' must in all cases be backed by 'willingness' and its imminent physical action is demonstrated when it is about to be put into action. Time lag between the two may sometimes be very short, may even be negligible, but it must always be preceded by an intention or a will to do. In short, 'readiness' must be said to be the total equipment of a person who is willing to do a thing before he actually does it. There may be cases where though a person may be willing, yet may not be able to do what he wills. He cannot be said to be ready to do it. In other cases, the person may possess all that is necessary to do an act. He may be ready but if the will to do is not there, his willingness may be lacking (*Bijai Bahadur and others* v. *Shri Shiv Kumar & anr.* AIR 1985 All. 223).

P. 1006, after the text corresponding to fn. 39:

A person who is a party to the contract for sale is bound to execute the sale deed if other terms are fulfilled by the purchaser, even though the property might not be belonging to him, as, in that case the purchaser would take risk of purchasing from him with open eyes. The person to whom the property might legally belong cannot be bound by that sale, but all the same the parties to the contract would be bound by the contract to sell and the purchaser under the contract can force the vendor under the contract to perform his part of the contract (*Diwali Lal & others* v. *Sardar Baldev Singh & others* AIR 1985 Patna 344).

P. 1011, add in fn. 68:

See, also, *Ram Briksha Singh & Ors.* v. *Rudra Narain Singh* (deceased by L.R.s.) AIR 1986 Allahabad 19.

P. 1011, add in fn. 69:

See, also, *Rameshwar Singh* v. *Hari Narayan Singh & Ors.* AIR 1984 Patna 277.

P. 1012, after the text corresponding to fn. 74:

The question of good faith is always a question of fact, which depends upon the facts and circumstances of each case. No hard and fast rule can be laid down as to the quantum of evidence that should be produced to convince a Court that the party has acted in good faith (*Munna Lal* v. *Smt. Krishna Kumari and another* AIR 1983 Allahabad 5).

P. 1012, add in fn. 74:

See, also, *Rameshwar Singh* v. *Hari Narayan Singh and others* AIR 1984 Patna 277.

P. 1012, add in fn. 78:

See, also, *Raminder Singh and anr.* v. *Sham Lal and anr.* AIR 1984 P & H. 145.

P. 1013, after the text corresponding to fn. 89:

Clause (C): In a suit for specific performance filed by *A* against *B*, a decree for possession could not be passed against *C* where it could not be shown that *C* was claiming through *B* or was later inducted into possession by *B* (*Mohd. Hanif* (deceased by LRs) *and others* v. *Mariam Begum and Others* AIR 1986 Bombay 15).

P. 1015, after the text corresponding to fn. 98:

In a suit against a minor for specific performance of an agreement for sale of immoveable property, the court, in exercising its discretion under section 20, is not justified in reopening the issue of the benefit of minor on the ground of rise in prices during the pendency of the suit when court had earlier granted permission under Section 8 of the Hindu Minority and Guardianship Act to the Guardian of the minor for sale of minor's property (*Chater Bhuj Goel* v. *Gurpreet Singh* AIR 1983 Punjab & Haryana 406).

P. 1015, add in fn. 98:

See, also, Hamsmmal v. *P.V. Thakkar* AIR 1982 Madras 108.

P. 1015, add in fn. 99:

See, also, *Smt. Harbans Atma Singh* v. *Ramesh Kumar,* AIR 1986 P & H 14.

P. 1016, after the text corresponding to fn. 4:

Specific performance is a discretionary remedy which may or may not be granted. It is quite possible that in a given case the party who asks for specific performance may, even when successful, get only damages in lieu of specific performance. Therefore, unless the plaintiff gets a decree for specific performance in his favour, he does not get a right to possession. He cannot, therefore, at the interlocutory stage, dispossess somebody who is in possession prior to the filing of the suit. Receiver, accordingly, could not be appointed (*Purushottam Vishindas Raheja* v. *L.I.C. & others* AIR 1982 Bombay 523).

P. 1016, after the text corresponding to fn. 6:

Where the plaintiff was guilty of making a material alteration in the agreement, specific performance was refused (*S.K. Panchaksharam Mudaliar & others* v. *T.V. Kanniah Naidu & others* AIR 1986 Madras 156).

P. 1021, add in fn. 56:

See, also, *K. Sambasiva Rao* v. *P. Bangaru Raju,* (AIR 1985 Andhra Pradesh 393).

P. 1021, add in the fn. 57:

See, also, *K. Sambasiva Rao* v. *P. Bangaru Raju* (AIR 1985 Andhra Pradesh 393).

P. 1022, after the text corresponding to fn. 64:

Sec. 20 and Sec. 14: When Section 14 in term specifies the cases in which specific performance cannot be granted, it cannot be understood that Section 20 is a departure from the rigours of Section 14 (*Gujarat Electricity Board, Gandhinagar* v. *M/s Mahesh Kumar & Co.* AIR 1982 Gujarat 289).

P. 1023, add in fn. 78:

See, also, *Smt. Ranganayakamma* v. *N. Govinda Narayan* AIR 1982 Karnataka 264, where the Court, after considering the hardship of a widow (seller), and of a businessman (purchaser) held that it was manifestly unjust to decree specific performance in favour of the purchaser.

P. 1025, add the following paragraph after the paragraph headed "Sub-Sec (2)(c)":

The plaintiff must come to Court with clean hands. When the plaintiff does not come with clean hands, as where he is guilty of fraud or some other practice, he may ordinarily get no relief by way of specific performance. A contract is to be judged as at the time at which it was entered into, and if fair when made, the fact that it has become too hard by the force of subsequent circumstances, or changing events, will not prevent its specific performance. Nevertheless, if it is seen that the contract itself is not fair and is one-sided, the Court may refuse to enforce the contract. Where, therefore, not only the terms of the contract itself but also the mental condition of the defendant, the presence of heirs of the defendant, the absence of independent legal advice and the inadequacy of price in a second (connected) contract showed that the contract was one-sided, the Court held that it should not be enforced and that damages should constitute an adequate relief (*Sunil Chandra Ghosh* v. *Hemendra Kr. Deb* AIR 1985 Calcutta 233).

P. 1027, after the text corresponding to fn. 3:

A deity is not a perpetual minor and specific performance can be granted against a deity (*Sri Durga Thakurani Bije Nijigarh and others* v. *Chintamani Swain & others* AIR 1982 Orissa 158).

P. 1027, after the text corresponding to fn. 8:

A contract entered into by a guardian of a Hindu Minor for purchase or sale of immovable property is specifically enforceable by or against the minor (*Roomal & Ors.* v. *Siri Niwas,* AIR 1985 Delhi 153). See, also, *Manik Chand* v. *Ramchandra* (AIR 1981 Supreme Court 519).

P. 1027, add in fn. 11:

See, also, *Roomal & Ors.* v. *Siri Niwas* AIR 1985 Delhi 153.

P. 1028, add in fn. 16:

See, also, *Prag Datt* v. *Smt. Saraswati Devi and anr.* AIR 1982 Allahabad 37.

P. 1029, after the text corresponding to fn. 25:

Where, however, only four of the five co-owners had executed an agreement for reconveyance of property, a decree for specific performance was passed against the four co-owners in respect of their shares in the property (*Lalit Mohan Taran* v. *Lal Mohan Deb and others* AIR 1985 Gauhati 35).

P. 1032, after the text corresponding to fn. 45:

Where, however, in a suit for specific performance of an agreement for sale, the plaintiff claimed damages in the alternative, and on the plaintiff not pressing for specific relief, the court passed a decree for damages, it was held that the decree was not null and void or *non est* (*John* v. *Mammootty* AIR 1985 Kerala 120).

P. 1034, after the text corresponding to fn. 58:

It may also be as per the terms of the agreement (*Smt. Harbans Atma Singh* v. *Ramesh Kumar*, AIR 1986 P & H 14).

P. 1035, after the text corresponding to fn. 60:

Where the Court granted a decree for specific performance of agreement to sell immoveable property, but the decree was silent with regard to the prayer for possession, it was held that decree for specific performance necessarily embodied a mandate to fulfil all the terms including the term for delivery of possession (*Debabrata Tarafder* v. *Biraj Mohan Bardhan* AIR 1983 Calcutta 51).

P. 1035, add the following after the text corresponding to fn. 61:

"At any stage of the proceeding". The term "proceeding" is a very wide and comprehensive term and it includes execution proceeding also. The term "at any stage of the proceeding" gives widest permission to the court to allow amendment at any stage of the proceeding including execution of the decree. The amendment can be allowed even in an appeal arising out of the order passed by the executing Court rejecting the prayer for permission. The proviso recognises the well settled position that the Court passing a decree for specific performance retains control over the subject matter as long as anything remains to be done in the case (*Lotu Bandu Sonavane* v. *Pundalik Nimba Koli*, AIR 1985 Bombay 412).

"An appropriate case". "An appropriate case" means a case in which the relief does not necessarily flow from the decree for specific performance of the agreement of sale. If such a relief is ancillary to and necessarily flows from a decree for specific performance then it is not necessary to specifically seek such a relief and the bar of Section 22(2) would not be attracted. If the defendant is in possession of the property agreed to be sold and the decree directs a specific performance of the agreement of sale, the defendant is bound to execute the sale deed as per the decree and put the plaintiff in possession of the property as contemplated by Section 55(1)(f) of the Transfer of Property Act. In such a case it is not necessary to specifically claim the relief of possession in the suit (*Lotu Bandu Sonavane* v. *Pundalik Nimba Koli*, AIR 1985 Bom. 412).

Section 22 enacts a rule of pleading. It enables the plaintiff to ask for possession in the suit for specific performance and empowers the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the

defendant should execute the deed and put the plaintiff in possession. If the said relief is not claimed in the Plaint, the Court shall permit the plaintiff at any stage of the proceedings, including execution proceedings, to amend the plaint on such terms as it deems proper. The purpose is to avoid multiplicity of suits which the law Courts always abhor. Where the High Court granted relief of possession without first allowing amendment of the plaint, the Supreme Court held that the omission to allow amendment was not so fatal as to deprive the decree-holders of the benefits of decree when section 55 of the Transfer of Property Act authorises the transferee to get possession in pursuance of a sale deed (*Babulal* v. *M/s Hazari Lal Kishori Lal & others* AIR 1982 Supreme Court 818).

In a suit for specific performance filed by *A* against *B*, a decree for possession could not be passed against *C* where it could not be shown that *C* was claiming through *B* or was later inducted into possession by *B* (*Mohd. Hanif* (deceased by LRs) *and others* v. *Mariam Begum & Others* AIR 1986 Bom. 15).

While decreeing refund of amount paid by plaintiff under an agreement and while holding that the subsequent purchasers were bona fide purchasers for value without notice, it was improper for the Court to allow to plaintiff to retain possession of the property until the amount was refunded and keep the subsequent purchasers out of possession (*Balaram Barik & others* v. *Banambava Maharana* AIR 1982 Orissa 271).

The Calcutta High Court, however, disallowed an amendment seeking to introduce relief for possession on the ground that the property in question was situate outside the jurisdiction of the Court (*Rajkumar Singhania* v. *Benoy Kumar Mazumdar & Ors.* AIR 1985 Calcutta 328).

P. 1035, before the sentence starting with the words "But see....." in the first line:

In this connection, see the observations of Calcutta High Court (Special Bench) in *Sm. Dhiraj Bala Karia* v. *Jethia Estate Pvt. Ltd.* AIR 1983 Calcutta 166.

P. 1035, after the text corresponding to fn. 61:

A plaintiff may amend the plaint to include a claim for refund of advance money paid to the defendant. The amendment may be made at any stage of the proceeding including the appellate stage (*Mst. Sahida Bibi* v. *Sk. Golam Muhammad* AIR 1983 Calcutta 216).

P. 1035, add in fn. 61:

See, also, *Rahat Jan* v. *Hafiz Mohammad Usman* (deceased by L.R.s) and others AIR 1983 Allahabad 343.

P. 1042, after the text corresponding to fn. 6:

A third party, who has acquired, bona fide, interest in the subject matter of the suit for value would be a proper party in a suit for rectification of deed relating thereto (*Ram Suchit and anr.* v. *1st Additional Dist. Judge, Gorakhpur* AIR 1986 Allahabad 149).

P. 1046, add in fn. 24:

See, also, *Babu Lal* v. *M/s Hazari Lal Kishorilal & others* AIR 1982 Supreme Court 818.

P. 1047, add the following before the paragraph starting with the words "But under Sub-Sec.(4).....":

The use of the expression "further relief" in Sub-section (3) of Section 28 is a clear pointer that reliefs by way of delivery of possession or partition and separate possession of property mentioned in Section 22(1)(a) and in clause (b) of Sub-section 3 of Section 28 are ancillary or consequential to the passing of a decree for specific performance of a contract to transfer immoveable property (*Sm. Dhiraj Bala Karia* v. *Jethia Estate Pvt. Ltd.* AIR 1983 Calcutta 166).

P. 1047, after the text corresponding to fn. 32:

The Calcutta High Court has recently held that the Court does not lose its jurisdiction to extend time even where the original decree for specific performance provided that in the event of plaintiff default in depositing the balance of the consideration within the time fixed the plaintiff claim for specific performance "shall be barred for ever" (*Tapan Kumar Chatterjee* v. *Kalyani Debi* AIR 1985 Calcutta 243).

The Court can extend time for deposit of purchase-money or balance of the purchase money but the said Section does not empower the court to direct deposit of purchase money or balance of purchase money by instalments, not allowed by the conditional decree. Modification of a decree is not permitted by section 28 or by any other provision of the Act. The defendant should also be heard in plaintiff's application for modification (*Sunity Chandra Bose* v. *Nil Ratan Sinha* AIR 1985 Calcutta 282).

P. 1047, after the text corresponding to fn. 32:

Where the purchaser decree-holder failed to make payment of the amount within the time allowed to him under a decree for specific performance in his favour, and also failed to apply for extension of time, the defendant-seller became entitled to get the contract rescinded (*Onkar Nath and anr.* v. *Basheer and othera* AIR 1986 P & H. 152).

P. 1047, after the text corresponding to fn. 33:

An application for rescission of the contract for sale of land can be made in the suit in which the decree for specific performance is passed (*Kanhaiyalal* v. *Mulla Abdul Hussain* (deceased by L.R.s) *and others* AIR 1985 M.P. 24).

P. 1050, after the text corresponding to fn. 4:

For a case where the court declared the nullity of a power of attorney when two of the executants thereof were of unsound mind and consequent nullity of a deed of partition executed in exercise of power of attorney, see *Mrs. Clara Aurora de Braganca & others* v. *Mrs. Sylvia Angela Alvares & Ors.* AIR 1985 Bombay 372.

P. 1050, add in fn. 5:

See, also, *Amar Krishna Kukherjee* v. *Smt. Asha Rani Ghosh* AIR 1985 Cal. 398.

P. 1051, add in fn. 11:

See, also, *Dunia Lal Datta* v. *Nagendra Nath Datta* AIR 1982 Calcutta 163.

P. 1053, after the text corresponding to fn. 22:

Jurisdiction. A suit for cancellation of a decree passed by a Revenue Court on the ground that it was a result of a fraud, is triable by a civil court and not the revenue court (*Gurucharansingh & others* v. *Mst. Gurdayal Kaur & others* AIR 1982 Rajasthan 91)

P. 1053, add in fn. 22:

See, also, *Smt. Uma Devi & Others* v. *Narayan Nayak and others* AIR 1985 Orissa 96.

P. 1061, add in fn. 39:

See, also, *K. Madhadeva Sastry* v. *Director, Post-Graduate Centre, Anantpur* AIR 1982 A.P. 176.

P. 1062, after the text corresponding to fn. 48:

Section 34 — not exhaustive: Section 34 is not exhaustive of all the circumstances and recourse to Order VII R. 7 of the Code of Civil Procedure is not excluded in appropriate cases (*Government of State of Orissa* v. *Jaldu Rama Rao & Company* AIR 1983 A.P. 214).

Section 34 and Section 35: Section 34 does not contemplate that a declaratory decree will be passed when the facts of the case come under the purview of Section 35 of the Act (*Dunia Lal Datta* v. *Nagendranath Datta and anr.* AIR 1982 Cal. 163).

P. 1063, add the following paragraph before the paragraph headed 'Discretion of the Court':

Declaratory Suit, Sec. 34 and Sec. 41: In a declaratory suit, whether governed by the provisions of S. 34 of the Specific Relief Act or not, the principles embodied in Section 41(b) of the Specific Relief Act are equally applicable (*Anil Kumar Sinha and others* v. *Subhas Kumar Sinha & others* AIR 1985 Calcutta 315).

P. 1066, after the text corresponding to fn. 79:

A worshipper, as next friend of deity, represents the deity, and can maintain a suit for declaration and to challenge alienation of deity's property (*Bhagauti Prasad Khetan and etc.* v. *Laxminathji Maharaj and etc.* AIR 1985 Allahabad 228).

P. 1068, add in fn. 10:

See, also, *Mool Raj* v. *Atma Ram* AIR 1986 J & K 24.

P. 1069, add in fn. 18:

See, also, *Mangninath Tiwary & others* v. *Phool Mohammad Dhobi & Ors.* AIR 1985 Patna 338.

P. 1073, after the text corresponding to fn. 54:

When the suit property is under attachment (custodia legis) at the commencement of the suit, the absence of prayer for possession does not render the suit bad (*Gyasuddin* v. *Allah Tala Waqf Mausuma and anr.* AIR 1986 Allahabad 39).

P. 1074, add in fn. 69:

See, also, *Samad Dar* v. *Mohamed Ismail Tantrary,* AIR 1983 J & K 59.

P. 1077, after the text corresponding to fn. 2:

A suit by a co-shebait for declaration of his right to perform Sheva and for restraining his co-shebait from preventing him from entering the room is not bad if there is no prayer for possession as possession of one Shebait is possession of another unless there is ouster (*Sri Sri Iswar Kalimata Thakurani* v. *Shebaits of Sri Sri Iswara Kalimata Thakurani & Ors.* AIR 1985 Calcutta 366).

P. 1077, after the text corresponding to fn. 95:

Where an Anjuman filed a suit for a declaration that a certain property was a waqf property and not of the defendants, but did not claim possession of the property, it was held that it was not a suit under Section 34. The Court further observed that even if it was a suit under Section 34, the plaintiff, not being mutawalli or trustee, were not entitled to possession and that the suit for declaration simpliciter was maintainable (*Anjuman Islamia* v. *Najini Ali & Ors.* AIR 1982 M.P. 17).

Where, however, the plaintiff seeks a declaration of his title and is in possession of the property, the suit without a prayer for possession is maintainable (*Chitui Naga* v. *Onhen Kuku* AIR 1984 Gauhati 62).

P. 1082, add the following paragraph after the paragraph headed 'vested interest':

A person likely to be adversely affected. A person who is likely to be adversely affected by an order may file a suit for a declaration that the order is *ultra vires* and beyond the powers of the authority that passed it (*Anne Besant Girl's High School* v. *Deputy Director of Public Instruction & Ors.* AIR 1983 Supreme Court 526).

P. 1084, after the text corresponding to fn. 71:

However, the Managing committee of a school constituted in accordance with the rules framed under the West Bengal Secondary Education Act 1950 is neither a body corporate nor a statutory body. An employee of such a school does not acquire a statutory status. The remedy of such an employee is in damages and not by way of declaration (*Smt. Usha Das (Roy)* v. *Smt. Arati Kar (Maiti)* AIR 1982 Calcutta 174).

P. 1085, after the text corresponding to fn. 83:

Section 34 and Section 35: A person not bound, under this section, by an earlier decree, cannot file a suit for a declaration under section 34 (*Dumia Lal Datta* v. *Nagendra Nath Datta and anr.* AIR 1982 Cal. 163).

P. 1085, add in fn. 82:

See, however, *Autar Singh & others* v. *Th. Atma Singh & Others* AIR 1982 J & K 141.

P. 1088, after the text corresponding to fn. 12, add the following:

Husband and Wife. Unless the suitor is in exclusive occupation of the premises and the defendant is trying to threaten that occupation by reason of the conduct which may be indecent, immoral, cruel or peace-breaking, injunctions are not to issue. Such injunctions may be granted where the value or utility of the property itself or the very existence of the occupant is threatened.

When suits of the kind which relate to property are filed, the wife has to work out exclusive title to the property. The principles applicable and operative are ordinary normal principles, in that those who are entitled to the enjoyment of the property while the entitlement subsists could not be excluded from such entitlement by reasons of the allegations with regard to devious marital conduct which requires further investigation and clear proof. More over when one of the parties forces entry without the aid of the Court relying on her entitlement, by sheer reason of such entry, she would not be entitled to protect such conduct and exclude the other spouse from the subsisting right or entitlement (*Bharti Surendra Shah* v. *Surendra Ramanlal Shah* AIR 1983 Bombay 258).

P. 1089, after the text corresponding to fn. 14:

In a suit for injunction it is not necessary for the plaintiff to plead readiness and willingness to pay the balance of the premium price (*M/s Time Properties & Promoters* v. *Delhi Development Authority,* AIR 1986 Delhi 317).

P. 1089, add the following before S. 37:

Privity of contract and Injunction. In absence of privity of contract no discretionary relief by way of injunction could be granted against electricity authorities restraining them from disconnecting the supply of electricity (*M/s Puneet Plastic Industries* v. *M/s Rawat Hosiery & anr.* AIR 1985 Delhi 257).

Breach of peace. Where there is considerable heat, tension and possibility of breach of peace, the proper course would be to see that the decree or interim order does not accentuate the problem. Granting of relief of injunction is discretionary. The relief must be granted where it is absolutely necessary. It may be granted where it would help in the preservation of peace and public order. Where there is a possibility of breach of peace of public order, the Court ought to proceed with caution (*Sarwar Husain & others* v. *Additional Civil Judge, Moradabad and others* AIR 1983 Allahabad 252).

P. 1089, after the text corresponding to fn. 18:

Where the defendant was publishing defamatory matter against the plaintiff, it was held that an *ex-parte* injunction was properly granted against the defendant (*Hari Shankar* v. *Kailash Narayan & others* AIR 1982 M.P. 47).

P. 1090, after the text corresponding to fn. 20:

In a suit for possession of a property the Court can grant a temporary injunction to ensure preservation of status quo and to restrain the defendants from wasting, removing, alienating, demolishing, altering, transferring and changing the same (*Hari Shankar & Ors.* v. *Satya Prakash and another* AIR 1982 Rajasthan 183).

P. 1090, add in fn. 20:

See, also, *Bindeshwar Narayan Singh & others* v. *Managing Committee, Shri Sundermal Hindi High School & others* (AIR 1982 Gauhati 69).

P. 1091, add the following after the text corresponding to fn. 28:

Possession disturbed after suit, and permanent injunction. In a suit for permanent injunction to restrain the defendants from plaintiffs' possession of suit land, a temporary injunction was granted by the trial court and affirmed by the appellate Court. Later, the suit was dismissed for default and the defendants took possession of the suit land. On restoration of the suit, the court ordered the defendants to deliver possession to the plaintiffs. The fact that the defendants had come into possession for some time after the institution of the suit did not disentitle the plaintiffs to the grant of permanent injunction if the plaintiffs were found to be in possession of suit land on the date of the institution of the suit (*Nirbhayasingh* v. *Shankarlal & Others* AIR 1985 M. P. 141).

Balance of convenience. On consideration of balance of convenience, a Court may refuse injunction if it cannot be shown that irreparable injury will be caused if no injunction is granted (*M/s Misra & Company* v. *Hindustan Aeronautics Ltd.* AIR 1985 Orissa 22). (See, also, *Urmila & Co. Pvt. Ltd.* v. *J. M. Baxi & Co. Ltd.* AIR 1986 Delhi 336 and *M/s Magnum Films and anr.* v. *Golcha Properties Pvt. Ltd.* AIR 1983 Delhi 392).

No injunction against a person with better title. A plaintiff, being a transferee of the suit land under an unregistered conveyance, is not entitled to an injunction against a party who has a better title (*Amrao Singh & others* v. *Sanatan Dharam Sabha, Chandigarh* AIR 1985 P & H. 195).

Injunction against Municipality. The Court in order to safeguard the special interest of the neighbour can issue a mandatory injunction not only against the Municipality, but against those who are on the lands unauthorisedly through that municipality (*Prabhudas Kalyanji and others* v. *Haji Hasan Haji Yusuf Maklal & others* AIR 1983 Gujarat 119).

Temporary and Permanent Injunction: It is a settled principle of law that in a suit where there is no permanent injunction sought, ordinarily a temporary injunction cannot be granted. The principles that govern the grant of perpetual injunction would govern the grant of a temporary injunction also (*Gujarat Electricity Board, Gandhinagar* v. *M/s Mahesh Kumar & Co* AIR 1982 gujarat 289).

Breach of peace. Where there is considerable heat, tension and possibility of breach of peace, the proper course would be to see that the decree or interim order does not accentuate the problem. Granting of relief of injunction is discretionary. The relief must be granted where it is absolutely necessary. It may be granted where it would help in the preservation of peace and public order. Where there is a possibility of breach of peace of public order, the Court ought to proceed with caution. (*Sarwar Husain & others* v. *Additional Civil Judge, Moradabad and others* AIR 1983 Allahabad 252).

P. 1091, after the text corresponding to fn. 28, also add the following under a new heading "Sec. 37 and Sec. 41":

The Supreme Court considered the provisions of Section 41(b) in the context of Section 37 of the Specific Relief Act and the provisions of the Code of Civil Procedure and observed as follows:

"Section 41(b) confers to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a court which is not subordinate to the court from which the injunction is sought. The Court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a court which is subordinate to the Court from which injunction is sought. As a necessary corollary, it would follow that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of Co-ordinate or superior jurisdiction.

Expression 'Injunction' in Section 41(b) is not qualified by any adjective and, therefore, it would comprehend both interim and perpetual injunction. It is however, true that Section 37 specifically provides that temporary injunctions are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of Code of Civil Procedure being confined to temporary injunction an unnecesary grey area will develop.

The Court can in appropriate cases grant temporary injunction in exercise of its inherent powers in cases not covered by Order 39 of the Code of Civil Procedure. But while exercising this inherent power, the Court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceedings cannot be granted. Section 41(b) is one such provision. And inherent power of the Court cannot be invoked to nullify or stultify a statutory provision."

An interim injunction to restrain filing of winding-up petition was, accordingly,

refused (*Cotton Corporation of India Ltd.* v. *United Industrial Bank Limited & Ors.* AIR 1983 Supreme Court 1272). (See, also, *Sarat Chandra Panda* v. *Hari Das & Others* AIR 1983 Orissa 196).

P. 1095, add the following after the text corresponding to fn. 47:

'Obligation'. The 'Obligation' contemplated in Section 38 is legal obligation. Where, therefore, it was found that the State Government was under no legal obligation to assign the land, the Municipality committed no breach of obligation in not securing the assignment and, in the circumstances, no injunction was granted for restraining the state and municipality from proceeding with construction of inspection bungalow on a land which was earmarked for Gandhi Memorial under the draft Master Plan which, however, was not published under the relevant Town Planning Act (*State of Orissa and anr.* v. *Puri Municipality & Ors.* AIR 1984 Orissa 132).

'Obligation' means a duty enforceable by law. Where no such obligation was spelt out, injunction could not be granted (*State Bank of Bikaner and Jaipur* v. *Firm Ballabh Das & Sons* AIR 1984 Rajasthan 107).

P. 1096 after the figure "42" in paragraph headed "injunction to prevent breach of contract", add the following:

Where the statutory formalities following a municipal auction were not completed, there was no completed contract and there could, therefore, be no question of relief of specific performance or injunction in favour of auction purchaser plaintiff (*Doshi Mohanlal Duralabhji* v. *Savarkundla Municipality* AIR 1982 Gujarat 6).

Where there was no obligation in a bank to lend money or to keep the industry of the plaintiff running, an injunction requiring the bank to lend money or to do any acts to keep the industry running could not be granted under Section 38(1) (*State Bank of India* v. *J.S. Ramamoorthy* AIR 1982 Mad. 197).

P. 1096, add the following after the word 'remedy' in the 2nd paragraph under the heading "injunction to prevent breach of contract":

See, in this context, *M/s Urmila & Co. Pvt. Ltd.* v. *J. M. Baxi & Co. Ltd.* AIR 1986 Delhi 336.

P. 1100, after the text corresponding to fn. 89:

The possession of a tenant by sufferance is juridical and should be protected by the Courts. He is entitled to remain in possession till he is evicted in the course of law. His possession till he is evicted in the course of law. His possession can, accordingly, be protected by an injunction (*Mogilipuvvu Annapurnaiah* v. *Melampati Narasimha Rao and anr.* AIR 1982 Andhra Pradesh 253).

P. 1100 add in fn. 89:

See, also, *Raghavendra Narain Shah* v. *Motilal Gupta & others* AIR 1982 Allahabad 304.

P. 1105, add in fn. 44:

See, also, *Jagdish Rai & others* v. *Abdul Wahab* AIR 1982 Allahabad 301.

P. 1105, after the text corresponding to fn. 48:

Where an owner of land obstructs another co-owner from using the land even when the

use causes no injury or detriment to him, an injunction can be granted against the obstructing owner. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment (*Ayyaswami Gounder and others* v. *Munnuswamy Gounder & others* AIR 1984 Supreme Court 1789).

P. 1105, after the text corresponding to fn. 52:

A suit, however, for injunction at the instance of one of the brothers against the others and a nephew all of whom were co-sharers in the Shebaiti and Pujari rights was not maintainable (*Nagarwali Devi & others* v. *Girjapati Tewari and others* AIR 1982 Allahabad 80).

P. 1105, after the text corresponding to fn. 53:

A person in possession has no right to a permanent injunction to prevent his eviction for all times to come, but he cannot be evicted or removed without due process of law. In a doubtful case it is better to maintain the status quo possession should prima facie be protected (*Smt. Shakuntala* v. *Hira Nand Sharma and Others* AIR 1986 Delhi 27).

P. 1105, add in fn. 57:

See, also, *Sardari Lal Gupta* v. *Siri Krishan Aggarwal,* AIR 1984 P & H. 439.

P. 1108, after the text corresponding to fn. 81:

An injunction was granted where it was found that the defendants' user of the latrine constituted nuisance to the plaintiff (*Abdul Hakim & another* v. *Ahmad Khan* AIR 1985 M.P. 88).

P. 1112, after the text corresponding to fn. 16:

In *Khawaz Bux* v. *Mirza Mohammad Ismail* (AIR 1984 Allahabad 83) the Court, however, issued a mandatory injunction directing the defendant to forthwith execute the necessary documents required to effectuate the transfer of permit in favour of the plaintiff.

P. 1113, add in fn. 24:

See, also, *Cotton Corporation of India Ltd.* v. *United Industrial Bank Ltd. & ors.* AIR 1983 Supreme Court 1272.

P. 1114, add in fn. 32:

See, also, *Surat Municipal Corporation* v. *Rameshchandra Shantilal Parikh* AIR 1986 Gujarat 50.

P. 1114, add the following after the text corresponding to fn. 36:

Bank guarantee and injunction: Where the Court found that the bank guarantee was liable to be encashed without any recourse to Court of law, an injunction to restrain the bank from enforcing guarantee was refused when it was sought on the ground that there was a dispute between the principal debtor and the creditor which was referred to arbitration and till the award was made (*Damodar Paints Pvt. Ltd.* v. *Indian Oil Corporation Ltd., Delhi, and Anr.* AIR 1982 Delhi 57).

In a suit where there is no permanent injunction sought, ordinarily a temporary injunction cannot be granted. The principles that govern the grant of perpetual injunction

would govern the grant of a temporary injunction also (*Gujarat Electricity Board, Gandhinagar* v. *M/s Maheshkumar & Co.* AIR 1982 Gujarat 289).

Bank Guarantee and Injunction: See *Road Machines (India) Pvt. Ltd.* v. *The Projects & Equipment Corporation of India Ltd.* AIR 1983 Calcutta 91 where the court refused an injunction to restrain a bank from making payment under a bank guarantee.

P. 1115, add the following at the end of para headed 'At interlocutory stage':

A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances and mostly in those cases when status quo existing on the date of the institution of the suit is to be restored (*M/s Magnum Films and another* v. *Golcha Properties Pvt. Ltd.* AIR 1983 Delhi 392).

P. 1116, add in fn. 54:

See, also, *Surat Municipal Corporation* v. *Rameshchandra Shantilal Parikh* AIR 1986 Gujarat 50.

P. 1117, after the text corresponding to fn. 63:

A court granted an interim mandatory injunction requiring the defendant respondent to return possession of the premises to the plaintiff when the defendant, during the interval between the dismissal of the suit and filing of the appeal, managed to put his lock on the premises. Absence of prayer for mandatory relief was not a bar to granting such relief (*Bhupatlal Govindji* v. *Bhanumati Dayalal* AIR 1984 Gujarat 10).

P. 1117, add the following in the paragraph headed 'Contracts':

In *Khawaz Bux* v. *Mirza Mohammad Ismail* (AIR 1984 Allahabad 83) the Court issued a mandatory injunction directing the defendant to forthwith execute the necessary documents required to effectuate the transfer of permit (under the Motor Vehicles Act) in favour of the plaintiff.

P. 1118, after the text corresponding to fn. 70:

Where the defendant encroached upon the property of the plaintiff by erecting a wall, but the plaintiff, who filed the suit about 9 years after the event and prayed for removal of the wall four years later, was found to have acquiesced therein, the Court declined to order the removal of the wall (*Krothapalli Satyanarayana* v. *Koganti Ramaiah and others* AIR 1983 Supreme Court 452).

P. 1118, after the text corresponding to fn. 65:

An injunction was issued against Commissioner, Corporation of the City of Bangalore, at the instance of the tenants of a building when the Corporation issued a notice to the landlord for demolition of the building without observing the principles of natural justice (*Commissioner, Corporation of the City of Bangalore* v. *M/s Kapoorchand Brothers, Bangalore and etc.* AIR 1982 Karnataka 23).

P. 1120, after the text corresponding to fn. 87:

Party-Wall. Raising of a party-wall without the consent of other tenant-in-common is permissible if no damage is suffered by him. A party-wall is ordinarily a solid wall throughout its entire extent. It follows that co-owners of the wall do not have a right to open ventilators or windows or other openings in it except by an agreement with the other owner or under a statutory provision. An injunction, therefore, cannot be issued

to prevent the raising of a party wall if no damage is suffered by the plaintiff. Nor can mandatory injunction be issued to prevent a co-owner from filling up the openings or to compel him to restore the openings (*Sardari Lal Gupta* v. *Siri Krishan Aggarwal* AIR 1984 P & H 439).

P. 1120, after the text corresponding to fn. 88:

Where there was an easy and more convenient alternative way of going to the properties of the plaintiff, mandatory injunction was refused and it was held that the plaintiff could be compensated by award of money in lieu of injunction (*Inder Lal & Others* v. *Abdul Salam and Others* AIR 1983 Rajasthan 57).

P. 1120, after the text corresponding to fn. 89:

An injunction was granted restraining the working of a brick kiln where it was likely not merely to cause some damage to the plaintiff's grove but was bound to destroy it altogether and loss could not be awarded for the loss that would be caused by total destruction of the grove (*M/s Ganga Bricks Udhyog & others* v. *Jai Bhagwan Swarup and anr.* AIR 1982 All. 333).

P. 1120, after the text corresponding to fn. 90:

Purchaser's right to injunction. A purchaser of land may maintain a suit for injunction against a person who is in mere physical custody, as distinguished from possession, of the property on behalf of the vendors from disturbing the plaintiff-purchaser's possession (*Patel Naranbhai Jhinabhai* v. *Patel Gopaldas Venidas* AIR 1982 Gujarat 340).

Licensor and Licensee. Upon termination of a license, a suit for mandatory injunction by the Licensor against the Licensee is maintainable (*E. P. George* v. *Thomas John* AIR 1984 Kerala 224). Where a suit in effect was a suit for possession, the relief should not be denied merely because the plaint is couched in terms of a suit for a mandatory injunction (*Sant Lal Jain* v. *Avtar Singh* AIR 1985 Supreme Court 857).

P. 1122, after the text corresponding to fn. 3:

Where the encroachment by the defendant was doubtful and the Court afforded opportunity to amend the plaint to include a claim for monetary compensation and the plaintiff did not avail of the opportunity, the Court dismissed the suit seeking demolition of alleged encroachment (*Chandra Bhan Singh* v. *Sheo Shankar* (deceased by LRs) *and others,* AIR 1984 Allahabad 92).

See, also, *Gopal Chandra Chaudhury* v. *The Life Insurance Corporation of India* AIR 1985 Orissa 120.

P. 1123, add the following paragraphs before the paragraph headed "Proceedings–Small Causes Court and Arbitrator":

The Supreme Court considered the provisions of Section 41(b) in the context of Section 37 of the Specific Relief Act and the provisions of the Code of Civil Procedure and observed as follows:

"Section 41(b) denies to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a court which is not subordinate to the Court from which the injunction is sought. The Court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a Court which is subordinate to the Court from which injunction is sought. As a necessary corollary, it would follow that the Court is precluded from granting an injunction restrain-

ing any person from instituting or prosecuting any proceeding in a Court of co-ordinate or superior jurisdiction.

Expression 'Injunction' in Section 41(b) is not qualified by any adjective and therefore, it would comprehend both interim and perpetual injunction. It is however, true that Section 34 specifically provides that temporary injunctions are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of Code of Civil Procedure being confined to temporary injunction an unnecessary grey area will develop.

The Court can in appropriate cases grant temporary injunction in exercise of its inherent powers in cases not covered by order 39 of the Code of Civil Procedure. But while exercising this inherent power, the Court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceedings cannot be granted. Section 41(b) is one such provision. And inherent power of the Court cannot be invoked to nullify or stultify a statutory provision."

An interim injunction to restrain filing of winding-up petition was, accordingly refused (*Cotton Corporation of India Ltd.* v. *United Industrial Bank Limited & Ors.* AIR 1983 Supreme Court 1272). (See, also, *Sarat Chandra Panda* v. *Hari Das & Others* AIR 1983 Orissa 196).

P. 1123, add in fn. 7:

See, also, *M/s Udyogsilpa Pvt. Ltd.* v. *State of Orissa & Others,* AIR 1983 Orissa 168.

P. 1123, after the text corresponding to fn. 8:

Where the injunction sought was not to prevent multiplicity of proceedings and was sought against certificate officer who was not subordinate to the Court from which injunction was sought, the relief of permanent injunction could not be granted (*M/s Udyogsilpa Pvt. Ltd.* v. *State of Orissa & Others,* AIR 1983 Orissa 168).

P. 1124, after the text re "clause (g) Acquiescence":

The provisions of Section 41 can be attracted at the threshold (interim application stage) to cases where there is no dispute in regard to the facts which would attract the application of relevant provision of Section 41 barring the jurisdiction of the Court in regard to the granting of injunction and by implication prohibiting the entertaining of injunction suit in question (*M. Holkar and another* v. *A.P. Srihan* AIR 1985 P & H. 24). However, in a similar case, the same Court refused ad interim injunction *M/s Ram Gopal Banarsi Dass* v. *Satish Kumar* AIR 1986 P & H 52 (Full Bench).

P. 1124, after the text corresponding to fn. 18:

An injunction restraining a bank from giving effect to its call off notice to the plaintiff, however, could not be granted. In this case, the plaintiff's own conduct also disentitled him to an injunction (*State Bank of India* v. *J.S. Ramamoorthy* AIR 1982 Madras 197).

P. 1124, after the text corresponding to fn. 19:

Where the effect of the order passed by the City Civil Court (a Subordinate Court) is clearly to prohibit and/or restrain the decree-holder from proceeding any further with the execution despite the order of execution passed by the High Court. Sec. 41(b) is attracted (*Anil Kumar Sinha & others* v. *Subhas Kumar Sinha & others* AIR 1985 Cal. 315).

P. 1124, add in fn. 19:

But, now, see *Cotton Corporation of India Ltd.* v. *United Industrial Bank Ltd. & Ors.* AIR 1983 Supreme Court 1272.

P. 1126, add in fn. 36:

See, also, *M/s Urmila & Co. Pvt. Ltd.* v. *J. M. Baxi & Co. Ltd.* AIR 1986 Delhi 336.

P. 1127, after the text corresponding to fn. 47:

Delhi High Court, in *Modern Food Industries India Ltd.* v. *M/s Shri Krishna Bottlers (P) Ltd.* AIR 1984 Delhi 119 declined to grant injunction for enforcement of a negative covenant in a franchise agreement which required the defendant not to manufacture or bottle soft drinks other than those of the plaintiff. The Court felt that considerable damage would be done to the defendants while the plaintiff would not be hit so hard in the facts and circumstances of the case.

P. 1130, add the following at the beginning of the page:

Bank Guarantee and Injunction. See *Road Machines (India) Pvt. Ltd.* v. *The Projects & Equipment Corporation of India Ltd.* AIR 1983 Calcutta 91 where the Court refused an injunction to restrain a bank from making payment under a bank guarantee.

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Latest Judgement

P. 263, Section 23. Public policy — unconscionable bargain

In a very recent judgement of the Supreme Court, *Central Inland Water Transport Corporation Ltd. and another* v. *Brojo Nath Ganguly and another* (AIR. 1986 S.C. 1571), it is now held that new heads of public policy can be evolved in the light of Fundamental Rights and Directive Principles in the Constitution of India.

INDIAN CONTRACT
AND
SPECIFIC RELIEF ACTS

THE
INDIAN CONTRACT ACT
(ACT IX OF 1872)

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows:—

PRELIMINARY

Short title.

1. This Act may be called the Indian Contract Act, 1872.

Extent and Commencement.

It extends to the whole of India except the State of Jammu and Kashmir; and it shall come into force on the first day of September, 1872.

Enactments repealed.

Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract,[1] not inconsistent with the provisions of this Act.

Law anterior to Contract Act, Introduction of English Law into India.—The charters of the eighteenth century which established Courts of justice[2] for the three presidency towns of Calcutta, Madras and Bombay, introduced into their jurisdictions the English common and statute law in force at the time[3] so far as it was applicable to Indian circumstances.[4] It is, however, a matter of controversy whether English law was introduced by the charter of 1726 (13 Geo. I.) so as to extend to India the statutes passed up to that date only, or subsequently

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1 The words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade." In the section as cited by the Privy Council there is no comma after "contract": *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 I.A. 121, at p. 127; 18 Cal. 620, at p. 627. See further under "Saving of usage or custom of trade, etc.," below.

2 These were at first the Mayors' Courts, which, in Calcutta, were superseded by the Supreme Court in 1773, and finally by the High Court in 1862. The Mayors' Courts in Madras and Bombay were replaced, in 1797, by the Recorders' Courts. The Recorder's Court in Madras was abolished in 1799, and that in Bombay in 1823, and a Supreme Court was established in its stead, which again was superseded by a High Court in both places in 1862.

3 Though this view of the introduction of English law into India was pronounced incorrect and unreasonable by the Indian Law Commissioners in their celebrated *lex loci* Report of 31st October, 1840, it may now be taken as an accepted doctrine. The Commissioners maintained that neither the Hindu nor the Mahomedan law was the *lex loci* of British India, as it was so interwoven with religion as to be unfitted for persons professing a different faith, and they held that, there being no *lex loci*, the English law became *ipso jure* the *lex loci* when any part of British India became a possession of the British Crown, and binding upon all persons who did not belong to the Hindu or Mahomedan community. They recommended the passing of an Act declaring a *lex loci* for British India founded on the English Law, but the recommendation was never carried into effect. See in this connection *Naoroji* v. *Rogers* (1867) 4 B.H.C. 1, 17—26; *The Indian Chief* (1801) 3 Robinson Adm. pp. 28, 29, where Lord Stowell showed a much juster understanding than the Indian Law Commissioners of the nature of Asiatic personal law; and the cases cited in the next note.

4 Thus it has been held that the Statute of Mortmain, 9 Geo. II. c. 36, does not apply to India *(Mayor of Lyons* v. *East India Co.* (1836) 1 M.I.A. 175; 43 R.R. 27, 83); similarly the law as to forfeiture for suicide (*Adv.-Gen. of Bengal* v. *Ranee Surnomoye Dossee* (1863) 9 M.I.A. 391) and the law as to maintenance and champerty (*Ram Coomar* v. *Chunder Canto Mookerjee* (1876) 4 I.A. 23) do not apply to India, as not being applicable to Indian circumstances.

also by the charters of 1753 and 1774 so as to embrace statutes up to 1774.[5]

Introduction of Hindu & Mahomedan Laws of Contract into India.—The indiscriminate application of English law to Hindus & Mahomedans within the jurisdiction of the Supreme Courts led to many inconveniences.[6] To obviate this, the statute of 1781 (21 Geo. III. c. 70, s. 17) empowered the Court at Calcutta (being then the Supreme Court), and the statute of 1797 (37 Geo. III c. 142, s. 13) empowered the Courts of Madras and Bombay (being then the Recorders' Courts), to determine all actions and suits against the inhabitants of the said towns, provided that their succession and inheritance to lands, rents, and goods, and all matters of *contract* and dealing between party and party, should be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos (Hindus) by the laws and usages of Gentoos, and where only one of the parties should be a Mahomedan or Gentoo by the laws and usages of the defendant.[7] The effect of these statutes was to supersede English law so far as regards Hindus and Mahomedans in the case of contracts and other matters enumerated in the statutes, and to declare the right of Hindus and Mahomedans to their own laws and usages. The result was that in a suit on contract, for instance, between Hindus, the Hindu law of contract was applied, and the Mahomedan law in the case of a contract between Mahomedans, and this continued up to the enactment of the Indian Contract Act.

Hindu & Mahomedan Laws of Contracts as administered by High Courts.—The statute of 1781 applied to the Supreme Court at Calcutta, and the statute of 1797 applied to the Recorders' Courts in Madras and Bombay. In 1862 High Courts were established for each of the presidency towns of Calcutta, Madras and Bombay, but the same personal law continued to be administered to Hindus and Mahomedans, and is administered to them even at the present day subject to legislative enactments. Turning to matters of contract, the Hindu law of contract was in fact applied by the High Courts in the exercise of their original jurisdiction to Hindus, and the Mahomedan law to Mahomedans, up to the passing of the Indian Contract Act in 1872, although the Courts to which the statutes of 1781 and 1797 were applicable had been abolished. The preservation of this jurisdiction appears to be accounted for by the charters of the High Courts. Taking the case of the Calcutta High Court, the combined effect of the Letter Patent of 1862 (cl. 18) and of the amended Letters Patent of 1865 (cl. 19)[8] was to render it incumbent upon the High Court to apply in the exercise of its ordinary original civil jurisdiction the same *law or equity* that would have been applied by the Supreme Court. Now, the law or equity applied by the Supreme Court being under the statute of 1781 the Hindu law of contract to Hindus, and the Mahomedan law of contract to Mahomedans, the provision in that statute for applying the Hindu & Mahomedan laws of contract to Hindus & Mahomedans became incorporated by implication in the charters of 1862 as well as 1865, and in this manner that provision came to have effect in the High Court. This was, however, subject to the legislative powers of the Governor-General-in-Council as provided by the forty-fourth clause[9] of the charter of 1865. The Indian Legislature had, therefore, the power to alter by legislative enactment the provisions of cl. 19 of the charter, and this is done in the case of contracts by the Indian Contract Act. The result is that notwithstanding the provisions of cl. 19 of the

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5 This question has not only a historical interest, derived from the trial and conviction of Nuncomar under the English statute of 1728 (2 Geo. II. c. 25). According to the view that only the statutes up to 1726 were introduced into India, the conviction under the statute of 1728 would be illegal. It would, however, be legal according to the other view, and that view was maintained by Sir James Stephen in his Nuncomar and Impey, vol. ii. See Ilbert on the Government of India, pp. 34-35.

6 Cowell's Courts and Legislative Authorities in India, 6th ed. p. 55. Under the Regulating Act, 1773, the Supreme Court of Calcutta practically exercised a general jurisdiction over the whole of Bengal.

7 For similar Indian enactments, see note (*12*), *infra*.

8 "And we do further ordain that with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued."

9 "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General-in-Council, exercised at the meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of our reign, chapter sixty-seven, and may be in all respects amended and altered thereby."

charter of 1865, which directs the High Court to apply the same law or equity that would have been applied by the Supreme Court (i.e., to apply, *inter alia,* the Hindu & Mahomedan laws of contract to Hindus & Mahomedans), the High Court has now to administer the law as laid down in the Indian Contract Act, whether the parties to the suit be Hindus, Mahomedans, or otherwise.[10] In other words, the "law or equity" required to be administered by the High Court under cl. 19 of the amended Letters Patent is, in matters of contract, modified by the Indian Contract Act and other enactments relating to particular contracts. Subject, however, to any law made by the Governor-General-in-Council, the High Courts are still bound, in the exercise of their ordinary original civil jurisdiction, to apply the Hindu & Mahomedan laws of contract to Hindus & Mahomedans as comprised in the expression "law or equity" in cl. 19.

As respects the High Courts in Madras and Bombay, the statute of 1797 contained a provision similar to that of the statute of 1781 for applying Hindu law to Hindus and Mahomedan law to Mahomedans. The statute of 1797, however, applied to the Recorders' Courts in Madras and Bombay. Those Courts were superseded by a Supreme Court in Madras in 1799, and in Bombay in 1823. The charter of the Supreme Court of Madras and that of the Supreme Court of Bombay contained similar provisions for the application of Hindu and Mahomedan law. The "law or equity" administered by the Supreme Courts in Madras and Bombay thus consisted in the application of Hindu law to Hindus and Mahomedan law to Mahomedans, and the same "law or equity" is directed to be applied by the High Courts in Madras and Bombay, by virtue of their charters (which closely resemble those of the Calcutta High Court), to cases coming before those Courts in the exercise of their ordinary original civil jurisdiction. S. 17 of the statute of 1781 and s. 13 of the statute of 1797 referred to above have been repealed by the Government of India Act, 1915. S. 112 of the latter Act reproduced the sections almost verbatim. This section in turn has been repealed by the Government of India Act, 1935, and reproduced in sec. 223 of that Act.

Law administered in Mufassal Courts.—The old Bengal Regulation III of 1793 (s. 21) directed the Judges in the Zilla and City Courts in cases where no specific rule existed to act according to justice, equity, and good conscience. Similar provisions occurred in the Madras Regulation II of 1802, s.17. Both these regulations are now repealed, but the direction to act, in the absence of any specific rule, according to justice, equity and good conscience, still retains its place in the Bengal Civil Courts Act, 1887, s. 37, and in the Madras Civil Courts Act, 1873, s. 16.

As to the Courts in the Mufassal of Bombay, The Bombay Regulation IV of 1827, s. 26, which is still in force, provides that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, equity and good conscience.

The expression "justice, equity, and good conscience" has been interpreted to mean the rules of English law so far as they are applicable to Indian society and circumstances.[11] This expression also occurs in Indian Acts relating to Civil Courts in other parts of India.[12]

Applicability of the Act.—The second clause of s. 1 of the Act says in the most general

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10 See *Madhub Chunder* v. *Rajcoomar Doss* (1874) 14 B.L.R. 76.

11 *Waghela Rajsanji* v. *Shekh Masludin* (1887) 14 I.A. 89, 96; 11 Bom. 551, 561; *Dada* v. *Babaji* (1865) 2 B.H.C. 36, 38; Webbe v. *Lester* (1865) 2 B.H.C. 52, 56; *Naresh Chandra* v. *Ram Chandra,* 1952 A. Cal. 93; *Gogun Chunder Ghose* v. *Dhuronidhur,* 7 Cal. 616.

12 The Bengal, Agra and Assam Civil Courts Act, 1887, s. 37; the Punjab Laws Act, 1872, s. 5; the Central Provinces Laws Act, 1875, ss. 5, 6; the Oudh Laws Act, 1876, s. 3; and the Burma Laws Act, 1898, s. 13. Originally the words were synonymous with the rules of natural reason, or the law of nature; but "an Englishman would naturally interpret" them "as meaning such rules of English law as he happened to know and considered applicable to the case": Ilbert, Government of India, 2nd ed. 330. Thus the Common Law has acquired in India a kind of moral predominance like that which Roman law obtained, under the name of "written reason," in various regions of Continental Europe where it was not recognised as having positive authority, especially in the customary law provinces of France under the old monarchy. *Cp.* Pollock, The Expansion of the Common Law, pp. 132-134.

terms that the Act is to extend to the whole of India. Those words are large enough to include all Courts and persons of all denominations. The third clause of s. 1 provides that nothing contained in the Act shall affect the provisions of any statute not thereby expressly repealed. The schedule of the Act enumerates the enactments repealed by the Act, but this enumeration does not include the provision in the statutes of 1781 and 1797 directing Hindu law to be applied to Hindus and Mahomedan law to Mahomedans. This circumstance gave rise, in *Madhub Chunder* v. *Rajcoomar Doss,*[13] to a question as to the applicability of the Contract Act to Hindus in cases coming before the High Court in the exercise of its original civil jurisdiction. The parties to the suit were Hindus, and the case came before the High Court of Calcutta in the exercise of its original civil jurisdiction. On behalf of the plaintiff it was contended that the Contract Act did not apply, and that the case was governed, as provided by s. 17 of the statute of 1781, by the Hindu law of contract, which, it was alleged, did not render an agreement in restraint of trade void, as was done by s. 27 of the Act. It was, however, held that the Act did apply to Hindus, having regard to the general words used in cl. 2 of the section; as respects non-repeal of the statute of 1781, it was said that it was not necessary to repeal it, as the Supreme Court to which it applied had been abolished, and there was nothing left to which it could apply.

Scheme of Contract Act.—The scheme of the Indian Contract Act is that it enacts in ss. 1 to 75 provisions applicable in general to all contracts, and then deals separately with particular kinds of contract such as sale, guarantee, bailment, agency and partnership, and the scheme necessarily posits that all these transactions are based on agreements.[14] Partnership and sale of goods are no longer parts of the Contract Act as separate statutes have now been enacted dealing with these two subjects.

Scope of the Act.—The Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters, but there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts.[15]

But to the extent it deals with a subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law *dehors* the statutory provisions;[16] unless the statute is such that it cannot be understood without the aid of English Law;[17] or where any matter cannot be brought within the provisions of the Contract Act.[18] The same view was taken of the similarly worded preamble of the Specific Relief Act (Act I of 1877).[19] It has been observed by Bhagwati J. that in Chapter V the Act deals with relations which are not contractual.[20]

English law if applicable.—Therefore the principles of English law cannot be introduced where the subject is dealt with by the Act. But if it is necessary to interpret the Act, the aid of

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13 (1874) 14 B.L.R. 76.

14 *The State of Madras* v. *Gannon Dunkerley & Co. Ltd.* (1959) S.C.R. 379, 397; (1958) A.SC. 560; *Sheikh Brothers Ltd.* v. *Ochsner* (1957) A.C. 136; (1957) 2 W.L.R. 254, 260 P.C. (structure of the Act).

15 *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 I.A. 121; 18 Cal. 620, 628, 629, cited in *Jwaladutt R. Pillani* v. *Bansilal Motilal* (1929) 56 I.A. 174, at p.178; 1929 A.P.C. 132, 133-4; *Meghu Mian* v. *Kishun Ram,* 1954 A.P. 477: *Special Officer Amaravati* v. *Thirumalaswami* (1973) 2 Mad. L.J. 361

16 *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 319; (1954) A.SC. 44, 47; *State of Punjab* v. *Hindustan Development Board* (1960) 2 Punj. 676; (1960) A. Punj. 585; *Mohoree Bibee* v. *Dhurmodas Ghose,* 30 I.A. 114, 125; 30 Cal. 539, 548 (exhaustive and imperative); *Gajanan* v. *Moreshwar,* 44 Bom. L.R. 703: (1942) A.B. 302 (ss. 124 and 125); *Burn & Co.* v. *Mcdonald,* 36 Cal. 354; *Kapur Chand Godha* v. *Mir Nawab Himayatali* (1963) 2 S.C.R. 168, 178: (1963) A.SC. 250, 254; *Superintendence Company of India* v. *Krishna Narain* (1980) A.SC. 1717, 1721.

17 *State of West Bengal* v. *B.K. Mondal* (1962) 2 Supp. S.C.R. 876, 894, 912; (1962) A.SC. 779; *Ramanandi Kuer* v. *Kalawati Kuer,* 55 I.A. 18; 7 Pat. 221, 227.

18 *F. Kanhayalal* v. *Dineshwar* (1959) A.MP. 254; *Mohoree Bibee* v. *Dhurmodas Ghose* 30 I.A. 114; 30 Cal. 539 (P.C.); *Bhagwandas* v. *Girdhari Lal & Co.* (1966) A.SC. 543; (1966) 1 S.C.R. 656.

19 *Ramdas Khatau & Co.* v. *Atlas Mills Ltd.,* 55 Bom. 659; 1931 A.B. 151; *Meghu Mian* v. *Kishan Ram* (1954) A.P. 477.

20 *Tan Bug Taim* v. *Collector of Bombay* (1945) 47 Bom. L.R. 1010; 224 I.C. 476; (1946) A.B. 216.

English law may be pressed into service.[21]

Law codified.—Where the law is codified it is of little avail to enquire what is the law apart from such codification. The code itself must be looked to as the guide in the matter.[22] When a statute clearly covers a case, it is hardly necessary to refer to decisions.[23] The language of the provisions of the Contract Act cannot be enlarged, or construed narrowly or otherwise modified in order to bring the construction in accord with the scope and limitations governing the English doctrine.[24]In regard to the Law of Contract, the Courts in India have generally been guided by the Common Law of England where no statutory provision to the contrary is in existence.[25] The courts should examine the language of Indian statutes uninfluenced by any consideration derived from the English Law upon the subject.[26]

The decisions of Australian, Canadian and other Commonwealth courts and of the courts of the United States of America, when relevant, will have persuasive authority and will be listened to in courts in India with attention and respect as judgments of eminent men accustomed to expound the principles of jurisprudence similar to our own.[27] The law of England so far as it is consistent with the principles of equity and good conscience has generally prevailed in this country unless it conflicts with Hindu or Mahomedan Law.[28] The English Common Law and the concept of justice, equity and good conscience cannot be excepted, adapted or amended by a court where the power is given to the Central Government to do so and it has not done so.[29]

Railway Receipts and Bills of Lading and Way Bills.—In *Ramdas* v. *Amerchand & Co.*[30] the point for decision was whether a railway receipt was an "instrument of title" within the meaning of s. 103 of this Act. It was contended that it was not, for the following reasons: First, that the Indian Contract Act was primarily a consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, that it was improbable that the Indian Legislature could have taken the lead in a legal reform for which England had to wait until the passing of the English Factors Act of 1877. In dealing with these arguments, the Privy Council said: "Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform. Such a reform may have been long recognized as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous."

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21 *Superintendence Co. of India* v. *Krishna Margin* (1980) A.SC. 1717, 1721-22; *Satyabrata Ghosh* v. *Mugneeram* (1954) S.C.R. 310; (1954) A.SC. 44.

22 *Burn & Co.* v. *Mcdonald*, 36 Cal. 354.

23 *Kapur Chand Godha* v. *Mir Nawab Himayat Ali Khan* (1963) 2 S.C.R. 168, 178; (1963) A.SC. 250, 254 (per S.K. Das J.).

24 *State of Punjab* v. *Hindustan Development Ltd.* (1960) 2 Punj. 676; 1960 A. Punj. 585; *Secretary of State* v. *Sarin & Co.*, 11 Lah. 375; 1930 A.L. 364; *Chhunna Mal Ramnath* v. *Moolchand Ram Bhagat*, 55 I.A. 154; 9 Lah. 510; (1928) A.P.C. 99: observations of Jenkins C.J. in *Abaji Sitaram* v. *Trimbak Municipality*, 28 Bom. 66 not accepted; *Mr. Ramanandi Kuer* v. *Mt. Kalawati Kuer*, 55 I.A. 18; (1928) A.PC. 2, 4 (Case of Wills).

25 *Bhagwandas* v. *Girdhar Lal* (1966) 1 S.C.R. 656: (1966) A.SC. 543. 549.

26 *Mt. Ramanandi Kuer* v. *Mt. Kalawati Kuer*, 55 I.A. 18, 23; 7 Pat. 221, 227; *State of Punjab* v. *Hindustan Development Board* (1960) 2 Punj. 670; (1960) A. Punj. 585 (s. 70 of Contract Act).

27 *In re C.P. Motor Spirit Act*, 1939 F.C.R. 18; (1939) A.F.C. 1; *Tan Bug Taim* v. *Collector of Bombay* (1946) A.B. 216.

28 Per Garth C.J. in *Gogun Chunder Ghose* v. *Dhuroninder*, 7 Cal. 616.

29 *Indian Airlines Corporation* v. *Madhuri Choudhri* (1965) A.Cal. 252 (case relating to liability of aircraft carriers).

30 (1916) 43 I.A. 164, 170; 40 Bom. 630, 636; *Morvi Mercantile Bank* v. *Union of India* (1965) 3 S.C.R. 251; (1965) A.SC. 1954; *Official Assignee* v. *Mercantile Bank Ltd.*, 61 I.A. 75; (1934) A.P.C. 246; *Ibrahim* v. *Union Bank of India* (1966) A.Guj. 6, 12. (But to a limited extent.)

A Bill of Lading partakes of the nature of a negotiable instrument and by endorsing it, the holder of the Bill of Lading can transfer the property in the goods and by parting with it the holder parts not only with the property in the goods but also with their possession.[31] The registration book of a motor vehicle in Malaya or in England is not a document of title, nor, it is submitted, is it in India.[32] A way bill issued by a public carrier receiving goods for carriage is not a document of title so as to authorise by endorsement of delivery the possessor of the document to transfer or receive the goods thereby represented.[33]

How far Hindu & Mahomedan Laws of Contract are still in force.—As stated above, the Contract Act does not cover the whole field of contract law. In cases, therefore, not provided for by the Contract Act or other legislative enactments relating to particular contracts, it is incumbent upon the High Courts, in the exercise of their original jurisdiction, to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. This is because of the provisions of the chapters of those Courts noted above, which substantially continued the direction in this respect of the Acts of 1781 and 1797.[34] As an instance of the above proposition may be mentioned the rule of the Hindu law of contract known as *damdupat*, according to which interest exceeding the amount of the principal cannot be recovered at any one time.[35] This rule is still in force in Maharashtra[36] and in the presidency town of Calcutta,[37] but it is not recognised outside that town[38] or in the Madras Presidency.[39] There is, however, a difference of opinion as to whether the rule is abrogated by the Transfer of Property Act, 1882,[40] as regards interest on mortgages governed by that Act. It has been held by the High Court of Madras that it is;[41] by the High Court of Bombay[42] and Calcutta,[43] that it is not. Another instance is the rule applicable to Hindus governed by the Mitakshara law in the Bombay Presidency, that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages. This rule according to the Bombay High Court, is not affected either by the Interest Act, 1839, or by the Contract Act.[44] The rule, however, is not applied to Hindus in the Madras Presidency.[45] But such cases are very few, and the Hindu & Mahomedan laws of contract may, for all practical purposes, be regarded as having been superseded by the Contract Act and other enactments relating to particular contracts.

Act and Regulations not expressly repealed.—The law made by the Legislatures for the Presidencies of Bengal, Madras, and Bombay, before the date of the Government of India

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31 *Modi Co.* v. *Union of India,* 1969 A.SC. 9.

32 *Sajan Singh* v. *Sardara Ali* (1960) A.C. 167; (1960) 1 All E.R. 269; (1960) 2 W.L.R. 180 (P.C.) (Logbook in England).

33 *Canara Industrial & Banking Syndicate* v. *Ramachandra* (1968) A.Mys. 133; *Morvi Mercantile Bank* v. *Union of India* (1965) 3 S.C.R. 245; (1965) A.S.C. 1954, dist.; *Ramdas* v. *S. Amer Chand,* 43 I.A. 164; followed.

34 It will be seen from what is said above that the statement in Ilbert, Government of India, 2nd ed. p. 327, is not formally accurate so far as it implies that these provisions are still in force by virtue of the Acts themselves: yet in *Madhwa Sidhanta* v. *Venkataramanjulu* (1903) 26 Mad. 662, 670, the Act of 1797 was assumed to be still in force.

35 See The Rule of Damdupat, by Framjee R. Vicajee, in *Journ. Soc. Comp. Legisl.* for December, 1900, at p. 464.

36 *Dhondu* v. *Narayan* (1863) 1 B.H.C. 47; *Khushalchand* v. *Ibrahim* (1866) 3 B.H.C.A.C. 23; *Nathubhai* v. *Mulchand* (1868) 5 B.H.C.A.C. 196; *Hakma Manji* v. *Meman Ayab* (1870) 7 Bom. H.C.O.C. 19; *Pavanaga* v. *Govind* (1873) 10 Bom.H.C. 382; *Ramchandra* v. *Bhimrav* (1877) 1 Bom. 577; *Ganpat* v. *Adarji* (1877) 3 Bom. 312; *Dawood* v. *Vullubhdas* (1893) 18 Bom. 227; *Gopal Ramchandra* v. *Gangaram Anand Shet* (1895) 20 Bom. 721, over-ruling *Shri Ganesh* v. *Keshavrav* (1890) 15 Bom. 625; *Harilal* v. *Nagar* (1896) 21 Bom. 38; *Ali Saheb* v. *Shabji* (1895) 21 Bom. 85.

37 *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781.

38 *Het Narain* v. *Ram Deni* (1883) 12 Cal. L.R. 590.

39 *Annaji Rou* v. *Ragubui* (1883) 6 Mad. H.C. 400.

40 See ss. 86 and 88 of the Act. Both these sections have been repealed by the Code of Civil Procedure, 1908, and are reproduced in that Code in O. 34, rr. 2 and 4.

41 *Madhwa Sidhanta* v. *Venkataramanjulu* (1903) 26 Mad. 662.

42 *Jeewanbai* v. *Manordas* (1910) 35 Bom. 199.

43 *Kunja Lal* v. *Narsamba* (1915) 42 Cal. 826; 31 I.C. 6.

44 *Saundanappa* v. *Shivbasawa* (1907) 31 Bom. 354.

45 *Subramania Aiyar* v. *Subramania Aiyar* (1908) 18 Mad. L.J. 245.

Act, 1833 (3 & 4 Will. IV. c. 85), were known as "Regulations." The statute of 1833 established a legislature for the whole of British India, and the laws made under that statute, and the subsequent enactments modifying that statute, are known as "Acts." As regards the Regulations, it may be stated that a major part of them has been repealed by subsequent Indian legislation. Among the Acts relating to particular contracts and not expressly repealed by the Contract Act may be mentioned the following: The Interest Act, 1839, the Usury Laws Repeal Act, 1855, the Indian Bills of Lading Act, 1856, the Workman's Breach of Contract Act, 1859 (now repealed), the Merchant Shipping Acts (English) of 1854 and 1859, the Carriers Act, 1865, and the Policies of Insurance Assignment Act, 1866 (now repealed). The Acts enumerated above were passed before the enactment of the Contract Act. Among the Acts dealing with particular contracts and passed after that date may be noted the Negotiable Instruments Act, 1881, the Transfer of Property Act. 1882, Merchant Shipping Act, 1883 (now repealed), the Indian Emigration Act, 1883 (now repealed) and the Indian Railways Act, 1890.

Saving of usage or custom of trade, etc.—The term "usage of trade" is to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles, and analogies, and, according to the opinion now received, can still be increased by proof of living general (not merely local) usage.[46] Such a usage remains unaffected by the provisions of the Act, even though it may be inconsistent with those provisions. Both the reason of the thing and the grammatical construction of the section[47] require that the words "not inconsistent with the provisions of this Act" should not be connected with the clause "nor any usage or custom of trade," and apply only to the immediately preceding words "nor any incident of any contract." This view was taken by the Privy Council in *Irrawaddy Flotilla Co.* v. *Bugwandas.*[48] The contrary seems to have been assumed by the Bombay and Calcutta High Courts in two earlier cases.[49] Both these cases were considered by the Privy Council in the above case. In both these cases, again the opinion was expressed by the Bombay and Calcutta High Courts that the liability of a common carrier under the common law of England, which renders him liable for all loss or damage to goods except when caused by the act of God or the King's enemies, was a "usage of trade," the one Court holding that it was inconsistent, and the other that it was consistent, with the provisions of the Contract Act. In the Privy Council case cited above, their Lordships were inclined to the opinion that the liability of a common carrier under the English common law as an insurer of goods was not a usage of trade, but an "incident" of the contract quite consistent with the provisions of the Act. Such an incident is not inconsistent with the provisions of ss. 151 and 152 of the Act, having regard to the words "in the absence of any special contract" occurring in s. 152. All these cases are considered more fully in the notes to s. 151. See also as to "usage of trade" in the case of High Courts attorneys, s. 171 and *In re McCorkindale,*[50] there cited.

Not inconsistent with the provisions of this Act.—A stipulation in a contract of guarantee that the surety shall not have the benefit of s. 133 has been held to be inconsistent with the Act.[51]

Evidence as to usage of trade.—In this connection may be noted the provisions of s.92(5) of the Indian Evidence Act, 1872, which enacts that, though a contract may be in writing, oral evidence may be adduced to prove any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description, provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms

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46 See *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898) 2 Q.B. 658; *Edelstein* v. *Schuler & Co.* (1902) 2 K.B. 144.

47 In the section as cited by the Privy Council, there is no comma after "contract": see (1891) 18 I.A. 121, at p. 127.

48 (1891) 18 I.A. 121, 127; 18 Cal. 620, 627.

49 *Kuverji* v. *The Great Indian Peninsula Railway Co.* (1878) 3 Bom. 109, 113; *Moothora Kant Shaw* v. *The India General Steam Navigation Co.* (1884) 10 Cal. 166, 185.

50 (1881) 6 Cal. 1. The exception cannot of course apply unless there is a trade, e.g., the profession of a barrister is not a trade: *Nihal Chand* v. *Dilawar* (1933) 5 All. 570; 143 I.C. 727; 1933 A.A. 417 (F.B.).

51 *Chitguppi & Co.* v. *Vinayak Kasinath* (1921) 45 Bom. 157; 58 I.C. 184. See under s. 133.

of the contract.[52] For commercial transactions see the cases undermentioned.[53] And further such incident should not be inconsistent with the general provisions of the Contract Act, having regard to the words "nor any incident of any contract not inconsistent with the provisions of this Act." This is a reproduction of the English law on the subject.[54] As to the evidence necessary to prove a usage of trade, it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported by the parties into their contract. To prove such a usage, there needs not either the antiquity, the uniformity, or the notoriety of custom in its technical sense; the usage may still be in course of growth, and may require evidence for its support in each case.[55] But the Mysore High Court has held that the usage to be recognised in the ordinary course of business must be certain, definite and Uniformally recognised in the ordinary course of business. No such usage was proved in that case that goods covered by a way bill of a public carrier must be delivered against its production.[56] See also Evidence Act, s.13(b).

Rule of damdupat.—Rule of damdupat applies only during the continuance of the contractual relationship of debtor and creditor. It ceases to be operative when the contractual relationship ends by reason of a judgment or decree.[57]

Law merchant.—The law merchant is far from immutable and it is open to any court to find on the basis of evidence that it has changed, or if a change has previously been judicially ascertained and established in other proceedings, to take notice of that change.[58]

Sections referring to usage or custom of trade.—S. 190 enacts that an agent cannot delegate his authority to another unless allowed by the "ordinary custom of trade." Similarly an agent is bound, in the absence of directions from the principal, to conduct business according to "the custom which prevails in doing business" of the same kind at the place where the agent conducts such business (s. 211). It may here be observed that the expression "usage or custom of trade" used in s. 1. as well as the sections referred to above, relates to a particular usage as distinguished from a general or universal usage. A general usage pervading all trades has no binding force, if it is inconsistent with the provisions of the Act. A general usage is equivalent to a general law, and no general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself.[59]

Law applicable to aircraft.—Rules of English Common Law applicable in the case of aircraft carriers and contracts of exemption of liability will not be applicable in India because the Common Law is justice, equity, and good conscience. And if a rule is inequitable or the Common Law has been abrogated or modified by statute law in England, that rule of Common Law will not be applicable in India.[60] But this view was not accepted by a Bench of the Calcutta

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52 See *Ruttonsi Rowji* v. *Bombay United Spinning and Weaving Co.* (1917) 41 Bom. 518, at pp. 538, 540; 37 I.C. 271.

53 *London Export Corporation Ltd.* v. *Jubilee Coffee Roasting Co.* (1958) 3 All E.R. 411; *Juggomohan Ghosh* v. *Manick Chand,* 7 M.I.A. 262, 282; *Binay Krishna* v. *North Bengal Sugar Mills* (1945) 2 Cal. 173; (1949) A. Cal. 490 (contract for supply of molasses); *Hind Mercantile Association Ltd.* v. *Miryala Venkateshwarlu & Co.* (1959) A.AP. 545 (contract for supply of groundnut oil); *Se Se Oil* v. *Gorkharam Gokalchand* (1962) 64 Bom. L.R. 113.

54 Per Cur. in *Brown* v. *Byrne* (1855) 3 E. & B. 715; 23 L.J.Q.B. 316; and in *Hamfrey* v. *Dale* (1857) 7 E & B. 274; 26 L.J.Q.B. 137, 140.

55 *Juggomohun Ghose* v. *Manickchand* (1859) 4 W.R. 8, 10; 7 M.I.A. 263, 282; *Wittenbaker* v. *Galstaun* (1917) 44 Cal. 917, at p. 925; 43 I.C. 11. The allowance of new usage involves the possibility of allowing change in previous usage; *Moult* v. *Halliday* (1898) 1 Q.B. 125, 130.

56 *Canara Industrial & Banking Syndicate* v. *Ramachandra* (1968) A.Mys. 133, 137.

57 *Kusum Kumari* v. *Debi Prasad,* 63 I.A. 114; 1936 A.PC. 63; *Devidas* v. *Yeotmal Central Bank Ltd.* (1956) A.N. 239; (1955) Nag. 613.

58 *Teheran-Europe Co. Ltd.* v. *S.T. Belton (Tractors) Ltd.* (1968) 2 W.L.R. 523, 530; *Miller, Gibb & Co.* v. *Smith & Tyrer Ltd.* (1917) 2 K.B. 141; 33 T.L.R. 295, C.A. consd.; *Elbinger Actiengesellschaft* v. *Claye* (1873) L.R. 8 Q.B. 313 not folld.

59 *Mothora Kant Shaw* v. *The India General Steam Navigation Co.* (1883) 10 Cal. 166, 185. See also *Meyer* v. *Dresser* (1863-4) 16 C.B.N.S. 646; L.J.C.P. 289. where Erle C.J. said: "It is a contradiction to say the law does not give the right, and yet that there is a universally established usage to allow it. A universal usage cannot be set up against the general law."

60 Per P.C. Mallick J. in *Mukul Dutta* v. *Indian Airlines Corporation,* 1962 A.Cal. 311. Somewhat similar doctrine was hinted by Sinna C.J. in *State of Rajasthan* v. *Vidya Vati* (1962) Supp. 2 S.C.R.

High Court in *Indian Airlines Corporation* v. *Madhuri Chaudhari,*[61] and better opinion is that

Carriage by air in India is not governed by the Contract Act or the Indian Carriage of Goods Act, 1934, but they are governed by rules of English Common Law. The carrier can therefore escape liability by an exemption clause in the contract exempting on the ground of misconduct or negligence of its servants. Such a clause is not hit by s.23 of Contract Act.[62]

Air accidents—Res ipsa loquitar.—The doctrine of *res ipsa loquitar* may or may not apply to an air accident dependent upon the facts and circumstances of the case.[63] A good working test of the application of this maxim (*res ipsa loquitar)* was laid down by the Massachusetts Supreme Judicial Court thus:[64]

"... it only applies when the direct cause of accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendants or their servants."

Plaintiffs claimed against the defendant airline in respect of passenger's death, personal injury and property damage. On the tickets and baggage checks delivered to the plaintiffs the notification of the provisions of the Warsaw Convention was so small as to be virtually invisible. It was held in the United States District Court that (1) the Convention required not merely the delivery of a ticket and check before departure notifying the provisions of the Convention excluding and limiting liability but also that such excluding and limiting liability were applicable; (2) that the type in which the conditions on the ticket were printed was too small to constitute notification; and (3) that the defendant was in breach of the Convention and could not exclude or limit its liability.[65]

In case of inconsistency between the French and English Texts in Warsaw Convention, French Text prevails, *(Corocraft* v. *Pan American Airways,* (1969) 1, All E.R. 82.

In the U.S.A. the liability for air accident can be limited and consignment note (French text) need not contain all particulars *(American Smelting & Refining Co.* v. *Philippine Airlines,* (1956) U.S.& Can Av. R.387)

Choice of law governing contract.—It may be doubtful what law is to be applied to decide on the validity or the interpretation of a contract, or both, as where the contract is made in one jurisdiction and is to be performed in another, or is sued on in a jurisdiction where it was not made or to be performed. The Act does not deal with questions of this kind.

In ordinary circumstances the proper law of a contract (to use Mr. Dicey's convenient expression) will be the law of the country where it is made.[66] But where a contract is made in one country and is to be performed wholly or in part in another, the proper law may be presumed to be the law of the country where it is to be performed.[67]

But these rules are only in the nature of presumptions, and subject to the intention of the parties, whether expressly declared or inferred from the terms and nature of the contract and the circumstances of the case.[68] The subject cannot be discussed at large here; the above rules, however, are settled and will commonly be found sufficient.

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989 (a case of liability of State for the torts of its servants).

61 1955 A.Cal. 252. See *Rukmanand Ajitsaria* v. *Airways (India) Ltd.* (1960) A.Assam 71; and *Air Carrying Corporation* v. *Shibendra* (1964) A.Cal. 396 (case confined to Presidency Towns). Cases of liability of a carrier; and *Indian Airlines* v. *Sm. Madhuri Chaudhari* (1965) A.Cal. 252, 259.

62 *Air Carrying Corporation* v. *Shibendra* (1964) A.Cal. 396 (a case of Presidency Towns), D.B.; *Rukmanand Ajitsaria* v. *Airways (India) Ltd.* (1960) A.Assam 71; *Indian Airlines* v. *Madhuri Chaudhari* (1965) A.Cal 253, D.B.; Contra *Mukul Dutta* v. *Indian Airlines Corporation* (1962) A.Cal. 311; *American Smelting & Refining Co.* v. *Philippine Airlines,* (1956) U.S. & Can Av. R. 387 (American Law).

63 *Indian Airlines Corporation* v. *Madhuri Chaudhari* (1965) A.Cal. 252, 266.

64 *Wilson* v. *Colonial Air Transport Inc.,* 278 Mass. 420. See also Charles S. Rhyne: Aviation Accident (1947) published by Columbia Law Book Co. of Washington, pp. 130-38: the doctrine is inapplicable to aviation accidents.

65 *Lisi* v. *Alitalia-Linee Aeree Italiane* (1966) 2 Lloyds Rep. 328 (U.S. Distt. Ct.).

66 The English authorities will be found collected in Dicey, Conflict of Laws, 7th ed., pp. 804-811; the classical judgment in England is that of *Lloyd* v. *Guibert* (1865) 1 Q.B. 115, 122 (in Ex. Ch., a judgment of a very strong Court delivered by Willes J.); *Shanker Vishnu* v. *Maneklal Haridas* (1940) Bom. 799; 42 Bom. L.R. 873; 191 I.C. 653; 1940 A.B. 362.

67 *Ibid.; Cox* v. *The Governors of Bishop Cotton's School* (1874) Punj. Rec. No. 85; *Auckland Corporation* v. *Alliance Assurance Co.* (1937) A.C. 587; 167 I.C. 337; 1937 A.P.C. 54: *In re United Railways & Regla Warehouses Ltd.* (1961) A.C. 1007; (1960) 2 W.L.R. 969; (1960) 2 All E.R. 332.

68 Dicey, Rule 136, sub. rr. 1, 2 and 3; *Hamlyn* v. *Talisker Distillery* (1894) A.C. 202. And see *Abdul*

Generally (but with very important exceptions) the capacity to contract follows the law of domicile at the time of making the contract;[69] but capacity to contract with regard to immovable property is determined by the local law of its situation.[70] This of course is a matter of law which the parties cannot alter. A large proportion of the decisions under this head have been in matrimonial causes; but the special complications arising in questions of marriage and divorce are outside the scope of the present Act and of the ordinary law of contract.[71]

In recent years many cases on the subject have been decided both in India and in England which are indicative of how the problem of *lex loci* and *lex situs* is to be solved.

". . . Sovereignty being territorial, the English courts do not in general recognise the right of a foreign State to legislate as to the legality or legal effect of acts done in England unless some United Kingdom statute so provides. Where, however, the law of the foreign State purports to affect contractual rights between parties, the English court may give effect to it, even in respect of an act done in England, if the proper law of the contract is that of the foreign State. Even where the proper law of the contract itself is not that of the foreign State, the English court may also give effect to the law of the foreign State so far as it relates to acts required to be done in the foreign State in performance of the contract."[72]

Law applicable.—The proper law of the contract depends on the intention of the parties to be ascertained in each case on-

(i) the place of contracting;
(ii) the place of performance;
(iii) the place of residence or business of the parties respectively; and
(iv) the subject-matter of contract.
(v) Generally all surrounding facts.

The parties may have actually expressed their intention upon the matter and in such a case their intention will be effectuated.[73] The most satisfactory formulation is the law of the country "with which the transaction has its closest and most real connection".[74] According to Lord Radcliffe *in re United Railways & Regla Warehouses Ltd.*[75] the law of the place of performance ought to be regarded as of preponderating importance—where the capital was to be repaid and the trustees for certificate holders had their home (Pennsylvania). The doctrine of *renvoi* has no place in the law of contract. The proper law of the contract means the domestic rules of that law and not its rules of the conflict of laws.[76]

The parties' expression of intention is only a *prima facie* evidence as to the proper law applicable.[77] Whether the proper law applicable is the *lex loci contractus* or *lex loci solutionis* is a matter of presumption; but there are accepted rules for determining which of the two is ap-

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Aziz v. *Appayasami* (1903) 27 Mad. 131; 31 I.A. 1 (parties bound according to the law as they understood and adopted it at the time, though their interpretation proved erroneous); *Brijraj Marwari* v. *Anant Prosad,* I.L.R. (1942) 1 Cal.505; 202 I.C. 326; 1942 A.Cal. 509.

69 *Lachmi Narain* v. *Fatah Bahadur* (1902) 25 All. 195; Dicey, Rule 158.

70 *Bank of Africa* v. *Cohen* (1909) 2 Ch. 129, C.A.

71 See *Ogden* v. *Ogden* (1908) P. 46, C.A.

72 *Sharif* v. *Azad* (1966) 3 All E.R. 785, 789, 790-1 C.A.; (1966) 3 W.L.R. 1285; (1967) 1 Q.B. 605.

73 *In re Claim by Helbert Wagg & Co. Ltd.* (1956) 2 W.L.R. 183, 189; (1956) 1 All E.R. 129. 133; *Mt. Albert Borough Council* v. *Australasian Temperance Life Assurance Society Ltd.* 1938 A.C. 224, 240; (1937) 4 All E.R. 206; *In re United Railways of the Havana & Regla Warehouse Ltd.* (1959) 2 W.L.R. 251, 272; (1960) Ch. 52; on app. (1961) A.C. 1007, (1960) 2 All E.R. 332; (1960) 2 W.L.R. 969; *F. Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1041; (1961) A.SC. 1285, 1294 (intention expressed overrides presumption; inference from terms and nature of contract); *Societa Anonmina Luchesse Oili* v. *Gorkharam* (1964) 2 Mad. 90; (1964) A.M. 532, See *Mohammad Ishaq Ali* v. *Hiral Serogi,* P.L.D. (1964) D. 637 (Pak).

74 *Bonython* v. *Commonwealth of Australia,* 1951 A.C.201, 219 (per Viscount Simonds); *In re United Railways of the Havana & Regla Warehouse Ltd.* (1959) 2 W.L.R. 251, 273; (1960) Ch. 52; (1959) 1 All E.R. 214; on app. (1961) A.C. 1007; (1960) 2 All E.R. 332; (1960) 2 W.L.R. 969.

75 (1961) A.C. 1007; (1960) 2 W.L.R. 969; (1960) 2 All E.R. 332. But see *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 3 All E.R. 801 (H.L.) where Swiss law was the proper law and judgment was in Swiss francs.

76 Chitty: On Contracts (24th Ed.) para. 1912. *In re United Railways of Havana & Regla Warehouses Ltd.* (1960) Ch. 52 not following a dictum of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (1939) A.C. 277, 292.

77 *The Torni* (1932) P. 78; disapproved in *Vita Food Products* v. *Unus Shipping Co.* (1939) A.C. 277. See Claim by *Helbert Wagg Co. in re* (1956) 2 W.L.R. 183, 191; (1956) 1 All E.R. 129, 136.

plicable. Where the parties have expressed themselves, the intention so expressed overrides presumption. Where there is no expressed intention, then the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case.[78] Where a contract is made between parties residing in different countries or is made in one country to be performed in another the validity and effect of an arbitration clause in the contract must be determined by the "proper law" of the contract as a whole. As a principle of law and practice a court will not enforce a contract which is illegal by its own *lex fori.*[79] In *Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.*[80] the following two conditions were decisive as to the law applicable:

(1) The term of the jurisdiction of the Bombay High Court; and
(2) the existence of the arbitration clause indicating the arbitration would be in India.

The first term indicated that if the courts of a particular country are chosen, it is expected that they would apply their own laws unless there be either express intention or evidence. This is on the principle *"qui elegit judicem eligit jus"*.[81] The second circumstance of arbitration being in India was indicative of the parties having adopted the law of the country in which the arbitration is made.[82] A clause in the Arbitration Agreement that disputes will be settled by Arbitration in New York according to rules of the American Arbitration Society, i.e. by the American Arbitration Association contemplates that American Law will apply.[83] The construction of a contract by English Law involves the application of relevant English statutes and rules of English Common Law.[84]The House of Lords in a case of carriage of crude oil held that the contract showed that the law applicable was the law of the flag of the vessel carrying the goods.[85]

But an Indian citizen making a contract whilst in India would not be able and cannot be permitted to avoid the applicability of the Indian law to the contract made in India or to be performed in part or whole in India.[86]

In a contract between an English company and a German company the contract was held to be governed by German Law where the facts were: (i) debt was payable in London in Sterling without deduction of German taxes; (ii) English translation was the governing translation; (iii) Form of the contract was appropriate to English Law; (iv) Bonds could be issued in accordance with the text and practice ruling in the City of London.

On the contrary there was to be a mortgage on German immoveable property and in case of default it was liable to immediate seizure in execution after formal authorisation by a Notary Public. The contract provided that the loan agreement would be construed in accordance with German Law.

From these facts the Court held German Law to be the proper law of the contract.[87] If a contract made between a party in India and a party in Italy and the contract is illegal under the law of India, the arbitration agreement and the entire proceedings following thereon are illegal and the award would be tainted with the same infirmity. This was a case of a foreign award

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78 *F. Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1041; (1961) A.SC. 1285, 1294; *Sayers* v. *International Drilling* (1971) 3 All E.R. 163 (Dutch law applied).

79 *Societa Anonmina Luchesse Oili* v. *Gorkharam Gokalchand* (1964) 2 Mad. 90; (1964) A.M. 532, 536 (Scots Law not applied).

80 (1961) 3 S.C.R. 1020, 1041; (1961) A.SC. 1285, 1294.

81 *Spurrier* v. *La Cloche* (1902) A.C. 446 (even where arbitration clause is void); *N. V.Kurik Hoo Hendel* v. *James Finlay & Co.,* 1927 A.C. 604. Halsbury's Laws of England (3rd ed.) vol. 7, pp. 74, 75; *Hamlyn & Co.* v. *Tallisker Distillery* (1894) A.C. 202.

82 *D. Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1041; A.I.R. 1961 S.C. 1285, 1294, para 29; *Homlyn & Co.* v. *Tallisker Distilery* (1894) A.C. 202; *Spurrier* v. *La Cloche* (1902) A.C. 446. See Halsbury's Laws of England (3rd ed.) Vol. 7, pp. 74,75.

83 *Micheal Golodetz* v. *Seragud Din & Co.,* 1959 A.Cal. 603; *Mury Exportation* v. *D. Khaitan & Sons* (1956) A.Cal. 644.

84 *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (1939) A.C. 277; (1939) 1 All E.R. 513; Claim by *Helbert Wagg & Co. in re* (1956) 2 W.L.R. 183, 190; (1956) 1 All E.R. 129.

85 *Compagnie Armement Maritine S.A.* v. *Compagnie Tunisienne de Navigation* S.A. (1970) 3 All E.R. 71

86 *Se Se Oil* v. *Gorakharam* (1962) 64 Bom. L.R. 113; *Societe Anonmina Luchesse Oili* v. *Gorkharam Gokalchand* (1964) 2 Mad. 90; (1964) A,M. 532.

87 Claim by *Helbert Wagg & Co. Ltd. in re* (1956) 2 W.L.R. 183, 190; *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.,* 1939 A.C. 277; (1939) 1 All E.R. 513 and *The Torni* (1932) P. 78 referred to.

between a party in India and a party in Italy in proceedings taken in London.[88] But Dutch law was held applicable where an Englishman was employed by a Dutch company working an off shore drilling in Nigeria; the contract was in English, and salary was to be paid in sterling. The case was one in tort. *Sayers* v. *International Drilling,* (1971) 3 All E.R.163. See *W.J. Alen Ltd.* v. *El Nasar Co.,* (1972) 3 All E.R. 127 See *Miliangos* v. *George Frank Textiles Ltd.* (1975) 3 All E.R. 801 (H.L.) where Swiss law was the Law of the Contract.

A contract made between a cotton mill at Lyallpur (in Pakistan) and the plaintiffs was held governed by the law of Pakistan. After the Partition the plaintiffs migrated to India and the moneys in the hands of the mills were ordered to be paid over to the Custodian of Evacuee Property, Pakistan, under an Ordinance. In a suit by the plaintiff's evacuees in Delhi claiming the money, it was held that Lyallpur was the place of primary obligation, the elements out of which the contract to pay arose were most densely grouped at Lyallpur and Lyallpur was the natural seat of the contract and the place with which it had its closest and most real connection.

Accordingly the law of Pakistan was the proper law of the contract; and even under the English doctrine of *situs, situs* of the debt was Lyallpur and therefore either way the law of Pakistan applied.[89] Proper law of a contract is the law by which the parties intended or may fairly be presumed to have intended the contract to be governed. *Prima facie* it is presumed to be the law of the country where the contract is made.[90] Hence parties resident in Pakistan can enter into a valid contract in India for the sale of moveable property if the contract is to be performed in Pakistan in accordance with the laws of Pakistan and the money is to be paid in Pakistan. Such a contract is not hit by s. 5(1) of the Foreign Exchange Regulations Act (VII of 1947)[91]

A loan advanced to a borough in New Zealand and secured on the rateable value of all rateable property in the borough was payable at Melbourne in Australia.

The Privy Council held *lex situs* applied to the Security in New Zealand but not to the actual coupons, whether or not personal obligation to pay was properly regarded as a speciality debt. The Privy Council did not accept the view that the obligation to pay was governed by the place where the payment was stipulated to be made, in the sense that the amount of the debt could be lawfully varied by the laws of the place of payment to bind the courts in New Zealand because that would confuse two distinct conceptions—the obligation with performance.[92]

Consolidated 3½% stock of Commonwealth of Australia issued in 1932 against surrender of Queensland Government debentures issued in 1895 in varying sums of Pounds Sterling stipulating the payment either in Brisbane, Sydney, Melbourne or London, at the option of the holder was held to be governed by the law of contract of Queensland because the issue of debentures was under the Queensland's law and it was a charge on the revenues of the State.[93]

Where the building site was in Scotland and was owned by English owners and the building contractors were Scotch but the contract was made in London in R.I.B.A. form. English law was held applicable *(Whiteworth St. Estates* v. *James Millar* (1969) 2 All E.R. 210).

The rule in International Trade.—The rule in international trade where the contract specifies a foreign country in which the dispute will be adjudicated is thus stated by

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88 *Societa Anonmina Luchesse Oili* v. *Gorkharam Gokalchand* (1964) 2 Mad, 90; (1964) A.M. 532, 536; *Dhanrajmal Gobindram* v. *Shamji Kalidas* (1961) 3 S.C.R. 1020, 1041; (1961) A.S.C. 1285; *Juggilal* v. *General Fibre Dealers* (1962) Supp. 2 S.C.R. 101; (1962) A.SC. 1123; and *Khardah Co. Ltd.* v. *Raymon & Co.* (1963) 2 S.C.R. 183; (1962) A.S.C. 1810 folld.; *S.B. Jute Mills* v. *Fulchand* (1963) A.Cal. 140 refd.

89 *The Delhi Cloth & General Mills Co. Ltd.* v. *Harnam Singh* (1955) 2 S.C.R. 402; *distd.* in *United Commercial Bank Ltd.* v. *Okara Grain Buyers Syndicate Ltd.* (1968) A.SC. 1115. (Property had not been proved to have vested in Pakistan Custodian.)

90 *Mohammad Ishaq Ali* v. *Hiral Serogi,* P.L.D. (1964) D.637 (Pak.)

91 *Ibid.*

92 *Mount Albert Borough Council* v. *Australasian T. & G. Assurance Co.* (1938) A.C. 224; (1937) 4 All E.R. 206, 214 (P.C.); (1936) N.Z.L.R. 54 appd.; *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1934) A.C. 122 dist.

93 *Bonython* v. *Commonwealth of Australia* (1951) A.C. 201, 221 (P.C.).; *Goldsbrough Mort & Co. Ltd.* v. *Hall* (1948-49) 78 C.L.R. 1; *R* v. *International Trustee* (1937) A.C. 500, 531. See also *Mount Albert Borough Council* v. *Australasian T. & G. Assurance Co. Ltd.* (1938) A.C. 224; (1937) 4 All E.R. 206, 214.

Cheshire[94] on Private International Law. "As distinct from the express or implied choice of proper law the express choice of a foreign tribunal is not absolutely binding in accordance with the excellent principle that a contractual undertaking should be honoured, there is indeed a *prima facie* rule that an action brought in England in defiance of an agreement to submit to arbitration abroad will be stayed, [95] but nevertheless the Court has the discretion in the matter and where the parties are amenable to the jurisdiction as for example the defendant is present in England, it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country."[96] This view of the law was accepted by the Calcutta High Court although the action was stayed on other grounds.[97]

The principles applicable to international trade and the safeguards established for payment of price payable to the foreign sellers for goods supplied to buyers of other foreign countries have received approval by Indian Courts as shown by decided cases of which the latest Supreme Court decision is *United Commercial Bank* v. *Bank of India* (1981) A.S.C. 1428. The decisions of English Courts given herein are illustrative.

Proper law—Time of application.—The proper law attaching to a contract is that which applied at the time it was made. Hence the proper law could not be determined restrospectively by an event which at the time the contract was made was an uncertain event in the future. Nor could the contract flout in the absence of law until the proper law was determined nor change from one country to another on the happening of subsequent events. Therefore the choice of London by the plaintiff had no relevance in determining the proper law of a bond and as there were no other factors making English law the legal system with which the bond had the closest connection, the English courts did not have jurisdiction.[98]

In order to obtain a judgment for payment of money expressed in a foreign currency it was not necessary to establish that the proper law giving rise to the obligation was the law of foreign currency. Although the *lex loci contractus, the lex loci solutionis* and the proper law of the acceptance of a negotiable instrument were English, the money of account and the money in which payment might be made by the obligor were American. Therefore judgment could be given in US dollars.[99] In *Markender* v. *Fieldia A.C.*[1] the Court of Appeal held that although there was discretion to give leave to serve outside the jurisdiction, the Court would not do so where the contract was not void *ab initio* and the contract contained a clause for foreign jurisdiction. Hence the Court did not give leave.

A Panama Company entered into a contract with a Spanish Company for the construction of a rig. The price was fixed in U.S. dollars, part of which was paid and the rest was to be paid when the rig was accepted. A bank agreed to issue a letter of credit at the request of the Spanish Company for the repayment of the advance in the event of the order being cancelled by the Panama Company. The letter of credit was given on the instruction of a New York bank. But it contained no provision as to the system of law by which it was to be governed. A dispute arose between the parties concerning the validity of the period of the letter of credit. English law was not the proper law of the letter of credit and the question was whether the proper law was the law of New York State. It was held that the law was not necessarily the law of the issuing bank but the law with which the transaction had closest and most real connection; and although the letter of credit had been opened by the Spanish bank its closest and most real connection was with the law of New York State since the credit had been opened through a New York Bank and payment was to be made in U.S. Dollars. Accordingly the proper law was the law of New York State[2]

Insurance-marine.—The plaintiff's fleet was insured with an American insurer as a part in-

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94 Cheshire; On Private International Law (6th Ed.) p. 222; (7th Ed.) p. 193.
95 *The Cap Blanco* (1913) p. 130, (1911-13) All E.R. Rep. 365.
96 *The Athens* (1922) 11 LL.R. 6. *The Fehmarn* (1958) 1 All E.R. 333; (1958) 1 W.L.R. 150.
97 *Lakshminarayan Ramniwas* v. *Lloyd Triestino Societa* (1960) A.Cal. 155.
98 *Armar Shipping Ltd.* v. *Caisse Algerienic* (1981) 1 All E.R. 498, 504 (C.A.).
99 *Barclays Bank International Ltd.* v. *Levin Bros. (Bradford) Ltd.* (1976) 3 All E.R. 99, 904, 905.
1 (1966) 3 All E.R. 847, 849.
2 *Offshore International SA* v. *Banco Central. SA* (1976) 3 All ER 749, 751, 752. *Re United Railways of*

surer. The premiums and the claim were payable in America. The other insurers included some London insurers including Lloyds. The majoirity of the vessels were insured under dollar policies. Each of the policies contained "follow London Clause" whereby the insurers were to follow Lloyds underwriters in all matters of insurance including terms, conditions and settlement and in all matters of insurance. The policies also included the 'the New York Suable Clause' which provided that the place of actual and physical issue and delivery of the policy is the City of London but the assured had the option of treating New York for all those purposes. The plaintiff sought to issue a writ in the English Courts. It was held that the inference to be drawn from "follow London clause" was that the American policies were to be governed by English law because the clause was of paramount importance and this inspite of the fact that the law of the country, the defendant's policy had its closest connection, was America. And the 'New York Suable Clause' did not alter the effect of the "follow London clause."[3]

In a case in the Court of Appeal[4] the cargo owner was in England, the cargo was found short in the port of London and the survey was done in London. The ship was a frequent visitor to London. The shipowners were willing to submit to adjudication in London but objected to the giving of security. The action was allowed to proceed in England although the contract provided for disputes to be judged in U.S.S.R. and the cargo was loaded in a Russian port. The Court laid down the following two principles against staying of suits;

(a) A stipulation that disputes will be judged by the tribunals of a foreign country will be respected by English Courts and normally give effect to it but it is subject to the overriding principle that no one by his private stipulation can oust the jurisdiction of English Courts in a matter properly belonging to them.

(b) On the facts of the case the disputed property belonged to a buyer in England and it was more closely connected with England than with Russia and because the shipowners did not object to the jurisdiction of English Courts they only wished to avoid giving security.

The Bombay High Court[5] in a case where the contract provided for adjudication by arbitrator in England stayed the action and so did the Calcutta High Court[6] in similar circumstances where the Italian Law governed the contract of international trade. On appeal the Calcutta High Court[7] held that where on a consideration of the circumstances the Court came to the conclusion that it would be unjust or unfair to stay the suit it would refuse to grant the stay. It also held that the proper law of contract was Italian law but the parties could not oust the jurisdiction of the Indian Court by agreement whether executed in India or outside. But in the circumstances of that case the balance of convenience was not in favour of the Indian Merchant and therefore granted the stay.

Considering all these cases and authorities the Andhra Pradesh High Court has laid down the law which may be stated thus: "It is open to the Court to consider the balance of convenience, the interest of justice and the circumstances when it decides the question of jurisdiction of the Court in the light of the clause in the agreement between the parties choosing one of the several Courts or forums which were available to them. Indeed such a consideration is essential in the interest of international trade and commerce for the better relation between the countries and the people of the world.[8]

Discharge of a contract, law applicable.—The validity of the discharge of a contract normally depends on the proper law of contract. A discharge according to proper law of contract is valid and a discharge not according to proper law is not valid. A contractual debt may and normally will be regarded as situate at the debtor's place of residence but the discharge of a debt whether by performance or through other events is a matter—subject not to the *lex situs* of the debt but to the proper law of contract from which it arises.[9]

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the Havana and Regla Warehouses (Ltd.) (1960) 2 All ER 332 applied.

3 *Armadora Occidental S/A* v. *Horace Mann Insurance Co.* (1978) 1 All ER 407, 410, 411; (1977) 1 All ER 347 affd.

4 *The Fehmarn* (1958) 1 All E.R. 333, 335-6; (1958) 1 W.L.R. 159. *The Athens* (1922) 11 LL. Rep. 6 applied. *Racecourse Betting Control Board* v. *Secretary of State for Air,* (1944) 1 All E.R. 60-65. considered.

5 *Haji Abdulla* v. *G.R. Stamp* (1924) A.B. 381 (Marine Insurance).

6 *Messrs Lloyds Triestino Societa* v. *Messrs Lakshminarayan Ramniwas.* (1959) A.Cal. 669.

7 *Lakshminarayan Ramniwas* v. *Lloyd Triestino Societa* (1960) A.Cal. 155 (D.B.), on appeal against (1959) A.Cal. 669.

8 *Black Sea Steamship U.L. Lastochkina Odessa* v. *The Union of India* (1976) A.AP. 103, 104.

9 Rule 155 of Dicey's Conflict of Laws, 7th edn., pp. 804 and 807. The rule applies to a debt accrued and to a contractual obligation to pay *in futuro. Perry* v. *Equitable Life Assurance of the U.S.A.* (1929) 45 T.L.R. 468 (A claim on insurance policy dismissed because Soviet Law annulled rights under

Novation and lex situs.—The validity of the transfer of a contractual debt depends on *lex situs* but a novation, even a compulsory novation, is not governed by *lex situs* as it comprises annulment of one debt and the creation of another and no transfer of property is involved. The former is governed by the proper law of the contract and the latter probably by the law of the country with which the substitution of the new debtor is most closely connected.[10] The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole.[11] Different parts of a contract may be governed by different laws though the English Courts will not split the contract readily and without good reason.[12]

The Transfer of Property Act, 1882, s. 4, provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.

Distinction between liability in tort and in contract.—A distinction between liability in tort and in contract turns on the origin of the duty. In contract, the duty arises from the agreement of the parties; in tort it is independent of agreement and is imposed upon the parties by the law.[13] Tindal C.J. in *Boorman* v. *Brown*[14] stated the position thus:

> "The principle in all these cases would seem to be that the contract creates a duty, and a neglect to perform that duty, or the non-feasance, is a ground of action upon a tort."

According to Collins M.R. the distinction between tort and contract is not a logical one and it is sometimes difficult to see whether a particular thing is a wrong or a breach of a contract. Nevertheless, as the law has drawn a distinction, "tort" may be defined in terms of a breach of duty other than a contractual duty.[15] The distinction between tort and contract is discernible in many practical respects. The law relating to capacity is different; e.g. an infant is liable for his torts but not on contract excepting to a limited extent. A contractual right can be assigned but not a right of action in tort. The measure of damages is different. Exemplary damages can be awarded in tort but not in contract (except in breach of promise to marry). The tests for remoteness are different.[16] In two recent cases, *Clark* v. *Kirkby-Smith*,[17] a case of a Solicitor's liability, and *Bagot* v. *Stevens Scanlan & Co.* Ltd.,[18] a case of the liability of an architect, and in cases of professional relationships, it was held that liability arises out of contract. These cases distinguish between an action based on tort and an action based on contract.[19] Professor Winfield in *The Province of the Law of Tort* (1931) pointed out three main issues which in earlier centuries gave rise to the need to distinguish between tort and contract; these were survival of actions, joinder of actions and joint liability. Apart from these, there were other situations in which distinction might be material.[20] In modern times, the question is of importance in connection with damages and limitation. On the question of damages, there are two distinct points: remoteness of damage and measure of damages.

Act not retrospective.—The provisions of this Act do not apply to contracts made before

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insurance contracts). *United Railways of the Havana & Regla Warehouses Ltd. in re* (1959) 2 W.L.R. 251, 267, 268; (1959) 1 W.L.R. 214; affd. on app. 1961 A.C. 1007; (1960) 2 All E.R. 332; *R.* v. *International Trustee* (1937) A.C. 500; *Mount Albert Borough Council* v. *Australasian Etc. Ltd.* (1938) A.C. 224 (P.C.).

10 *United Railways of the Havana & Regla Warehouses Ltd., in re* (1959) 2 W.L.R. 251, 266-7, 269; (1969) 2 All E.R. 214, 233 (Wolff's Private International Law (2nd ed.) p. 458 reld. on.); on app. *In re United Railways & Regla Warehouses Ltd.*(1961) A.C. 1007; (1960) 2 W.L.R. 969; (1960) 2 All E.R. 332; *Arab Bank Ltd.* v. *Barclay's Bank,* (1954) 2 All E.R. 226 (not applied) and *In re Russian Bank for Foreign Trade* (1933) Ch. 747 dist.

11 *Hamlyn & Co.* v. *Talisker Distillery* (1894) A.C. 202.

12 Per Lord MacDermott in *Kahler* v. *Midland Bank Ltd.* (1950) A.C. 24, 42; (1949) 2 All E.R. 621.

13 Charlesworth on Negligence, 4th ed., section 1005; Criticised by Poulton in 82 L.Q.R. 346, 350; See also Winfield on Tort, p.6 (7th ed.) & Prosser: Torts (2nd ed.), p.5.

14 (1842) 3 Q.B. 511, 526.

15 *Sachs* v. *Henderson* (1902) 1 K.B. 612, 616.

16 Chitty on Contract (24th ed.) paragraph 6.

17 1964 Ch. 506; (1964) 3 W.L.R. 239.

18 (1964) 3 All E.R. 577.

19 Tort or Contract: 82 L.Q.R. 346.

20 82 L.Q.R. 346.

the Act came into force.[21]

Principles of construction of contracts.—A person is only entitled to enforce his contractual rights in a reasonable way and a court will not support an attempt to enforce them in an unreasonable way.[22] The courts should not, in commercial transactions, be astute to defeat the efficacy of documents which parties have acted on, by seeking to apply to their construction rules such as the "subject to contract rule". Such rules are but guides. They must not become tyrants, compelling a construction which in the circumstances of a particular case, produces a wholly artificial and unreal result.[23] The court should put itself in a frame of mind which would make itself possible to understand how commercial minds work. [24] The House of Lords in *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*[25] (H.L.) summarising the rules applicable to construction of commercial documents laid down that effort should be made to construe commercial agreements broadly and one must not be astute to find defects in them or reject them as meaningless. The dealings of men should, as far as possible, be treated as effective and the law may not incur the reproach of being the destroyer of bargains.[26] But in certain cases the court may relieve the parties to the contract of their duty on what is called public policy.[27]

The construction of a contract cannot be governed or affected by the intention or belief of one of the parties not communicated to the other.[28] The true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards.[29] In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear there is very little the court can do about it.[30] Therefore, where an insurance policy provided that the "insurance may be terminated at any time at the request of the insured" and "the insurance may be terminated at any time at the instance of the company" the words "at any time" can only mean at any time the party concerned likes, or to put it differently, it means either party may at its will terminate the policy. No other meaning of the words used is conceivable.[31] It would be legitimate to take into account the surrounding circumstances for ascertaining the intention of parties and therefore the absence of a specific clause against transferability is not conclusive.[32] What has to be seen is whether it would be held on a reasonable interpretation of the contract aided by such considerations as can legitimately be taken into account that the agreement was not to be transferred.[33] In the construction of written instruments, it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful then to have regard to the circumstances surrounding their

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21 *Omda Khanum* v. *Brojendro* (1874) 12 B.L.R. 451, 458; *ibid.* p. 472, on appeal.

22 *White & Carter (Councils) Ltd.* v. *McGregor* (1962) 2 W.L.R. 17, 22 (H.L.); (1962) A.C. 413; (1961) 3 All E.R. 1178.

23 *Cranleigh Precision Engineering Ltd.* v. *Bryant* (1965) 1 W.L.R. 1293, 1302.

24 *Navnit Lal* v. *Kishan Chand & Co.* (1956) A.B. 151, 153.

25 (1959) A.C. 133, 158 (H.L.); *Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1035; (1961) A.SC. 1285.

26 Per Lord Tomlin in *Hillas & Co.* v. *Acros Ltd.* (1932) 147 L.T. 503, 512; (1932) All E.R. Rep. 494; *Coffee Board, Bangalore* v. *Haji Ibrahim* (1966) A.Mys. 118; *Dhanrajmal Gobindram* v. *Shamji Khimji & Co.* (1961) 3 S.C.R. 1020; (1961) A.SC. 1285.

27 *Gherulal Parekh* v. *Mahadevdas* (1959) Supp. 2 S.C.R. 406; (1959) A.SC. 781, 795; *Pearl Insurance Co.* v. *Atma Ram* (1960) A. Punj. 236 (F.B.).

28 *Hepburn* v. *Tomlinson (Hauliers) Ltd.* (1966) A.C. 451; (1966) 2 W.L.R. 453, 456 (H.L.); *Waters* v. *Monarch Fire & Life Assurance Co.* (1856) 5 E. & B. 870 dist.

29 *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36, 40; (1952) A.SC. 9; *Goshto Bihari* v. *Surs Estate* (1960) A.Cal. 752 (merely calling it a contract not enough); *Namayya* v. *Union of India* (1958) A.AP. 532; *Central Bank of India* v. *Hartford Fire Insurance Co.* (1965) A.SC. 1288.

30 *Central Bank of India* v. *Hartford Fire Insurance Co.* (1965) A.SC. 1288.

31 *Ibid.*

32 *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183, 207; (1962) A.SC. 1810; *Virjee Dayaram & Co.* v. *Ramkrishna Rice & Oil Mills* (1956) A.M. 110 appd.; *Hemraj Keshavji* v. *Shah Haridas Jethabhai* (1964) 3 S.C.R. 686 at p. 698; 1964 A.SC. 1526; *Modi Co.* v. *Union of India,* 1969 A.SC. 9.

33 *Modi Co.* v. *Union of India,* 1969 A.SC. 9; *Hemraj Keshavji* v. *Haridas Jethabhai* (1964) 3 S.C.R. 686; (1964) A.SC. 1526; *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co.* (1959) A.C. 133, 158; *Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1025; (1961) A.SC. 1285.

creation and the subject-matter to which it was designed and intended they should apply.[34] Even a formal antecedent contract cannot be looked at to control the terms of the conveyance much less mere communings which would only show what they intended to do but cannot show what they did do.[35]

In the words of Lord Wright in *Luxor Ltd.* v. *Cooper:*[36] However similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract and in the light of material circumstances of the parties in view of which the contract is made. To compare one contract with another is not a profitable task.[37] But an agreement to sell may be used to clear an ambiguity in the sale deed.[38] The courts have sometimes been ready to read an earlier oral statement and a later formal document forming together a single comprehensive contract, i.e. the parties have made their contract partly in writing and partly by word of mouth.[39]

The names of partners in a deed of partnership is a term of the contract. A contract deals with the subject-matter as well as the persons between whom it is entered into and the names of the parties in so far as they relate to terms creating obligations cannot be divorced from the terms of the contract.[40] Words which do not occur in the part dealing with description of the goods but elsewhere cannot reasonably be assumed to be intended as part of the description.[41]

A contract of sale of fallen and standing trees provided for the sale of "(excluding sandalwood, coconut, arecanut and all specified fruit trees and tamarind trees or 10 or 15 silver oak trees of below 36" girth grown and standing in ...Estate". It was argued that mango and jack fruit being fruit trees were excepted because mango and jack fruit trees are considered timber but there was no clause of the contract which excluded these trees which were also timber and fruit trees. Hence the contention was repelled.[42]

Additions to printed form.—In interpreting contracts, a special agreement or clause between parties added to the printed form must be given greater weight than those of the printed form, so also words in manuscript in a shipping contract would prevail over print.[43] There is no general rule extractable from *H.O. Brandt & Co.* v. *H. N. Norris & Co. Ltd*[44] that on every f.o.b. or f.a.s. contract the buyer must supply a ship into which or alongside which the goods can legally be placed, where there exists a prohibition on export except with a licence.[45] The obligation depends on contract and the surrounding circumstances in each case. A clause in a contract for sale of goods to the Union Government that "in the event of the contractor not being in possession of the goods, the contract would be deemed to have been cancelled" does not make the contract void as non-availability does not render the contract void.[46]

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34 *Rajah Vatsavaya Venkata* v. *Venkatapathi Raju, 1924 A.PC. 162; Royal Bank of Canada* v. *Joseph Salvatori,* 1927 A.PC. 272; *River Commissioners* v. *Adamson,* 2 App. Cas. 734; *Gulab Chand* v. *Kudilal,* 1959 A.M.P. 151; on app. (1966) A.SC. 1734; *Penn* v. *Simonds,* (1971) 3 All E.R. 237 (Pre-contract negotiations cannot be looked at, but contract construed in view of surrounding circumstances and object of the contract).

35 *Bomanji Ardeshir* v. *Secretary of State,* 56 I.A. 51; 1929 A.PC. 34; 53 Bom. 322 (P.C.); *Nokayya* v. *Jagga Rao* (1955) Andh.L.J. 571.

36 (1941) A.C. 108; (1941) 1 All E.R. 33, 44; *Narayana Rao* v. *Ramchandra Rao* (1959) A.AP. 370, 374.

37 *Sethia (1944) Ltd.* v. *Partabmull Rameshwar* (1950) 1 All E.R. 51 (C.A); on app. (1951) 2 All E.R. 352n.

38 *Desikhacharyulu* v. *Narasimhacharyulu* (1958) A.AP. 278; *Suleman Vadu* v. *Tricumji Velji,* 12 Bom. H.C.R. 10 followed.

39 *Birch* v. *Paramount Estate Ltd.* citied in *Oscar Chess Ltd.* v. *Williams* (1957) 1 All E.R. 325, 329.

40 *Shankar Bandhu* v. *Shankar Babaji,* 1956 A.B. 165. But see *Satyanarayana* v. *Lakshmi Narasimham* (1968) A.AP. 330 (subject to Madras jurisdiction on top of a letter not part of contract).

41 *Soundararajan & Co.* v. *Annamalai Nadar* (1960) A.M. 480.

42 *T.A. Sankunni* v. *B.J. Philips* (1972) A.M. 272, 274; *Pirthidin* v. *RamLal* (1926). Oudh. 136; & *Krishna Rao* v. *Babaji,* 24 Bom. 31; reld on.

43 *Riley* v. *Coglan* (1967) 1 W.L.R. 1300, 1308, Halsbury's Laws of England (3rd ed.) vol. 11, para. 671; *China Cotton Exporters* v. *Biharilal Cotton Mills* (1961) 3 S.C.R. 845; (1961) A.SC. 1295 (manuscript prevails over printed matter). But see *Jacques* v. *Lloyd D. George & Partner Ltd.* (1968) 1 W.L.R. 625 (a printed form containing an unreasonable clause cannot be enforced in the case of an Estate Agent).

44 (1917) 2 K.B. 784.

45 *A.V. Pound & Co. Ltd.* v. *M.H. Hardy & Co. Inc.* (1956) 2 W.L.R. 683, 689.

46 *Arun & Co.* v. *The Union of India* (1964) A.Punj. 230.

Paramount Clause by addition.—Where a type "Paramount clause" was included in a charter party without words of limitation all the rules referred to in the Paramount Clause would form part of the terms of the charter party and would take precedence over the terms of the charter party.[47]

Conditions not binding on merger.—The terms of a contract of service must be strictly construed and there can be no question of beneficent construction.[48] After the change of sovereignty by the ruler of an Indian State merging his State with what was British India, the successor government is not bound by a contract of the previous ruler unless it agrees to be so bound.[49] The acceptance of a tender issued by Government for the sale of 244 tons approximately of iron scrap is a valid contract because it implies the sale of a quantity which if it is slightly more than that of quantity will require the purchaser to pay for the excess weight and if less then the Government will have to refund the amount paid in excess by the buyer. Such a term is implied where the contract would fail completely unless such a term is implied or where in effect it gives substance to the whole transaction or where circumstances demand such application.[50]

Construction of Terms.—The words "not in accordance with the bye-laws of any recognised cotton association" require that the contract notes must contain all the terms and conditions set out in the form in order to comply with it; but substantial compliance with the form would be enough and literal compliance is not essential.[51]

Hedge Contracts.—The omission in contract notes between the members to mention the difference of the Rs. _____ above or below the settlement rates of "hedge contracts" for the purposes of periodical settlements as required by bye-laws 139 and 141 or the omission to mention measurements of the bales as required by bye-law 80 of the prescribed form does not render the contract void.[52]

The question whether delivery should be spread over arises only in cases of instalment contracts.[53] The term "free of income-tax" in the case of salary to be paid to an officer means "free of taxes on incomes" and would include super-tax also because super-tax is additional income-tax.[54]

Football club.—An agreement between a football club and a player provided:

"The club hereby engages the player and the player in consideration of the sum of £500 . . . agrees to serve the club for the remainder of his football career from the date hereof. . . ."

By this agreement, what the club was getting was his agreement to serve and what the player was getting in return for that was the payment of £500.[55]

"Force majeure" is not a French version of *"vis major"*. It is a term of wider import. Strikes, breakdowns of machinery though not included in *vis major* are included in *"force majeure"*. By use of the term *"force majeure"* the intention is to save the performing party from the consequences of anything over which he has no control. The use of the word "usual" makes all the difference and parol evidence can be given to make it certain.[56] But the

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47 *Nea Agrex SA* v. *Baltic Shipping Co. Ltd* (1976) 2 All E.R. 842.
48 *State of Orissa* v. *Hari Chandan Babu,* 1964 A.Or. 73.
49 *Ibid.*
50 *Debi Prasad & Sons* v. *Union of India* (1969) A.B. 163; Anson: Law of Contract (22nd ed.) p. 129; and Halsbury's Laws of England (3rd ed.) 121 para 212 quoted.
51 *Gordhandas Purshottamdas* v. *Eastern Cotton Co.* (1958) A.SC. 713; (1959) S.C.R. 346; *Radhakisson Gopikisson* v. *Balmukund,* 60 I.A. 63; (1933) A.PC. 55 referred to.
52 *Gordhandas Purshottamdas* v. *Eastern Cotton Co.* (1958) A.SC. 713; (1959) S.C.R. 346; *Burchell* v. *Thompson* (1920) 2 K.B. 80; *Ex parte Stanford* (1886) 17 Q.B.D. 259; *Thomas* v. *Kelly* (1888) 13 App. Cas. 506; and *Parsons* v. *Brand* (1890) 25 Q.B.D. 110 dist.
53 *China Cotton Exporters* v. *Bihari Lal Cotton Mills* (1961) 3 S.C.R. 845; (1961) A.SC. 1295.
54 *Bharat Fire & General Insurance Ltd.* v. *Parameshwari Das Gupta* (1968) A.D. 68; *State of Madhya Pradesh* v. *Sirajud Din* (1964) 53 I.T.R. 158; (1965) A.SC. 198 *dist,; In re Reckitt, Reckitt* v. *Reckitt* (1932) 2 Ch. 144; (1932) All E.R. Rep. 961 reld. on.
55 *Riley* v. *Coglan* (1967) 1 W.L.R. 1300, 1309.
56 *Dhanrajmal Gobindram* v. *Shamji Kalidas* (1961) 3 S.C.R. 1020; (1961) A.SC. 1285, 1291; *Lebeaupin* v. *Crispin* (1920) 2 K.B. 714 refd. to *cf. English Electrical Associated Industries Ltd.* v. *Patley Pressings* (1953) 1 All E.R. 94 (subject to *"force majeure* conditions" held vague) and *Scammell and*

term does not include the inability of a seller to get an export licence except at a sale price which was higher than the contract price.[57] In 1974 the Polish State estimating that production of sugar would be sufficient for internal consumption and for export authorised a State organisation Rolimpex to enter into contracts with purchasers for its export. In November the Polish Government imposed an immediate ban on export of sugar and revoked export licences already granted. Because of the ban export to 'C' was prevented. 'C' claimed damages and Rolimpex pleaded exemption from liability on the ground of *force majeure* by Government intervention and it was held that though Rolimpex was an organisation of the Polish State and because under the Polish law it was not entitled to plead sovereign immunity it was to be treated as a separate legal entity and it was beyond its control to export the contracted sugar. It was, therefore, entitled to rely on the *force majeure* as defence to the plaintiff's claim and in the circumstances Rolimpex could not be expected to apply for an export licence following the government's ban on export of sugar. This decision was affirmed by the House of Lords[58] The addition of the word "usual" refers to something which is invariably to be found in contracts of a particular type.[59] The expression "arising out of" or "concerning" or "in connection with" or "in consequence of" or "relating to the contract" in an arbitration clause are of sufficient amplitude to take in a dispute as to the validity of an agreement.[60] The use of the word "approximately" in a tender issued by Government for the sale of iron scrap which is filled in by a buyer and accepted by the Government only means that in case the quantity is slightly less the buyer will get a refund to that extent and if it is more he will have to pay for the excess.[61]

It is well settled that while the Indian Contract Act merely provides certain elementary conditions under which the contract becomes binding on the parties, it does not provide any particular form or condition of a contract. Therefore, the parties to a contract may agree to a particular form or condition or of mode in which the contract is to be executed. Where a contract with the Railways prescribes the particular form in which a contract is to be executed the contract has to be executed in that form. The provisions of the Contract Act are not superseded by the Railways Act. It only provides for a particular form in which the contract is to be executed.[62]

Construction of contractual documents.—All stipulations and acts which arise from and out of a written contract have to be understood pragmatically and given effect to in accordance with law. In a Madras case the question to be decided was whether a deed described as a partnership between the plaintiffs and the defendants was in reality a partnership, it was held that it never was intended to be acted upon as such as there was intrinsic evidence that it was only a working arrangement between the parties.[63] Merely because an express provision was not made in an agreement regarding the *modus operandi* of its implementation the legal obligation of one of the parties which is quite apparent in the agreement cannot be avoided.[63]

Forward contract—Construction—Transferability.—A contract for delivery of goods at a future date, even though for a specific price and of specific quality of goods, can be excluded from the definition of non-transferability, if it is shown on a reasonable interpretation of the

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Nephew Ltd. v. *Ouston* (1941) A.C. 251 ('on hire purchase terms' held vague) dist.; *Shamrock S.S. & Co.* v. *Storey & Co.* (1899) 5 Com. Cas. 21 refd. to in *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* (1944) 1 K.B. 12 appd.; *Hillas & Co.* v. *Arcos Ltd.* (1932) All E.R. Rep. 494 (H.L.) appd. in *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* (1959) A.C. 133, 158 (H.L.) (broad meaning to be given to commercial documents).

57 *Brauer & Co. Ltd.* v. *James Clark (Brush Materials) Ltd.* (1952) 2 All E.R. 497.

58 *Czarnikow Ltd.* v. *Centrala Handlu Zagranicznego Rolimpex* (1978) 1 All E.R. 81, affirmed in (1978) 2 All E.R. 1043. *Trendtex Trading Corpn.* v. *Central Bank of Nigeria* (1977) 1 All E.R. 881 appld.

59 *Dhanrajmal Gobindram* v. *Shamji Khimji & Co.* (1961) 3 S.C.R. 1020; (1961) A.SC. 1285, 1291.

60 *Khardah & Co. Ltd.* v. *Raymon & Co.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810; *Ruby Insurance Co. Ltd.* v. *Pearey Lal Kumar* (1962) 1 S.C.R. 501; (1952) A.SC. 119.

61 *Debi Prasad & Sons* v. *Union of India* (1969) A.B. 163.

62 *Union of India* v. *The Steel Stock Holders Syndicate* (1976) 3 S.C.R. 504; (1976) A.SC. 879, 883.

63 *K.E.M. Mohamed Ibrahim Marcan* v. *Perumal Padayachi* (1974) 1 M.L.J. 507, 513.

contract that it is not transferable.[64] The words in a mercantile agreement (1) "invoice weight to be accepted" and (2) "this contract is subject to import licence and therefore the shipment date is not guaranteed" were interpreted to mean that subject to import licence, shipment date was guaranteed.[65]

The purchaser at a forest auction of timber to be cut and recovered by the purchaser passes timber felled and logs cut by the purchaser and not the standing forest. Hence where for failure to pay the instalments by the purchaser the Government, under the contract, took possession of the timber and logs felled and cut by the plaintiff and sold them and also the balance of the standing timber, the auction purchaser was not entitled to the amount realised on resale.[66]

The term *'bilticut'* in the law relating to contracts means a contract F.O.R. the price being payable against the delivery of Railway Receipt.[67] In *Ganga Saran's* case,[68] one of the terms of the contract was

"We shall continue sending goods as soon as they are prepared to you . . . we shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said Mill."

The Supreme Court agreeing with the interpretation of somewhat similar phrase in *Harnandrai* v. *Pragdas*[69] held that the words did not mean that the goods will not be supplied at all. The words 'prepared by the Mill' are only a description of the goods to be supplied and expression "as soon as they are prepared" and expression "as soon as they are supplied to us by the said Mill" simply indicate the process of delivery. The Bombay High Court in *Navnit Lal & Co.* v. *Kishan Chand & Co.*[70] held that the term "the goods will be shipped to your friends 'as soon as they are delivered to us' by Messers. Allegappa Textile Cochin Ltd. is not a term of contingency or any condition precedent to the performance of the contract. The words of the term are regulatory of the mode of performance and not of the very obligation to perform the contract.

Contempt of Court and Exercise of Right under a Contract.—An employer brought a suit for declaration that the notice of termination of his service was illegal but no interim injunction had been asked for. The defendants gave a second notice of termination of service and the employee moved the Court for contempt. The Supreme Court held that the law of contempt and the operation of a contract have separate viable areas so that justice is not interfered with and the contract is not "cribbed and cramped." Hence the *bona fide* or honest exercise of right under a contract should be the yardstick for allocating respective areas to contempt and contract. So where a party during the course of litigation terminated the services of his adversary, his act will not constitute contempt in the absence of an injuction or undertaking to the contrary.[71]

Interpretation clause.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(b) When the person to whom the proposal is made signifies his assent

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64 *Hemraj Keshavji* v. *Haridas Jethabhai* (1964) 3 S.C.R. 686, 697-8; (1964) A.SC. 1526, 1530; *Khardah & Co. Ltd.* v. *Raymon & Co. Ltd.* (1962) A.SC. 1810; reld. on (1963) 3 S.C.R. 183.

65 *China Cotton Exporters* v. *Biharilal Cotton Mills* (1961) 3 S.C.R. 845; (1961) A.SC. 1295.

66 *State of West Bengal* v. *Harendra Nath* (1958) A.Cal. 21.

67 *Moolji Jaitha* v. *Seth Kirodimal* (1961) A.Ker. 21; *Seth Harijimal* v. *F. Gulabchand Udeychand*, 1955 Nag. 722; 1956 A.N. 118.

68 *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36.

69 50 I.A. 9.

70 (1956) A.B. 151; *Harnandrai* v. *Pragdas*, 50 I.A. 9; *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36.

71 *K.T. Chandy* v. *Mansa Ram Zade* (1974) A.SC. 642, 644: (1974) 25 CR 650; *Tukaram G. Gaokar* v. *R.N. Shukla* (1968) 3 S.C.R. 422: (1968) A.SC. 1050; *Jang Bahadur Singh* v. *Baijnath Tiwari* (1969) 1 S.C.R. 134: (1969) A.SC. 30; *Pratap Singh* v. *Gurbux Singh* (1962) Supp. S.C.R. 838; (1962) A.SC. 1172; and *Govind Sahai* v. *The State of U.P.* (1969) 1 S.C.R. 176; (1968) A.SC. 1513. disting.

thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:

(c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee".

(d) When, at the desire of the promisor, the promisee or any other person had done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement.

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Summary of the Section.—This section is understood to be the work of Sir James Stephen. There is nothing like it in the original draft prepared by the Indian Law Commissioners at home, which only laid down in general terms that "a contract is an agreement between parties whereby a party engages to do a thing or engages not to do a thing".[72] As the section stands, its position and form are open to the remark that it professes to be an interpretation clause, but really declares a considerable part of the substantive law. Moreover, the propositions it lays down are by no means confined to principles of universal jurisprudence, but embody several conceptions which are peculiar to the Common Law, or of peculiar importance in it. We learn from cls. (a), (b), (c), (e), and (f) that an agreement is a promise or a set of reciprocal promises; that a promise is formed by the acceptance of a proposal; and that there must be a promisor who makes the proposal and a promisee who accepts it. In the case of reciprocal promises each party is a promisor as to the promise he makes and a promisee as to that which he receives; he is both proposer and acceptor, proposing to become liable and accepting the other's liability. The mutual proposals of the two parties become promises by mutual acceptance; whatever may have happened before the promises are exchanged is merely preliminary negotiation, and does not enter into the legal analysis of the transaction.

Proposal and Promise.—The word "proposal" is synonymous in English use with "offer." But the language of these definitions appears to confine "proposal" to an offer to be bound by a promise. One learned writer maintains that the presence of a request expressed or implied is an essential element in every true offer.[73] Thus a man who offers to sell and deliver, then and there, existing portable goods in his immediate control, such as a book or a jewel, does not offer a promise but an act, and if the other party takes the goods on the spot and becomes liable to pay for them, he (the buyer) is the only promisor.[74] In such a case the seller would seem not to make a proposal within the terms of the Contract Act. But in England no one would hesitate to say that he offers (or proposes, though this word is less usual) to sell his goods. A quotation of prices is not an offer, but an invitation for offers;[75] the same is true of

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72 S.I. of draft Second Report of Indian Law Commissioners, 1866, at p. 11.

73 69 L.Q.R. 99, J.C. Smith.

74 We assume for simplicity's sake that there is no question of warranty, as in fact there often is none.

75 *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee* (1919) 37 Mad. L.J. 712; 54 I.C. 550; cp *Secretary*

many common forms of advertisement. A statement of the lowest price at which a landowner is prepared to sell has been held by the Privy Council not to be an offer. [76] A term in a partition deed that any of the parties wishing to sell his share will sell to the others at the market value is not an offer but an undertaking to make an offer.[77]

The Manchester City Council adopted the policy of selling its houses to the tenants. One of the tenants applied on a printed form supplied by the Council to supply the terms. The Council wrote back saying that it may be prepared to do so and gave the terms of the sale and of the mortgage and asked the tenant to fill up the accompanying form if he would like to buy and send it to the Council Treasurer. The form was headed 'Application to buy a Council House' and it concluded with the statement 'I now wish to purchase my Council House.' The above answers are correct and I agree that they shall be the basis of the agreement regarding the purchase. Before the contracts could be prepared and exchanged there was a change in the Council and policy was changed and the sales were not completed. The tenant brought an action claiming specific performance. The House of Lords held that there was no completed contract and the Council had not made an offer but had invited the tenant to make an offer. The action therefore failed.[78]

Offer and acceptance of Counter offer.—The sellers gave to the buyers quotations for the sale of their machine tools and the terms and conditions included two clauses (1) a price variation clause providing price ruling on the date of delivery and (2) the terms and conditions in that letter to prevail over terms and conditions in the buyer's orders. The buyers placed an order with terms and conditions materially different from that of the sellers with no price variation clause. At the foot of the order there was a tear-off acknowledgement of receipt of order with the words "we accept your order on the terms and conditions stated thereon". When the goods were ready and delivered the price had gone up and the sellers demanded higher price. The buyers paid the price quoted and the sellers brought an action for the balance. The Trial Court upheld the claim but the Court of Appeal reversed the judgment for the following reasons:

1. The buyers order was a counter offer and the sellers by completing and sending the tear-off acknowledgement had accepted the counter offer and could not claim the increase in price.
2. The documents had to be read as a whole and the tear-off acknowledgement was the decisive document.[79]

The Act does not say, but it seems to imply, that every promise is an accepted proposal. In *Shyam Sundar's* case it was held that for a promise there must not only be a proposal but also acceptance of the proposal.[80] In the Common Law this is not so, for a binding promise may be made by deed, that is, by writing under seal without any communication between the parties at all. This is because the deed, as an ancient formal method of proof, was conclusive against its maker. It was introduced at a time when, under the archaic procedure still in force in the eleventh and twelfth centuries, all proof had to be conclusive or nothing. The party's solemn admission that he was bound originally excluded all defence. It still dispenses, in England, with positive proof of any ulterior ground of liability.[81] But the practice of executing deeds in the English form and the legal doctrines exclusively applicable to such instruments have never been introduced in India. We have, therefore, no occasion to dwell on them here. There is nothing analogous to them in the provision of our Act (s. 25, sub-s. 1, below) for sanctioning certain voluntary agreements by registration. It is also difficult at first sight to say, without doing some violence to language, that in the common affairs of life a promise is

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of State v. *Madho Ram* (1929) 10 Lah. 493, 502; 1929 A.L. 114; *Grainger* v *Gough* (1896) A.C. 325 (H.L.)

76 *Harvey* v. *Facey* (1893) A.C. 552. Followed in *MacPherson* v. *Appanna,* 1951 A.S.C. 184.

77 *Pooran Singh* v. *Krishna Bai,* 1951 A.M. 396.

78 *Gibson* v. *Manchester City Council* (1979) All E.R. 977.

79 *Butler Machine Tool Co. Ltd.* v. *Ex-Cell-O Corporation (England) Ltd.,* (1979) 1 All E.R. 965, 967, 968, *Hyde* v. *Wrench* (1840) 3 Beav. 334; *Brogden* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. 666 appld.

80 *Shyam Sunder* v. *Parlakimedi Municipality* (1964) A.Or 111.

81 This is subject to the important qualification that specific performance of a merely voluntary covenant will not be granted. In most American jurisdictions the peculiar law concerning the form and effect of deeds has been altered by legislation.

always an accepted proposal. Take the case of a man offering to sell and deliver goods on credit, then and there, to another who at first does not want the goods, but is finally persuaded to take them at a price named by the seller. Here the seller delivers the goods and receives in exchange the buyer's promise to pay for them. Now the buyer's promise has never been a proposal: the seller offered to sell, and the buyer accepted the offer by taking the goods and pledging his credit. It may be said, however, that the buyer must be deemed to adopt the seller's terms at the last moment before delivery of the goods. For the seller will not deliver them unless he knows that he will get the buyer's promise to pay for them; and the only way in which he can be sure of this is the existence of a proposal from the buyer to become liable for the price, which proposal will become a promise on the goods being delivered. Further, it may be said that this is the only way in which the promise can really be simultaneous with the performance for which it is exchanged, as the theory of the Common Law requires it to be. Both these reasons (though the force of the latter appears to be destroyed in India by sub-s. (d), as we shall see) appear to be sound, and sufficient on principle to justify the language of the Act. The case of mutual promises will be considered when we come to it under sub-s. (d).

New Agreement.—Where an employer asked his employee who was claiming his wages to wait till the disposal of the appeal it gives rise to a new agreement and falls under section 2(a) of the Contract Act.[82]

Option and offer.—The feature which distinguishes an option from a mere offer is consideration.[83] A circular by a bank notifying a raise in the bank rate on over-drafts is not an express but an implied proposal under s.2(a); if a constituent keeps alive his overdraft and even makes further borrowings, it would imply his promise to pay at a higher rate.[84]

Promise and Consideration.—Again, the technical use of the word "promise" in the Act is far narrower than the popular use. Express words of promise may be and often are in law no more than a proposal.[85] In common life many promises are made, and regarded as morally binding between one person and another, without any "view to obtaining the assent of that other" to the contents of the promise. In common speech no one thinks of acceptance by the promisee as being an essential condition which must be satisfied before a declaration of intention amounts to a promise. It may be asked, then, why the word "promise" should not have retained its literal and proper meaning, and further why all deliberate promises should not be binding, subject to necessary exceptions and regulations. For example, a promisor could not be held to remain bound if the promisee refused to accept; and some rules of evidence would be required by way of caution, so that men should not be burdened by legal obligations in consequence of hasty or trifling words which the other party had no moral right to take seriously. The answer is that the way thus suggested has indeed been taken by other systems of law, and especially the modern Roman law, which has been adopted on the continent of Europe and in the kingdom of Scotland, but the common law has taken a distinct road of its own. Apart from the peculiar case of a promise made by deed, English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value, and the parties treat as such by making it a subject of bargain[86] The value so received in exchange for the promise may consist in present performance, for example the delivery of goods, or it may itself be the promise of a performance to come. These elements are embodied in the definition of consideration by cl. (d) of our section. This clause is especially open to the remark that what purports to be interpretation of terms is really substantive enactment. Only in s. 25, however, with partial anticipation in ss. 10, 23, and 24 does it appear for what purpose the notion and definition of consideration have been introduced.

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82 *Union of India* v. *T.L. Dakshinamurthy* (1975) A.M. 337, 340.

83 *Goldsbrough Mort & Co. Ltd.* v. *Quinn* (1910) 10 C.L.R. 674.

84 *Hulas Kanwar* v. *Allahabad Bank Ltd.* (1958) A.Cal. 644.

85 Thus a letter requesting a loan of money, and promising repayment with interest on a certain day, is not a promissory note but a mere proposal for a loan. *Dhondbhat* v. *Atmaram* (1889) 13 Bom. 669; *Narayanasami* v. *Lokambalammal* (1897) 7 Mad. L.J. 220.

86 See under S. 25 under consideration; *infra*.

Consideration necessary.—Consideration is a necessity to the validity of an English simple contract though not so in Scotland.[87]

Said Denning L.J. in *Combe* v. *Combe*:[88]

The doctrine of consideration is too firmly fixed to be thrown by a side wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract although not its modification or discharge.

Definition of Consideration.—The terms of the Indian definition must now be examined. They do not appear to follow those of any authoritative English exposition; they expand, with only verbal difference, those of one of the explanations in the Commissioner's original draft.[89] Whether it was so intended by the framers or not, some of the terms are capable, in their literal meaning, of restoring a doctrine which was long ago finally disallowed in England, and, moreover, they have been held to have that effect.

In a recent Supreme Court case [90] Subbarao J. compared the content of the definition of consideration in *Currie* v. *Misa*[91] and of the definition in s.2 (d) of the Act.

According to English Law[92] it is:

"A valuable consideration in the sense of the law may consist either in some right, interest, forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."[92]

These observations were quoted with approval by the Supreme Court in *Chidambara Iyer* v. *Renga Iyer*[93] and it was observed that the contents of the above definition and of the definition in s. 2(d) is the same. An alternative approach is the view put forward by Sir Frederick Pollock:[94]

"An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.[94]

The definition was approved by the House of Lords.[95]

...it has also found considerable favour with extrajudicial writers,[96] largely because it emphasises the notion of bargain upon which the English Law of contract may be said to be based.

So it is the price of a promise, a return or *quid pro quo* for a promise made.[97] The requirement of consideration, vital to the English conception of contract, is not satisfied by a purely moral obligation, nor is it synonymous with motive. It is the price paid by one party for the

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87 Chitty on Contract, Vol. I (20th Ed.), p. 39. See 24th Ed., paras 1, 2, 24. Stairs Inst. Law of Scotland 95.

88 (1951) 2 K.B. 215, 220; (1951) 1 All E.R. 767, per Denning, L.J. See Lord Simonds in *Tool Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, *Gould* v. *Gould;* (1969) 3 All E.R. 728. (A promise by husband to give £10 a week to wife "as long as I live" not binding as there was no consideration). See also *Gould* v. *Gould,* (1969) 3 W.L.R. 490. (Agreement by husband to pay £15 a week "as long as I have it").

89 S. 10, expl. 3: "A good consideration must be something which at the desire of the person entering into the engagement *another person* (N.B.) has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing." None of the illustrations show any intention to alter the modern common law.

90 *Chidambara Iyer* v. *Renga Iyer* (1966) 1 S.C.R. 168; (1966) A.S.C. 193, 197.

91 (1875) 10 Exch. 153, 162; on app. (1876) 1 App. Cas. 554.

92 *Currie* v. *Misa* (1875) 10 Exch. 153, 162; *cf. Bunn* v. *Guy* (1803) 4 East 190; and *Thomas* v. *Thomas* (1842) 2 Q.B. 851.

93 (1966) A.SC. 193, 197; (1966) 1 S.C.R. 168. But see Cheshire & Fifoot: Law of Contract (5th Ed.), p. 61; (6th Ed.), pp.59, 60. *Dickenson* v. *Abel,* (1969) 1 All E.R. 484; (1969) 1 W.L.R. 295 (Commission paid on sale without specifying service is without valuable consideration).

94 Pollock: Principles of Contract (13th Ed.), p. 133; quoted in *Keshub Mohindra* v. *Commissioner of Gift Tax* (1968) 70 I.T.R. 1, 23.

95 *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (1915) A.C. 847, 885, (1914-15) All E.R. Rep. 333, 335, per Lord Dunedin.

96 Cheshire and Fifoot, *op. cit.*, 60. Law Revision Committee's Sixth Interim Report (1937), para. 17; Salmond and Williams: Principles of the Law of Contract (2nd Ed.), p. 101; Williston: Contracts, S. 100; American Restatement on Contracts, para. 75.

97 Bachawat J. in *Fazlad Din* v. *Panchanan Das* (1957) A.Cal. 92 referring to Chitty on Contract, Vol. I (20th Ed.), p. 39.

promise of the other; and it must move from the promisee. But the Courts will not ask if the price is adequate: this is for the parties themselves to decide.[98]

Adequate consideration.—Consideration must be a reasonable equivalent or other valuable benefit passing from the promisor to the promisee or from the transferor to the transferee. Adequate consideration must be sufficient and valuable considering the facts, circumstances and necessities of the case. Gift on the other hand has no element of consideration; and passing of money is wholly foreign to a gift. It is submitted that the adequacy of consideration is for the parties to bargain about. And the concept given by their Lordships must be confined to the circumstances of the case.[99] Another view is:

"...Detriment to the promisee is of the essence of the doctrine, and benefit to the promisor is when it exists, merely an accident.[1]

The essential thing in a case is that the offeror should state a price which the offeree should pay if he wishes to purchase a promise.[2]

In *Chappell & Co. Ltd.* v. *Nestles Co. Ltd.*[3]

where the latter had advertised to supply one of the six gramophone records named in the advertisement in return for a postal order for one shilling six pence and three wrappers,

it was held that the wrappers were part of the consideration.

The Calcutta High Court referring to page 22 of 9th Edition of Pollock & Mulla's Contract Act with approval said that there is nothing to show in the definition of 'consideration' in section 2(d) of the Contract Act that the benefit of any act or abstinence as contained in that section must directly go to the promisor. A contract can arise even though the promise for doing or abstain[4] from doing something is for the benefit of a third party.[4]

The term "consideration" in the Gift Tax Act must be construed according to its definition in s. 2(d) of the Contract Act. There is nothing to show in that definition that the benefit of any act or abstinence as contained in that section must 'directly' go to the promisor. A contract can arise even though the promisee does or abstains from doing something for the benefit of a third party (in that case a limited company of which the assessees were shareholders and directors) and the promisor can treat benefit to the company as a consideration to them.[5] The consideration may be of benefit to the promisor or to a third party or may be of no apparent benefit to anybody but merely a detriment to the promisee but its adequacy is for the parties to consider at the time of making the contract and not for the court when it is sought to be enforced.[6] Lord Simon distinguished in *Fibrosa's* case[7] the meaning of consideration as used in quasi-contractual sense from that given in a contract.

We take the material phrases in order in a family settlement or a family arrangement which is binding on the parties the mother agreed to pay a sum which fell short of what the elder brother had to pay to the younger brother. Then it is a good consideration which brings about an enforceable agreement between the parties and it is not hit by s.25, Contract Act. The facts in this case were that on the death of the father differences arose between two brothers and the younger brother was claiming fifty lacs from the elder brother. The mother intervened and gave in writing to the younger brother promising to pay what fell short of the amount claimed. And the question arose in Wealth Tax proceedings. It did not matter if

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98 *Thomas* v. *Thomas* (1842) 2 Q.B. 857; 114 E.R. 330

99 *Somia Bhatia* v. *State of UP* (1981) ASC 1280 (A case under S.5(6) of Imposition Ceiling of Land Holdings Act).

1 Holdsworth: History of English Law, VIII, p. 11.

2 67 L.Q.R. 456; 69 L.Q.R. 106; per Sir A. Goodhart.

3 (1960) A.C. 87; (1959) 2 All E.R. 701.

4 *Sudhanshu Mohan Koley* v. *Mathura Mohan Adak* (1975) 1 Cal. 182, 189; *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.* (1972) A.S.C. 1311; *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, (1947) 1 K.B. 130; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (1955) 2 All E.R. 657; *Century Spinning and Manufacturing Co. Ltd.* v. *Ulhasnagar Municipal Council* (1971) A.SC. 1021, 1024. (1970) 3 SCR 854 relied on.

5 *Keshub Mohindra* v. *Commissioner of Gift Tax* (1968) 70 I.T.R. 1, 21.

6 Anson: Law of Contract (22nd Ed.), p. 91 relying on *Bolton* v. *Madden* (1873) 9 Q.B. 55, 57 quoted in *Keshub Mohindra* v. *Commissioner of Gift Tax* (1968) 70 I.T.R. 1, 23.

7 *Fibrosa Spolka Akeyjna* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32, (1942) 2 All E.R. 122, 129.

it was contingent contract under section 31, Contract Act, because when the event had happened it became enforceable under s. 32 Contract Act.[8]

Promise, before payment.—An act done before promise of making a payment or conferring other benefit could be a consideration for the promise where (i) the act was done at the promisor's request (ii) the parties understood that the act was to be remunerated by payment or conferment of a benefit and (iii) the payment or conferring of the benefit were legally enforceable. Since the consideration expressed in the guarantee, by incorporation, the plaintiffs promise in the main agreement not to sell the shares for a year, the defendants guarantee would not be treated as independent of the antecedent promise of the plaintiff not to sell because the parties understood the restriction on the sale to be within price of the shares. The plaintiffs promise was made at the request of defendant. The promise of indemnity was given to fulfill that intention. Hence the promise, although antecedent to the guarantee, was a good consideration and the indemnity given as a guarantee was enforceable.[9]

"At the desire of the Promisor."—The act constituting the consideration must have been done at the desire or request of the *promisor,* as when a person contracts a marriage in consideration of a promise of a settlement.[10] An act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff, not at the desire of the defendants, but of the Collector of the place, is void under s. 25, being without consideration.[11] Nor can it be supported under cl. 2 of that section, which enacts that an agreement without consideration is void, unless it is a promise to compensate a person who has already voluntarily done something for the promisor. The expression "voluntarily" appears to be used in contradistinction to the words "at the desire of the promisor".[12] In this case, even if the market were not established by the plaintiff at the desire of the defendants, the agreement would be binding, provided it was done by the plaintiff voluntarily *for the defendants.* The Court, however, found that the market was not constructed by the plaintiff for the defendants so as to bring the case within the provisions of s. 25, cl. 2.

Questions may sometimes arise whether the thing done by the plaintiff claiming under a promise was in fact done *at the desire of the promisor.* The Commissioners of the Howrah Municipality created themselves by deed trustees for the purpose of building a town hall in Howrah and inviting and collecting subscriptions for that purpose. The defendant was a subscriber to this fund of Rs. 100, having signed his name in the subscription book for that amount. As soon as the subscriptions allowed, the Commissioners, including the plaintiff, who was also vice-chairman of the municipality, entered into a contract with a contractor for the purpose of building the town hall. The defendant not having paid his subscription, a suit was brought against him by the plaintiff on behalf of himself and all the other Commissioners who had rendered themselves liable to the contractor. It was held that the suit would lie, as there was a contract for good consideration. It was stated in the course of the judgment that the subscriber knew the purpose to which the subscriptions were to be applied, and also knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work.[13] In fact, the act of the plaintiff (promisee) in entering into the contract with the con-

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8 *Commissioner of Wealth Tax, Mysore* v. *Vijayaba Dowger Maharani Sahiba* (1979) A.SC. 982, 983, 984; (1979) 3 S.C.R. 545; *Kesoram Industries & Cotton Mills Ltd.* v. *Commissioner of Wealth Tax (Central) Calcutta* 59 I.T.R. 767; (1966) A.SC. 1370, 1377 (1377); *Bombay Dyeing & Mfg. Co. Ltd.* v. *Commissioner of Wealth Tax, Bombay City I,* 93 I.T.R. 603; (1975).A.SC. 756; *Standard Mills Co. Ltd.* v. *Commissioner of Wealth Tax,* Bombay 63 I.T.R. 470; (1967) A.SC. 595.

9 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 74 (P.C.)

10 *Nanjunda Swami Chetti* v. *Kanagaraju* (1919) 42 Mad. 154, 159; 49 I.C. 666. It does not follow that where there are several promises included in one transaction a distinct "desire" must be found for each one, though the comment in *Vishveshvar* v. *Sadashiv* (1925) 27 Bom. L.R. 1456; 93 I.C. 930; 1926 A.B. 54, seems to go near to asserting this: *qu.* whether in that case there was a concluded agreement at all.

11 *Durga Prasad* v. *Baldeo* (1880) 3 All 221.

12 *Sindha Shri Ganpatsingji* v. *Abraham* (1895) 20 Bom. 755, at p. 758; *Raja of Venkatagiri* v. *Sir Krishnayya,* 1948 A.P.C. 150, 50 Bom. L.R. 517.

13 *Kedar Nath* v. *Gorie Mahomed* (1886) 14 Cal. 64, the statement of the facts in the body of the report is

tractor may be said in this case to have been done at the desire of the defendant (promisor) so as to constitute a consideration within the meaning of the section for the promise to pay the subscription. If there were no contract with the contractor, or if no liability had been incurred and nothing substantial had been done on the faith of the defendant's promise, the promise to pay the subscription would have been without consideration, and therefore void. It would seem to follow that in the opinion of the Calcutta High Court every promise of a subscription to a public or charitable object becomes a legal promise, and enforceable by the promoters, as soon as any definite steps have been taken by them in furtherance of the object and on the faith of the promised subscriptions. There are two English decisions of a similar kind, *Re Soames,*[14] *Re Mountgarret.*[15] In *Re Soames, S.* promised to leave the plaintiffs £3000 by his will for the maintenance of a school. The plaintiffs established a school, which the court held they would not have done, but for *S*'s influence. The will contained no such bequest, but the executors of *S* were held liable. In *Re Mountgarret, M* suggested that estimates be obtained for the cost of supplying seating in a school chapel. The school authorities obtained designs though no means were available. The designs were sent to *M,* and he replied that the school could look to him for £2800. He also stated that he was willing for lectern, pulpit and organ work to be added if the cost was not above £3000. Plans for the additional work were prepared, but then *M* died. *M*'s estate was held liable for the seating, and the plans for the other work, but not the actual work. These two English decisions seem in accordance with the principle of unilateral contracts, that is where there is a promise for an act. *A* makes a promise to *B* if *B* performs an act. *B* is at liberty to act or not, but if he does so *A* is liable on his promise. *Re Mountgarret* indicates that a promisor in such a case may revoke his promise at any time, and remain liable only for work done up to that time. There is little English authority on the point, but in *Errington* v. *E.* Denning L.J. in the Court of Appeal expressed the opinion that such a revocation is impossible once the promisee has started on performance.[16] The Madras High Court has followed the decision of the Calcutta High Court and held that where a person promises to pay a subscription for a particular object and steps have been taken in furtherance of the object on the faith of the promised subscription, the subscriber is liable.[17] In a subsequent case it was held by the same High Court that a promise to pay a subscription in order to meet a liability already incurred was not enforceable as in such a case it could not be said that there was any request by the promisor to the promisee to do something in consideration of the promised subscription.[18] In an Allahabad case where a Mahomedan subscribed Rs. 500 to a fund started to rebuild a mosque, and no steps were taken to rebuild the mosque, it was held that the promise was without consideration, and that the subscriber was not liable.[19] Mere willingness to utilise a donation for the purposes of a trust which was proposed to be set up for promoting technical or business knowledge including knowledge of insurance cannot be regarded as consideration within s. 2(d). [20] The facts of that case were:

In pursuance of a resolution of the company an insurance company paid 2 lakhs out of shareholders' fund towards a certain memorial trust proposed to be formed to promote technical or business knowledge including insurance. After the payment insurance business was taken over by and vested in the Life Insurance Corporation, the trustees of the Trust were called upon to return the amount so paid. This

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inadequate. Dist. *Adaitya Dass* v. *Prem Chand* (1928) 120 I.C. 105; 49 C.L.J. 278; 1929 A.Cal. 369 (no evidence of plaintiff's expense being incurred at defendant's request). Also dist. in *Dr. Gopal* v. *Trimbar,* 1953 A.N. 195.

14 (1897) 13 T.L.R. 430.

15 (1913) 29 T.L.R. 325.

16 (1952) 1 K.B. 290, 295.

17 *District Board of Ramnad* v. *Mahomed Ibrahim,* 1933 A.M. 524; 64 Mad. L.J. 574; 143 I.C. 496; cf. *Perumal* v. *Sendanatha,* 1918 A.M. 311; 44 I.C. 479.

18 *Doraswamy* v. *Arunachala,* 1936 A.M. 135; 159 I.C. 345.

19 *Abdul Aziz* v. *Masum Ali* (1914) 36 All 268; 23 I.C. 600. Cp *Re Hudson* (1885) 33 W.R. 819; 54 L.J. Ch; 811 Claim in administration suit for unpaid instalments of testator's promised subscription with allegation of expense and liabilities incurred on the faith thereof, treated as unarguable. The Court did however indicate that had the claim been for liabilities actually incurred by the plaintiffs it might have been successful. The case was not cited in *Re Soames* or *Re Mountgarret (supra) Re Hudson* was applied in *Commissioner of Income Tax* v. *Kameswar Singh,* 1953 A.P. 231.

20 *Dr. Lakshmanswami Mudaliar* v. *Life Insurance Corporation* (1963) A.S.C. 1185, 1190; (1963) supp.

amount was held to be a donation and the resolution of the company and acceptance by the trustees did not constitute a contract and even if it was an offer there was no consideration moving from the trustees.

And the donation was *ultra vires* of the company.[21] At all events a voluntary payment, even if repeated, is not in itself evidence of a promise to continue it.[22] The question of consideration for a promise only arises if the offer is accepted so as to ripen into an agreement and if there is no concluded agreement between the parties then the further question whether it is supported by consideration would not arise.[23]

When Contract Constituted.—A Company entered into a contract with 'B', the owner of a building site, to construct a building within two years, and if the building was completed in pursuance of the stipulations and the building was approved by B's surveyors, 'B' agreed to lease out the building to 'A' for 125 years. The lease was granted as agreed. 'A' assigned the lease to another group of Companies for larger sum of money. The question arose in taxation for Capital Gains Tax which depended on the date of the lease. It was held that the contract was not a conditional contract and the lease was acquired by the lessee on the date of the contract and not on the date of execution of the lease .[24]

The Supreme Court has held that a lessor does not recognise the transferee of a lessee as the substitute of the original lessee by receiving a part of the lease money from him without recognising the transferee as his debtor. Failure of the lessee to make payment of his liability to the lessor in stipulated time will entitle the lessor to recover possession according to the lease agreement between the lessor and the lessee.[25]

Fundamental Condition of Contract.—'C' agreed with 'T' to introduce a financier who would finance the project which 'T' was proposing to put up. The condition was that the building contract would be given to 'C', but the parties could not agree on the price of construction, and, therefore, the contract fell through and 'T' employed other contractors to do the work. 'C' claimed that 'T' was in breach of the contract in employing others. It was held that T agreeing to give the building contract to 'C' under conditions abovementioned did not give rise to an enforceable contract between the two because (1) price was a matter which was fundamental to the contract and (2) a contract to negotiate even though supported by consideration was not a contract known to the law since it was too uncertain to have any binding force.[26]

Contractual duty no consideration:—Although the rule that a promise by one party to a contract to fulfil his contractual duty towards the other party did not constitute good consideration was still good law, so that in a contract to build a ship the builders' original liability to build the ship did not constitute good consideration for an agreement to pay further percentage, but on a devaluation of currency the increase by the ship builders in the amount of their letter of credit which they had agreed to give as security for instalments was sufficient consideration on their part for that agreement since by increase they had undertaken an additional obligation or had rendered themselves liable to an increased detriment, and were not merely fulfilling their existing contractual duty.[27]

"Or any other person."—In modern English law it is well settled that consideration must move from the promisee.[28] Under the Act, however, consideration may proceed from the promisee *or any other person*. The result, according to the decisions now to be cited, is to restore

21 *Ibid.*

22 *Jiban Krishna Mullick* v. *Nirupama Gupta* (1926) 53 Cal. 922; 96 I.C. 846; 1926 A.Cal 1009; *Jamuna Das* v. *Ram Kumar, 1937 A.P. 358; 169 I.C. 396.*

23 *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdoor Union,* 1956 S.C.R. 872 at p. 885; 1957 A.SC. 95.

24 *Eastham (Inspector of Taxes)* v. *Leigh London & Provinical Properties Ltd.* (1971) Taxation Law Report 1976.

25 *Prakash Chand Khurana* v. *Harbans Singh* (1973) A.SC. 2065, 2068; *Nochulliyil Euzhuvan Theethi* v. *Eralpad Rajah, 40 Mad, 1111; Saradindu Mukherjee* v. *Sm. Kunja Kamini Roy* (1942) A.C. 514; *Krishna Bhatta* v. *Narayana Achary* (1949) A.M. 618 disting.

26 *Courtney and Fairbairn Ltd.* v. *Tolaini Brothers (Hotels) Ltd. and another* (1975) 1All E.R. 716.

27 *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd. and another* (1978) 3 All ER. 1170.

28 "The meaning of this rule seems to be that the matter of the consideration must be given, done, or suffered by the promisee himself, or, if by a third party, at the request and by the procurement of the

the doctrine of some earlier English decisions which are no longer of authority in England. In *Dutton* v. *Poole*,[29] decided so far back as 1688, where the father of a bride was about to fell timber on his estate to provide a marriage portion for her, and refrained from doing so on the eldest son promising to pay the amount to her, it was held that the daughter could maintain an action against the son on the promise to the father, It will be observed that no consideration proceeded from the daughter. She was not a party to the contract, and the whole consideration moved from the father. On the faith of the son's promise. the father abstained from felling the timber, and as a result the estate with the timber descended to the son as the heir-at-law. The ground of the decision was that, having regard to the near relationship between the plaintiff (daughter) and the party from whom the consideration moved (father), the plaintiff might be considered a party to the consideration. That is to say, a stranger to the consideration could, by construction of law, be regarded as a party to it, if he was closely related to the person from whom the consideration actually proceeded. But this decision is no longer law in England, and was finally set aside by *Tweddle* v. *Atkinson*.[30] In that case, decided in 1861, an agreement was entered into between the respective fathers of a husband and wife that each should pay a sum of money to the husband, and that the husband should have full power to sue for such sums. After the death of both the contracting parties the husband sued the executors of the wife's father upon the above agreement, but the action was held not to be maintainable. The husband was a stranger to the consideration, and the plea of nearness of relationship to the contracting parties was regarded as of no consequence. As to *Dutton* v. *Poole*. it was said that there was no modern case supporting that decision, and its authority was treated as overruled. It may now be taken as an established rule of English law that a third party cannot sue on a contract though made for his benefit, and the nearness of relationship cannot be invoked to import what may be called constructive consideration. The principle is as well established as any "in our law," said Lord Simonds in *Scruttons Ltd.* v. *Midland Silicones Ltd.*,[31] a "fundamental" principle as Lord Haldane called it in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co.*;[32] an "elementary" principle as it has been called times without number.[33] But the Privy Council declined to apply this Common Law rule to marriages under Muslim Law [34] or to partitions of joint properties.[35]

Dutton v. *Poole* was relied on, and *Tweddle* v. *Atkinson* distinguished, by Innes J., in *Chinnaya* v. *Ramayya*[36] in the High Court of Madras. In that case, *A*, by a deed of gift, made over certain property to her daughter, with a direction that the daughter should pay an annuity to *A*'s brother, as had been done by *A*. On the same say the daughter executed a writing in favour of the brother agreeing to pay the annuity. The daughter declined to fulfill her promise, and the brother sued the daughter to recover the amount due under the agreement. On behalf of the daughter it was contended that no consideration proceeded from the brother, and that he, being a stranger to the consideration, had no right to sue, Innes J. held, following *Dutton* v. *Poole*,[37] that the consideration *indirectly* moved from the brother to the daughter, and that he was, therefore, entitled to maintain the suit, *Tweddle* v. *Atkinson* was distinguished upon the ground that there no consideration proceeded either directly or indirectly from the husband, as he was not worse off from the non-fulfilment of the promises than he would have been if they had not been made. It does not appear probable that this ingenious attempt to save the authority of *Dutton* v. *Poole* would be supported in an English

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promisee, and as the agreed equivalent for the promise; and, with this meaning, the rule seems to import no more than is necessarily implied in the conception of a consideration as an essential part of the agreement": Leake Law of Contracts, 8th ed. (1931) p. 459.

29 (1688) 2 Lev. 210 appd. by Lord Mansfield in *Martyn* v. *Hind* (1779) 2 Cowp. 437, 443.

30 1 B. & S. 393; 124 R.R. 610. See especially the judgment of Crompton J. This has been the law for over a century and accepted by H.L. in *Beswick* v. *Beswick* (1967) 3 W.L.R. 932, 955 (H.L.): (1967) 2 All E.R. 1197. See contra Denning M.R. in the same case (1966) Ch. 538; (1966) 3 All E.R. 1 (C.A.).

31 1962 A.C. 446; (1962) 2 W.L.R. 186; (1962) 1 All E.R. 1.

32 1915 A.C. 847, 853; (1914-15) All E.R. Rep. 333.

33 *Scruttons Ltd.* v. *Midland Silicones Ltd.*, 1962 A.C. 446 (1962) 1 All E.R. 1; (1962) 2 W.L.R. 186, 191 (H.L.).

34 *Khwaja Muhammud Khan* v. *Husaini Begum*, 37 I.A. 152.

35 *Dan Kuer* v. *Sarla Devi*, 73 I.A. 208; (1947) A.P.C. 8, 15.

36 (1881) 4 Mad. 137.

37 (1688) 2 Lev. 210.

He held that estate duty was not payable on the daughters' annuities.[56]

Referring to this judgment, Lord Denning said in *Beswick* v. *Beswick*[57] that it was wrong to say that the daughters had no enforceable interest.

"Can the transferee take the assets and reject the promise? I think not.... In my opinion a contract such as this, for the benefit of widow and children, is binding."

The observations to the contrary *in re Millers Agreement* [56] and *Green* v. *Russell*[58] were held to be erroneous.

Lord Denning challenged the efficacy of the decision in *Tweddle* v. *Atkinson*[59] and characterised it as wrongly decided and as out of line with the law settled in previous centuries.[60] He considered the original common law rule to be more in accord with the needs of civilised society and remarked that in the United States and in Scotland the original view prevails.[61] The Court of Appeal by a majority held in *Beswick* v. *Beswick*[62] that a person for whose benefit a contract is made can sue on the contract in the name of the contracting party or jointly with him and if he refuses to join by adding him as a co-defendant. A somewhat similar view was expressed by Jenkins C.J. in *Debnarayan Dutt* v. *Chunilal Ghose*.[63] He said:

"In India we are free from these trammels (reference is to *Tweddle* v. *Atkinson* (1861) I B. & S.393) and are guided in matters of procedure by the rule of justice, equity and good conscience.

But the House of Lords[64] did not accept this view and considered the decisions of the House in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[65] and *Scruttons Ltd.* v. *Midland Silicones Ltd.*[66] as a bar to such suits. The English Law Revision Committee recommended in 1937 a revision of the law relating to consideration and third party rights thus: "that where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name."[67]

Privity—cestui que trust.—The general rule is that only the persons entitled to the benefits or bound by the obligations of a contract are entitled to sue or be sued upon it.[68] This is so even where it is clear from the contract that some provision in it was intended to benefit such third party.[69] Nor can it be used as a shield and not a sword. Therefore, if *A* for good consideration agrees with *B* that he will not sue *C* for *C*'s negligence, the latter will not be able to set up the promise of *A* to *B* as defence. There is no difference in principle between *A* promising *B* to pay *C* and *A* promising *B* that he will not claim that which *C* ought to pay *A*.[70] The Calcutta High Court has held that where a contract is made for the benefit of a third per-

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57 (1966) 3 W.L.R. 369, 402 (C.A.): (1966) 3 All E.R. 1.
58 (1959) 2 Q.B. 226; (1959) 3 W.L.R. 17; (1959) 2 All E.R. 525.
59 (1861) 1 B. & S. 393; (1861-73) All E.R. Rep. 369.
60 *Beswick* v. *Beswick* (1966) Ch. 538; (1966) 3 W.L.R. 396 (C.A.); *Drive Yourself Hire Co.* v. *Strutt* (1954) 1 Q.B. 250, 273-4; (1953) 2 All E.R. 1475, 1483. This view was not accepted by the Australian High Court in *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-7) 40 A.L.J.R. 471, 486; see infra.
61 *Drive Yourself Hire Co.* v. *Strutt* (1954) 1 Q.B. 250, 273-4; (1953) 2 All E.R. 1475, 1483.
62 (1966) Ch.538; (1966) 3 All E.R. 1;(1966) 3 W.L.R. 396 (C.A.) (Salmon L.J. Contra).
63 41 Cal. 137, 145.
64 *Beswick* v. *Beswick* (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932 (H.L); *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471 appd.
65 (1915) A.C. 847; (1914-15) All E.R. Rep. 333.
66 (1962) A.C. 446; (1962) 2 W.L.R. 188 (H.L.). See also *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-7) 40 A.L.J.R. 471, where the opinion of Denning M.R. was doubted.
67 Cmd. 5449 p. 31, refd. to in *Beswick* v. *Beswick* (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932 (H.L.).
68 *Vandepitte* v. *Preferred Accident Insurance Corporation* (1933) A.C. 70, 79; (1932) All E.R. Rep. 527; (1933) A.PC. 2 (P.C.); *Carberry* v. *Gardiner* (1936) 36 S.R. (N.S.W.) 559, 573; *Ryder* v. *Taylor* (1936) S.R. (N.S.W.) 31, 47-49; *Cf. Cathels* v. *Commissioner of Stamp Duties* (1962) S.R. (N.S.W.) 455 (Insurance by husband against death of bodily injury. Both husband and wife killed in an air crash). See *Des Raj* v. *Concord of India Insurance Co.* (1951) A. Punj. 114; *Shiv Dayal* v. *Union of India* (1963) A.Punj. 538.
69 *Scruttons Ltd.* v. *Midland Silicones Ltd.* (1962) 2 W.L.R. 186, 195, 196 (per Lord Reid), 213 (Lord Morris); (1962) 3 All E.R. 1. Crystallised in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393 (a stranger cannot "take advantage" from the contract) and finally established in *Dunlop Pneumatic Co. Ltd.* v. *Selfridge & Co. Ltd.* (1915) A.C. 847.
70 (1962) 2 W.L.R. 186, 213 (per Lord Morris) (H.L.); (1962) 1 All E.R. 1.

son there may be an equity in favour of the third person to sue upon the contract.[71]

Consideration contd.—A second principle is that there must be consideration to the promisor or at his request to some other person by the person enforcing the contract.[72] These two principles are not recognised in the same fashion by some continental countries or in Scotland. Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[73] said that the effect of the doctrine of consideration is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce, has legitimate interest to enforce.

Later cases on the doctrine.—The law has been crystallised in two recent cases; *Beswick* v. *Beswick* and *Coulls's* case. One decided by the English Courts[74] and the other by the High Court of Australia,[75] in which the rigor of the law relating to consideration and third party rights was reagitated. They may well be considered at some length.[74]

Beswick case was this:

One *PB* agreed with his nephew to transfer his business in consideration of the nephew employing him at £6-10s. a week for the rest of his life and to pay to *PB*'s wife after his death an annuity charged on the business at £5 a week for her life. The nephew took over the business but after the death of *PB* refused to pay any sum to *PB*'s widow. She brought an action against the nephew in her capacity as administratrix and her personal capacity. This action was decreed by the Court of Appeal. Lord Denning M.R. held that the rule that no third person can sue or be sued on a contract to which he is not a party is only a rule of procedure. Where a contract is made for the benefit of a third person, the third person may enforce it in the name of the contracting party or his executor or personal representative, or jointly with him, or, if he refuses to sue, by adding him as a co-defendant."[76]

Danckwerts L.J. there held that a contract to make a money payment can be specifically performed.[77] When the matter was taken to the House of Lords, the decision of the Court of Appeal was affirmed but the question whether the widow was entitled to sue at common law in her personal capacity as beneficiary, was not argued and the correctness of the decision in *Tweddle* v. *Atkinson*[78] was not challenged. *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[79] and *Midland Silicones* v. *Scrutton's Ltd.*[80] were considered as the greatest difficulty in the way of widow's right to sue personally. The Lords held that the widow as administratrix of the estate of her husband was entitled to enforce the agreement by way of specific performance in her own favour notwithstanding that damages recoverable for her husband's estate were or might be nominal.[81] Lord Reid was of the opinion that the widow had no right in her personal capacity but as an administratrix she could sue for specific performance for the

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71 *Khirod Behari Dutt* v. *Man Gobinda*, 1934 A.Cal. 682; (1934) 61 Cal. 841. Jenkins C.J.'s observations in *Debnarayan Dutt* v. *Chunilal Ghose*, 41 Cal. 137; (1941) A.Cal. 129; and *Dwarika Nath* v. *Priya Nath*, 36 I.C. 792; (1981) A.Cal. 941 reld. on; *Khirod's case* was not approved by the Privy Council in a Malayasian case *Kepong Prospecting Ltd.* v. *Schmit* (1968) 2 W.L.R. 55; see supra.

72 *Dunlop Pneumatic Co. Ltd.* v. *Selfridge & Co. Ltd.*, (1915) A.C. 847. *Snelling* v. *John Snelling Ltd.*, (1972) 1 All E.R. 79.

73 *Ibid.*

74 *Beswick* v. *Beswick* (1966) Ch. 538; (1966) 3 All E.R. 1, (1966) 3 W.L.R. 396 (C.A.); (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932 (H.L.).

75 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471.

76 *Beswick* v. *Beswick* (1966) Ch. 538; (1966) 3 All E.R. 1; (1966) 3 W.L.R. 396 (C.A.) (Salmon, L.J. Contra). Contra *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471, 477, 486; *Cf. Debnarayan Dutt* v. *Chunilal Ghose*, 41 Cal. 137, 145 (per Jenkins C.J.— Courts in India not hampered by *Tweddle* v. *Atkinson)*.

77 *Beswick* v. *Beswick* (1966) 3 W.L.R. 396, 410; (1966) 3 All E.R. 1 upheld by the House of Lords on appeal (1967) 3 W.L.R. 932; (1967) 2 All E.R. 1197 (H.L.); *Hohler* v. *Aston* (1920) 2 Ch. 420 (contract relating to purchase of a house); *Keenan* v. *Handley*, 2 DeG.J. & Sm. 283 (annuity); *Drimmie* v. *Davies* (1899) 1 Ir.R.176, 190 (annuity).

78 (1861) 1 B. & S. 393.

79 (1915) A.C. 847; (1914-15) All E.R. Rep. 333 (H.L.).

80 (1962) A.C. 446; (1962) 2 W.L.R. 188 (H.L.).

81 *Beswick* v. *Beswick* (1967) 2 All E.R. 1197, 1205, 1207, 1209, 1214, 1220 and 1221; (1967) 3 W.L.R. 932 (H.L.); *Swift* v. *Swift* (1841) 3 Ir.Eq.R. 267; *Keenan* v. *Handley*, 2 De G.J. & Sm. 283; 46 E.R. 384 (annuity); *Drimmie* v. *Davies* (1899) 1 Ir. 176 (annuity); and *Hohler* v. *Ashton* (1920) 2 Ch. 420 applied (contract relating to purchase of a house).

benefit of herself (p. 1205). Lord Hodson was of the same opinion (p.1207). For an unconscionable breach of faith, the equitable remedy was apt (p. 1208). So was Lord Guest. Lord Pearce was of the opinion that specific performance was the proper remedy[82] (p. 1212). Lord Upjohn held that in common law, a third party cannot sue to enforce a contract but equity must come in for the purpose of specifically enforcing a right (p.1218).

If the husband of the widow, said Lord Upjohn, in his lifetime could enforce the contract, there was no reason why the widow could not sue for her benefit (p.1219). The power of equity to specifically enforce a contract in favour of third party at the instance of the contracting party was not in doubt (pp. 1220, 1221). And further equity will act if damages would only be nominal[83] *Note:* pages mentioned herein are of the All E.R. The House of Lords in a later case observed that the question of third party rights required reconsideration *Wodar Investment Development Ltd.* v. *Winpey Construction (U.K.). Ltd.* (1980), All E.R. 571, 583.

In *Hohler* v. *Aston,*[84] Sargent J. enforced a contract relating to the purchase of a house for the benefit of third parties who were joined as co-plaintiffs but the relief was given to the plaintiff who made the contract. In *Keenan* v. *Handley*[85] the court enforced an agreement providing the benefit of an annuity in favour of the mother who was a party and after her death to her child who was not a party to it. In *Drimmie* v. *Davies,*[86] the Irish Court of Appeal ordered specific performance of an agreement whereby annuities were provided for third parties.

In *Coulls's* case,[87] "O" Company for a consideration of £5 agreed to quarry stone from the property of *C* and agreed to pay a fixed minimum royalty of £12 per week to *C* and his wife during their joint lives and thereafter to the survivor. The document was signed by the company, the husband and the wife. The wife was held entitled to receive the royalties after her husband's death and notwithstanding that she gave no consideration, she could enforce this right.

Barwick C.J. held that a person not a party to a contract may not himself sue upon the contract so as directly to enforce its obligations. But it is possible for that person to obtain the benefit of a promise made with another for his benefit by steps other than enforcement by himself in his own right.[88] It was also held:

In a contract where a promise by *A* is made to *B* & *C* for consideration to pay *B* & *C*, it is not open to *A* to question whether the consideration moved from both *B* & *C* or as between themselves only from one of them. The agreement was a promise in respect of which there was privity between *A* on the one hand and *B* & *C* on the other. It is enforceable in the joint lifetime of *B* & *C* but if both are parties to the action to enforce it. *B* though he supplied the consideration could not sue alone. If *C* were unwilling to join as plaintiff he could be joined as a defendant but judgment would be in favour of both *B* & *C*. Similarly if *B* would not join in the action, *C*, could join *B* as a defendant and with a similar judgment, i.e. in favour of *B* & *C*.[89]

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82 *Hart* v. *Hart* (1881) 18 Ch.D. 670, 685 (per Kay J. an agreement for valuable consideration and partially performed should be carried out by a decree for specific performance) and *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471 refd. to and appd.

83 *Beswick* v. *Beswick* (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932 (H.L.), referring to cases of specific performance of contracts for benefit of third parties; *Hohler* v. *Aston* (1920) 2 Ch. 420 at p. 950 (purchase of a house for the benefit of third parties); *Keenan* v. *Handley,* 2 De G.J. & Sm. 283 at p. 950 (annuity to mother, and after her death to her child not a party) and *Drimmie* v. *Davies* (1899) 1 Ir.R. 176, 190 (Holmes, L.J.) annuities provided for third parties); *Wilson* v. *Northampton & Banbury Junction Ry. Co.* (1874) 9 Ch. App. 279, 284 (specific performance instead of damages when Court can do more complete justice); Windeyer J.'s observations in *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471, 486 appd. (then unreported); *Veeramma* v. *Appayya* (1957) A.AP. 965.

84 (1920) 2 Ch. 420 quoted in *Beswick* v. *Beswick* (1967) 3 W.L.R. 932, 950 (Lord Pearce) H.L.

85 2 De G.J. & Sm. 283 quoted by Lord Pearce in *Beswick* v. *Beswick* (1967) 3 W.L.R. 932, 950 (H.L.).

86 Holmes L.J. (1899) 1 Ir.R. 176, 190.

87 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-7) 40 A.L.J.R. 471.

88 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471, 477, 483; *Beswick* v. *Beswick* (1966) Ch. 538 reld. on); *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co. Ltd.,* 1915 A.C. 847 dist. on the ground that the promise was gratuitous and privity was not lacking. See *Beswick* v. *Beswick* (1967) 2 All E.R. 1197 (H.L.) approving *Coulls's* case.

89 Per Garfield Barwick C.J. in *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471, 477.

In neither of these cases could *A* successfully deny either privity or consideration.

Similarly, if *B* were dead, the representatives of *B* would have to be joined by *C* because *A*'s promise was not made with *C* alone though the judgment will be in favour of *C* being the survivor.[90] The mode of enforcing would be by the executor enforcing the promise to pay the survivor, i.e. for the benefit of the widow.

Windeyer J. reviewed the law relating to consideration and the right of third parties to enforce a contract where consideration moves from a joint promisee and seems to hold that *C* (the wife) could enforce the contract in the manner suggested by the Chief Justice.[91] After quoting from Lord Selbourne that

"the Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice"[92]

and referring to Lord Erskine L.C. in *Alley* v. *Deschamps*.[93] Windeyer J. said:[94]

"Complete and perfect justice to a promisee may well require that a promisor perform his promise to pay money or transfer property to a third party. I see no reason why specific performance should not be had in such cases..."

The wife "could compel proceedings to enforce the contract".

Both *Beswick* v. *Beswick* and *Coulls's* case have provided some amelioration of the position of the *tertius*, e.g. to enforce the agreement as administratrix of her husband and to do so by way of an order for specific performance in her own personal favour.[95]

U.S.A.

In the U.S.A. in most but not in all jurisdictions, third persons (both donee beneficiaries or creditor beneficiaries)[96] are now able to sue directly upon contracts made by others for their benefit.[97] This view has been accepted after much conflict among courts and commentators:

Williston on Contracts (3rd Ed.) Vol. I, s. 114 contains the following question:

"Does the law require that promises shall be paid for by the promisee or does it merely require that the promise shall be paid for by some one?"

The rule as deducible from these cases is that third parties for whose benefit a contract has been made may not sue on the contract but the party making the contract may sue for specific performance for the benefit of the third party even where damages obtainable will be nominal.

Consideration—continued

In *Gurtner's* case.[98] the facts were:

By an agreement between the Minister of Transport and the Motor Insurers Bureau the latter agreed to pay the full amount of a judgment in favour of any injured person if that remained unsatisfied for seven days. The injured person not being a party, the Minister can sue for specific performance and can compel the bureau to honour its agreement by paying the injured person.

Lord Denning M.R. also held that if the Minister obtains an order for specific performance the injured person can enforce it for his own benefit.[98] and if the Minister hesitates to

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90 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471, 477-8 appd. in *Beswick* v. *Beswick* (1967) 2 All E.R. 1197 (H.L.). See *Allwood* v. *Rattenbury* (1822) 6 Moo C.P. 579, 584.

91 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 477, 487 quoted with approval in *Beswick* v. *Beswick* (1967) 2 All E.R. 1197, 1213, 1221.

92 *Wilson* v. *Northampton & Banbury Junction Ry. Co.* (1874) 9 Ch. App. 279, 284.

93 (1806) 13 Ves. 225, 227.

94 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.*, 40 A.L.J.R. 471, 487; *Beswick* v. *Beswick* (1967) 3 W.L.R. 932, 941 (Lord Pearce); (1967) 2 All E.R. 1187, 1214.

95 (1967) 3 W.L.R. 932; (1967) 2 All E.R. 1197.

96 40 A.L.J.R. 471. See also 41 A.L.J. 146-8.

97 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471, 484 referring to *Tweedale* v. *Tweedale* (1903) 116 Win. 17; 93 N.W. 440.

98 *Gurtner* v. *Circuit* (1968) 2 All E.R. 668, 674; *Beswick* v. *Beswick* (1967) 3 W.L.R. 932; (1967) 2 All E.R. 1197 (H.L.) folld.

sue the injured person may sue and thus compel performance.[99] (Per Denning M.R.); but Diplock and Salmon L.JJ. held the agreement to be enforceable only by the Minister and the injured party not being a party to the agreement cannot sue against it.[1]

There was no difference in this respect i.e. the right of third parties to sue between law and equity; but where a trust has been created by a contract, a *cestui que trust* can enforce the rights which the trust so created has given him. He is not a party to the contract and his rights are equitable, not contractual, though they arise out of a contract; and this exception to the general rule is apparent only, not real.[2] This equitable exception was applied in India by the Privy Council in *Khwaja Muhammad Khan* v. *Hussaini Begam*.[3] The father of the bridegroom had contracted with the father of the bride to make the daughter an allowanc called *kharch-i-pandan* if she married the son. After the marriage the daughter sued her father-in-law to recover arrears of the allowance. The Privy Council held that though she was no party to the contract yet "she was clearly entitled to proceed in equity to enforce her claim". A subsequent Calcutta case has suggested that in India there is no reason to fall back on this equity and that a person who takes a benefit under a contract may sue on the contract.[4] This view is, it is submitted, incorrect and has been dissented from by the Bombay High Court.[5] It is directly opposed to the decision of the Privy Council in *Jamna Das* v. *Ram Autar*[6] that a purchaser's contract to pay off a mortgage cannot be enforced by the mortgagee who was no party to the contract. Indeed the weight of decisions now is in favour of the view that a person not a party to the contract cannot sue on the contract unless the case comes within one of the recognized exceptions [7] and this seems clearly indicated by the provisions of sub-ss. (a), (b), (c) and (i) of s.2.[8] It has accordingly been held that where *A* mortgages his property to *B*, part of the consideration for the mortgage being *B*'s promise to *A* to pay *C* the amount which *A* owed to *C*, *C* not being a party to the contract, cannot sue *B* for the payment.[9] Similarly, it has been held that where a policy of insurance is effected by the assured on his own life, and the policy is expressed to be for the benefit of his wife, the wife, not being a party to the contract of assurance, is not entitled, in cases not governed by the provisions of the Married Women's Property Act, 1874, to sue the insurance company on the policy unless the policy is assigned in writing as provided by Transfer of Property Act, 1882, s.130, or a trust has been declared by the assured as provided by the Indian Trusts Act. 1882, s.5.[10] Upon the same principle where a

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99 *Gurtner* v. *Circuit* (1968) 2 W.L.R. 668, 674.

1 *Ibid.*, 676, 679, 682.

2 *Fletcher* v. *Fletcher* (1844) 4 Hare 67; *In re Empress Engineering Co.* (1880) 16 Ch.D. 125, per Jessel M.R. at p. 129; *Gandy* v. *Gandy* (1885) 30 Ch.D. 57; *Affreteurs Reunis* v. *Walford* (1919) A.C. 801. Whether a trust is in fact created is a question of interpretation: see Underhill on Trusts, 10th ed., p. 56.

3 (1910) 37 I.A. 152; 32 All. 410; 7 I.C. 237.

4 *Kshirodebihari* v. *Mangobinda* (1934) 61 Cal. 841; 152 I.C. 351; 1934 A.Cal. 682 not appd. in *Kepong Prospecting Ltd.* v. *Schmidt* (1968) 2 W.L.R. 55, 64 (P.C.); *Gauri Shankar* v. *Mangal*, 1933 A.L. 178; 141 I.C. 490. The judgment in the latter case purports to follow *Torabaz Khan* v. *Nanak Chand*, A.I.R. 1932 Lah. 566; 138 I.C. 263, but this seems clearly to have been a case of trust.

5 *National Petroleum Co.* v. *Popatlal* (1936) 60 Bom. 954; 38 Bom. L.R. 610; 165 I.C. 338; 1936 A.B. 344. The two views are discussed in *P.M.G. Patna* v. *Ram Kripal* (1955) A.P. 442.

6 (1911) 39 I.A. 7; All. 63; 13 I.C. 304. See also *Kepong Prospecting Ltd.* v. *Schmidt* (1968) 2 W.L.R. 55.

7 *Ganesh Das* v. *Mt. Banto* (1935) 16 Lah. 118; 158 I.C. 387; 1935 A.L. 354; *Adhar Chandra* v. *Dole Gobinda* (1936) 63 Cal. 1172; 40 C.W.N. 1037; 1936 A.Cal. 663; *Suryanaravana* v. *Basivireddi* (1932) 55 Mad. 436; 139 I.C. 135; 1932 A.M. 457; *Wali Uddin* v. *Ram Rakhan*, A.I.R. 1936 Oudh 313; 162 I.C. 451; *Pheku Ram* v. *Ganga Prasad* (1940) All. 96; 186 I.C. 513; 1940 A.A. 98; *Jnan Chandra* v. *Manoranjan* (1941) 2 Cal. 576; 1942 A.Cal. 251; *Shamji Bhanji & Co.* v. *North Western Railway Co.* (1946) 48 Bom.L.R. 698, 231 I.C. 367, 1947 A.B. 169; *Gulabchand* v. *Laxminarain* (1944) Nag. 46, 212 I.C. 539, 1944 A.N. 120; *Saraswatibai* v. *Haibatrao Ramji* (1945) Nag. 581, 1945 A.N. 261; *Suraj Prasad* v. *Ram Lal* (1947) 25 Pat. 269, 230 I.C. 224, (1947) A.P. 131; *Gajadhar Prasad* v. *Rishabhkumar* (1949) Nag. 122, 1949 A.N. 319; *Mst. Sudama Devi* v. *Ram Kishan Lal*, 1954 A.A. 348.

8 *Kepong Prospecting Ltd.* v. *Schmidt* (1968) 2 W.L.R. 55 (P.C.).

9 *Iswaran Pillai* v. *Sonnivevaru* (1913) 38 Mad. 753; *Kasturamma* v. *Venkatasurayya* (1915) 29 Mad.L.-J. 538; see also *Ganesh Das* v. *Mt. Banto* (1935) 16 Lah. 118; 158 I.C. 387; 1935 A.L. 354.

10 *Shankar* v. *Umabai* (1913) 37 Bom. 471. The parties to the suit in this case were Hindus, and it was

lease contained a stipulation that the lessee would pay to the *zamindar zamindari* dues which were payable by the lessor to the *zamindar*, it was held that the *zamindar*, not being a party to the lease, was not entitled to sue the lessee under the terms of the lease.[11] By a *tharao* the owners of certain villages were given full rights over the forests in those villages under their *vahivat*. Some of these villagers executed contracts in favour of the plaintiffs. But the Government after merger of the States cancelled the *tharaos*. In an action for injunction against the Government it was held that the plaintiffs could not enforce the agreement as they were not parties thereto.[12] So, where a man insures his life expressly for the benefit of his widow, this gives her no lien upon the policy moneys in preference to his creditors.[13] Where a person takes out a policy of insurance on his own life for his own benefit, and dies while the policy is still in force, leaving a will disposing of all his property, the beneficiaries under the will have no right either at law or in equity to enforce payment by the insurer, even though the executors refuse to sue and are made parties to the action.[14] In *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co. Ltd.*[15] it was held that an insurance policy only protected the owner and not the mortgagees. The rule had previously been illustrated by *Yangtsze Insurance Association Ltd.* v. *Lukmanjee.*[16]

Insurance by bailee.—A bailee can insure to cover his full insurable interest upto full value of the goods entrusted to him and if he does that he can recover the full value of the goods though he suffers no personal loss at all. But in that case he will have to account to the owner of the goods who has suffered loss, i.e. he will be trustee for the owners. He would be able to retain so much as would cover his own interest and be trustee for the balance.[17] The argument that in such a case there would be conflict with the principle that parties to a contract cannot confer enforceable rights on third parties was not accepted. The principle preventing *jus quaesitum tertio* firmly established was described by Lord Reid not to be primeval or necessary principle of the Law of England.[18] But courts are not bound to extend it on a logical basis so as to cut down an exception which has stood unchallenged for a century since *Waters* case.[19] The Calcutta High Court has held that such insurance is of the carrier though for the benefit of the owner of the goods who can therefore sue on the contract making the carrier a party.[20]

Privity of contract.—The doctrine of privity of contract implies a mutuality of will and is interaction of parties and their successors. It creates a legal bond or tie or *vinculum juris* personal to the parties. The rule is that no one but the parties to a contract can be bound by it or entitled under it.[21] This doctrine which prevents a third party to enforce a contract operates with equal logic to forbid the contracting parties to enforce obligations against a stranger. So

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held that the provisions of s. 6 of the Married Women's Property Act did not apply to them: *contra Balamba* v. *Krishnaya* (1913) 37 Mad. 483 (F.B.); *Re Engelbach* (1924) 2 Ch. 348 is an English case of the same type.

11 *Mangal Sen* v. *Muhammad Husain* (1915) 37 All. 115; *Adhar Chandra* v. *Dole Gobinda* (1936) 63 Cal. 1172; 40 C.W.N. 1037; 1936 A.Cal. 663.

12 *State of Gujarat* v. *Vora Fiddali* (1964) A.S.C. 1043, 1076.

13 *Krishna Lal Sadhu* v. *Pramila Bala Dasi*, 55 Cal. 1315; 114 I.C. 658; 1928 A.Cal. 518; the principle is strongly reaffirmed. Cp. *Mittar Sain* v. *Data Ram* (1925) 24 All.L.J. 185, 205; 90 I.C. 1000, 1926 A.A. 194.

14 *Miller* v. *National Mutual Life Insurance of Asia Ltd*, (1909) V.L.R. 193; 30 A.L.T. 193.

15 (1924) A.C. 294.

16 (1918) A.C. 585.

17 *Hepburn* v. *Tomlinson (Hauliers) Ltd.* (1966) A.C. 451; (1966) 2 W.L.R. 453, 457; (Carriers case); *Waters* v. *Monarch Fire & Life Assurance Co.* (1843-60) All E.R. Rep. 654; (1856) 5 E. & B. 870 appd. (Warehouseman). There were no orders of the owner and insurance was without his knowledge). Dicta of Bowen L.J. in *Castellain* v. *Preston* (1883) 11 Q.B.D. 380, 397-9, dist.; *Snowwhite Food Products (Pvt) Ltd.* v. *Sohanlal Bagla* (1964) A.Cal. 209.

18 *Hepburn* v. *Tomlinson* (1966) A.C. 451; (1966) 2 W.L.R. 453, 460.

19 *Waters* v. *Monarch Fire & Life Assurance Co.* (1843-60) All E.R. Rep. 654; (1856) 5 E. & B. 870.

20 *Snowwhite Food Products (Pvt.) Ltd.* v. *Sohanlal Bagla* (1964) A.Cal. 209.

21 *Shiv Dayal* v. *Union of India* (1963) A. Punj. 538; (1963) 2 Punj. 463

that a contract between *A* & *B* cannot impose a liability upon *C*. [22] A person cannot be subjected to the burden of a contract to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract.[21]

Goods supplied by the plaintiff to the defendant and admitted to have been received by the latter raise a presumption of an order having been placed by the defendant. It is immaterial whether or not the order was by a partner or a person authorised. The initial onus is thus discharged. Thus the privity of contract was established.[23]

A contract between *A* and Government authorised the latter to take possession of all tools, plant, machinery, stores and materials in or upon the works in certain eventualities of breach of contract. It could not, it was held, jeopardise the property of *B* who had entered into a partnership with *A* with the knowledge of Government and did not impose a liability on him.[21]

Exceptions.—There are exceptional cases in which a promisee may not be entitled to the money even though there was a tryst. In *Cleaver* v. *Mutual Reserve Fund Life Association*[24] a husband insured his life for the benefit of his wife by a policy which created a trust in her favour. The wife was convicted of murdering the husband and, therefore, disqualified from enforcing the trust. It was held that the executors of the husband could sue for the policy money.[25]

Consideration and privity of contract.—It has been controversial whether the rule that consideration must move from the promisee and the doctrine of privity of contract are fundamentally distinct or whether they are merely variations of a common theme. Two different factual situations may indeed arise. The plaintiff may be a party to an agreement without furnishing any consideration.

A, B & *C* may all be signatories to an agreement whereby *C* promises *A* & *B* to pay *A* £100 if *B* will carry out work desired by *C*. There may be another case where the person wishing to enforce a contract may not be a party to the agreement at all.

B & *C* may make an agreement whereby *B* promises to write a book for *C* and *C* promises to pay £100 to *A*.

In neither case can *A* sue *C*. But does he fail in the first case because the consideration has not moved from him and in the second because he is not privy to the contract? Lord Haldane in *Dunlop Tyre Co. Ltd.* v. *Selfridge Co. Ltd.*[26] differentiated the situation in law as well in fact, which was accepted by the Law Revision Committee in 1937. But this view has been criticised and the criticism would seem to be just.[27]

The fundamental assumption of the English Law, it must be repeated, is that a contract is a bargain. If a person furnishes no consideration, he takes no part in a bargain; if he takes no part in a bargain, he takes no part in a contract. In the second of the above two cases *A* is a stranger to the contract. But he is equally a stranger in the first; he is a party to an agreement but he is not party to a contract.[28] It is true if the doctrine of consideration were abolished the problem of privity will remain as in other continental legal systems. But as long as consideration is an essential feature of English Law it would seem to be immaterial whether a person is

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22 Cheshire & Fifoot: Law of Contract, p. 378 (5th Ed.) quoted in *Shiv Dayal* v. *Union of India* (1963) 2 Punj. 463; (1963) A.Punj. 538.

23 *Khushalbai Mahijibhai Patel* v. *Mohammad Hussain Rahimbux* (1981) A.SC. 977, 979.

24 (1892) 1 Q.B. 147.

25 Chitty: On Contract (24th Ed.) pr. 1121 p. 528.

26 (1915) A.C. 847, 853 (1914-15) All E.R. Rep. 333; Cheshire & Fifoot: Law of Contract (6th Ed.), p. 65.

27 Cheshire & Fifoot: Law of Contract (6th Ed.), p. 65. In the 5th edition, the authors accepted the differentiation. But they have been convinced that their arguments were fallacious. Furmstor 23 M.L.R. 382-384; A Casebook on Contract (2nd Ed.), p. 207; Salmond & Williams; The Law of Contracts (2nd Ed.), pp. 99-100 quoted by Windeyer J. in *Coulls* v. *Bagot's Executor* (1967) 40 A.L.J.R. 477, 483.

28 Cheshire & Fifoot: Law of Contract (6th Ed.), p.65.

forbidden to sue on the ground that he has given no consideration or on the ground that he is stranger to the contract. There are but two ways of saying the same thing.[29]

A transaction by which *A* promised to pay *B* & *C* for consideration during their joint lives and after the death of one of them to the survivor of them, the consideration moved from *B* but the agreement was signed by all three *A*, *B* & *C*. There was privity between *A* on one side and *B* & *C* on the other.[30] An agreement between the Government and forest officers appointed for the forests of a Raj is not enforceable against the Raj after the Government gives up its administration because there is no privity of contract.[31] In the case of industrial disputes, the rule as to privity of contracts is not applicable as the principle applicable is collective bargaining.[32]

A garage owner, after an Insurance Company had ordered that the plaintiff's car which was damaged in a collision be repaired undertook the job. Normally it should have taken five weeks, the garage owner took eight weeks. The owner sued the garage for expenses incurred by him in hiring a car for 3 weeks. The garage owner pleaded that the contract was with the Insurance Company and the car owner could not sue. The Court held that there was a second collateral contract when the garage undertook to do the job in a reasonable time and so it was liable to the plaintiff.[33]

A settlement under Industrial Disputes Act Wider.—A settlement under s. 18 (3) of Industrial Disputes Act is much wider in amplitude than a contract, the latter, assuming all other conditions under s.10 of the Contract Act are complied with, binds the parties to the contract. The ambit of the former is much wider. It binds not only the parties to the dispute, which the Conciliation Officer has settled, but binds all workmen in the establishment, present and future. It thus does not remain merely an agreement between the parties to the dispute or parties to the agreement but becomes a creature of statute having a binding effect on all the workmen in the establishment.[34]

Mutuality—lack of.—Lack of mutuality has exceptions or apparent exceptions, e.g. a contract where one party has an option by the exercise of which the other party becomes bound to perform his part.[35]

The facts in *Safiya Bi's* case were:

A sold immoveable property to *B* reserving right of repurchase within a specified time. *B* sold the property to *C* who took it with notice. The title conveyed is defeasible on the option being exercised. The transactions between *A* and *B*, and *B* and *C* constitute transactions supported by consideration and mutuality. *C* is a constructive trustee for *A* and the contract to reconvey is enforceable and s. 19 *(b)* of Specific Relief Act of 1963 applies.[36] There must be reciprocity as to the binding nature of the agreement between the person who wants to enforce it and the person against whom it is sought to be enforced. An agreement cannot be enforced at the instance of a person who is not himself bound by it. In other words there must be reciprocity as to the binding nature of the agreement between the person who wants to enforce it and the person against whom it is to be enforced.[37]

There is no contract between the manufacturer and the retail seller from the mere fact that the packets of tobacco or price lists or catalogues relating to goods contain a condition that goods are sold by the manufacturers on the condition that retailers do not sell the packet at a price below a fixed price.[38] A third party is not entitled to challenge the existence or the

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29 *Ibid,;* quoted with approval by Windeyer J. in *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471, 483.
30 *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (1966-67) 40 A.L.J.R. 471.
31 *State of Bihar* v. *Charanjit Lal* (1960) A.P. 139.
32 *Tobacco Friends Union* v. *U.P.* (1958) A.A. 688; *B.K. Jobanputra* v. *B.S. Kalelkar* (1965) A.B. 146.
33 *Charnock* v. *Liverpool Corporation* (1968) 1 W.L.R. 498.
34 *B.K. Jobanputra* v. *B.S. Kalelkar,* 1965 A.B. 746.
35 *Safiya Bi* v. *Abdul Shakoor Sahib,* 1967 A.M. 375; (1966) 1 Mad. 590; 36 Halsbury's Laws of England (3rd Ed.), p. 269.
36 *Safiya Bi* v. *Abdul Shakoor Sahib* (1967) A.M. 375; (1966) 1 Mad. 590.
37 *Kedardas Mohta* v. *Nand Lal Poddar* (1971) A.P. 253, 255.
38 *Taddy & Co.* v. *Sterious & Co.* (1904) 1 Ch. 354.

adequacy of consideration of a sale.[39]

The principle of the decision in *Khwaja Muhammad Khan* v. *Husaini Begam*[40] was followed by the High Court of Calcutta in a case which the facts were somewhat peculiar.[41] In that case *A* advanced Rs. 300 to *B* on the security of a *pattah* relating to immovable property and deposited with him by *B*. *B* then transferred by a registered *kabala* all his property, movable and immovable, to *C* for a sum of Rs. 2000. This Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000, the sum of Rs. 300 due to *A* should be paid by *C*. *A* sued *C* for Rs. 300, basing his claim upon the *kabala*. It was found that there was *no agreement* between *A* and *C* for payment of Rs. 300 by *C* to *A*,[42] but that on the very day on which the *kabala* was executed *C* acknowledged the obligation to pay Rs. 300 to *A*, that the acknowledgement was communicated to and accepted by *A*, and that as a result of this the *pattah*, which was erroneously believed by the parties as constituting a charge,[43] was handed over by *A* to *C*. Upon these facts it was held that *A* was entitled to recover the amount claimed from *C*. This decision was followed by the same High Court in a later case when there was no communication to *A* of the arrangement between *B* and *C*, the Court holding that the absence of communication did not make any difference in principle.[44] And it seems that generally the beneficiary in a *benami* transaction may sue, joining the *benamidar*.[45]

The same principle has been applied by the Courts of India to cases where a provision is made for the maintenance of female members of a Hindu family on a partition of the joint family property between the male members. Thus where *A* and *B*, two Hindu brothers, divided the family property between them, and agreed at the time of partition that they should contribute Rs. 300 in equal shares and invest the sum on the security of immovable property and pay the interest towards the maintenance of their mother, it was held that the mother, though she was not a party to the contract, was entitled to sue her sons to have that amount invested in her favour.[46] Similarly where on a partition between a Hindu son and his father it was arranged that the father should remain in possession and management of the share of the property allotted to the son and maintain the son's wife and his children out of it, it was held that the wife, though not a party to the arrangement, was entitled to sue the father for the maintenance of herself and her children.[47] The wife and children, though not named as parties to the contract, possessed an actual beneficial right which placed them in the position of *cestui*

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39 *Sivarama Konar* v. *Thiruvadinatha Pillai* (1957) A.TC. 189; *Sudhakar Sahu* v. *Achutananda Patel* (1967) A.Or. 89 (also adequacy of consideration).

40 (1910) 37 I.A. 152; 32 All. 410; 7 I.C. 237.

41 *Debnarayan Dutt* v. *Chunilal Ghose* (1914) 41 Cal. 137; 20 I.C. 630; see *Jiban Krishna Mullick* v. *Nirupama Gupta* (1926) 53 Cal 922, 925, 96 I.C. 846; 1926 A.Cal. 1009; and dist. *Krishna Lal Sadhu* v. *Pramila Bala Dasi*, note 73, p. 33; *Hashmatmal* v. *Pribdhas* (1928) 114 I.C. 111; 1929 A.S. 117. In *Daw Po* v. *U Po Hmyin*, A.I.R. 1940 Rang. 91, at p. 94; 187 I.C. 875, it is pointed out that the authorities show that "a stranger to a contract can sue upon it at any rate in the following circumstances, viz., (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger." For a case of estoppel see *Surjan Singh* v. *Nanak Chand*, 1940 A.L. 471; 191 I.C. 763. For a case of agreement to pay direct, see *Devaraji Urs* v. *Ramakrishniah*, 1952 A.Mys. 109; *P.M.G. Patna* v. *Ram Kripal* (1955) A.Pat. 442. Two other exceptions are mentioned in *Iswaran Pillai* v. *Sonnivevaru* (1913) 38 Mad. 753, (a) the creation of a charge on immovable property by the promisor or allocation by him of the specific money in suit in favour of the plaintiff, (b) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by s. 15 Specific Relief Act, 1963.

42 It was argued in this case that there was a novation within the meaning of s. 62 below, but it was held upon the facts that there was no novation.

43 The case was from the *Mufassal*, where a mortgage by deposit of title deeds is not recognised by law. See Transfer of Property Act, 1882, ss. 58 & 59.

44 *Dwarika Nath* v. *Priya Nath* (1917) 22 C.W.N. 279; 36 I.C. 792; see *Debnarayan Dutt* v. *Chunilal Ghose* (1914) 41 Cal. 137, at p. 141; 20 I.C. 630.

45 *Areti Singarayya* v. *Areti Subhayya* (1924) 47 Mad.L.J. 517; 84 I.C. 962; 1924 A.M. 861.

46 *Shuppu Ammal* v. *Subramaniyan* (1909) 33 Mad. 238; *Arumuga Gounden* v. *Chinnammal* (1911) 21 Mad.L.J. 918; *Nehal Singh* v. *Fateh Chand* (1922) 20 All.L.J. 708; 68 I.C. 778.

47 *Rakhmabai* v. *Govind* (1904) 6 Bom. L.R. 421; *Jang Bahadur* v. *Rana Uma Nath* (1937) 12 Luck. 639; 165 I.C. 113; 1937 A.O. 99.

que trust under the contract.[48] "Though the plaintiffs are not named parties to the contract, yet they are not in that sense strangers to the consideration of the contract so as to prevent them from suing on it in their own name as to such part as is for their benefit and on their behalf".[49] Similarly where a provision is made for the marriage expenses of a female member of a Hindu family on a partition of the joint family property between the male members, the female member is entitled to sue the parties to the partition deed to enforce the provision in her favour.[50] A family arrangement between a father, his daughter and her husband whereby the father conveyed his house to his daughter who undertook to maintain him for life would be a sufficient consideration. The daughter can specifically enforce the contract.[51] This principle was again given effect to by the Privy Council in *Mt. Dan Kuer* v. *Mt. Sarla Devi.*[52]

Third party—consideration.—Nearness of relationship is a circumstance which may be indicative of a trust but does not *per se* enable a third party to sue.[53]

A third party can sue on a contract if it is intended to secure a benefit to him so that he is entitled to say that he has a beneficial right as a *cestui que trust* under that contract.[54] The trustee can sue and if he does not the beneficiary can sue joining the trustee as a defendant. But sometimes it has been found difficult to decide whether in a contract the intention is to create a right arising by way of contract or by way of property under a trust. Two such cases are *In re Flavell*[55] and *In re Schebsman.*[56] In the former a trust was held created and in the latter it was not.

In *Les Affreteurs Reunis.* v. *Walford,*[57] the charterers of a ship, in their charter party with the shipowner, stipulated that a commission should be paid to the broker, who was employed by the charterers. The House of Lords held that the broker could enforce the agreement against the owners, although he was not the promisee in the contract, and had given no consideration for the promise by the owners. the absence of the charterers, the trustees, as plaintiffs was held to be immaterial, as the parties agreed to treat the case as if they were plaintiffs. If a party to a contract is a trustee of rights under the contract for a third party, that third party can in equity sue on the contract. But when it is sought to show that a trust for the benefit of a third party has been created by means of a contract between two other parties, it is not sufficient to show merely that the contract was entered into by one of the parties to the contract with a view to the benefit of that third party. To entitle the third party to sue, it must be shown that the parties to the contract, or one of them, intended at the time the contract was entered into, to confer upon the third party some interest in the subject-matter of the contract, and to confer that interest in such a way that it could not be destroyed or varied solely by the action of the parties to the contract.[58]

There are other English cases to the same effect collected by Professor Corbin,[59] but the development of the doctrine received a check at the hands of the Privy Council in an appeal from Canada: *Vandepitte* v. *Preferred Accident Insurance.* There *B* had insured his car with

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48 *Gandy* v. *Gandy* (1885) 30 Ch.D. 57 (a negative decision).
49 Per Green J. in *Blackwell & Co.* v. *Jones & Co.* (1870) 7 Bom.H.C. O.C. 144, at p. 148.
50 *Sundararaja* v. *Lakshmiammal* (1914) 38 Mad. 788; 24 I.C. 943.
51 *Veeramma* v. *Appayya* (1957) A.A.P. 965. See *Khwaja Muhammad Hussain* v. *Hussaini Begum,* 37 I.A. 152; 32 All. 410.
52 (1947) 73 I.A. 208, (1946) All. 756, 1947 A.P.C. 8.
53 *Veeramma* v. *Appayya* (1957) A.A.P. 965.
54 *Ryder* v. *Taylor* (1936) 36 S.R. (N.S.W.) 31, 47-49; *Gandy* v. *Gandy,* 30 Ch.D 57, 66 relied on; *Robertson* v. *Wait* (1853) 8 Exch. 299; *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford Ltd.* (1919) A.C. 801 (agreement in a charter party whereby the owners agreed to pay commission to broker which was enforced by broker); *Lloyds* v. *Harper* (1880) 16Ch.D. 290 refd. to in *Vandepitte* v. *Preferred Accident Insurance Corporation* (1933) A.C. 70, 79; (1932) All E.R. Rep. 527, 530.
55 (1883) 25 Ch.D. 89; See also *Harmer* v. *Armstrong,* 1934 Ch. 65; (1933) All E.R. Rep. 778 (an article in partnership agreement providing for a yearly payment out of net profits).
56 (1944) Ch. 83; (1943) 2 All E.R. 387 (a contract between an employee and two companies employing him providing for payment to his widow and daughter in certain eventualities).
57 (1919) A.C. 801.
58 *Ryder* v. *Taylor* (1935) 36 S.R. (N.S.W.) 31.
59 46 L.Q.R. 12.

D, *B*'s daughter *J*, driving with *B*'s permission, negligently injured *V*. *V* sued *J* with success but the judgment was unsatisfied *V* then sued *D* claiming that the policy covered *J* as well as *B*, *B* having so stipulated for her as trustee. The Privy Council held for *D*, holding that the intention to constitute a trust must be affirmatively proved, and that the trust doctrine applied only to benefits to be conferred on a third party *cestui que trust*, whereas were the argument of *D* to prevail, serious duties and obligations would be placed upon *J*, without her consent.[60]

Despite the view of the Privy Council that the intention to create a trust must be clearly proved,[61] the Court of Appeal in *Harmer* v. *Armstrong*[62] held that a trust had been established, although there was no clear indication to that effect and no reference to beneficiaries. *A* agreed under seal to buy the copyright in certain periodicals from *V*. *A* entered into the agreement on behalf of *H*. *V* then, with notice of *H*'s claim, allowed *A* to rescind. *H* obtained specific performance of the agreement against *A* and *V*.

Third Party cases

F & *W* agreed to sell a piece of land to a company and the company took the land with notice of the terms of a previous agreement between *F* & *W*. The company subsequently agreed with *W* that in consideration of his removing the caveat that he had filed, the company would pay to *F* the £250 "in accordance with the terms of agreement between *F* & *W*. wherein it was agreed that that sum should be a first charge on the land" in question.

The contract between *W* and the company was held unenforceable at the instance of *F* as it was without consideration and the caveat had lost its validity on the sale of land by *F* & *W* to the company.[63]

E, a married woman, claimed that *D* was the father of a child born to her which *D* denied. But *D* on correspondence through the department entered into a contract with *E* under which he was to pay maintenance to the children welfare department.

E sued for arrears of maintenance but the action failed on the ground that the agreement of *D* was to pay maintenance not to *E* but to the department and that her only remedy was to sue for damages for breach of contract.[64]

Security.—A deposit in a bank as security for the performance of a contract between the depositor and a third party remains the property of the depositor subject to its being placed at the diposal of the person for whose benefit the security is given on the breach of the contract. No trust is created in favour of the third party but it is a deposit for a particular purpose.[65] The facts were:

A contract of procurement of grain by a syndicate for and on behalf of the Punjab Government for the due performance of which security was deposited in a Bank in Okara, subsequently Pakistan, became impossible of performance due to the partition of the country and legal ownership of the deposit was and continued to be in the depositor and was claimable by the syndicate.[66]

Marriage Contracts—Who can enforce.—If a party holds out inducements to another to celebrate a marriage and the other party consents and does celebrate the marriage in consequence of them, a court of equity will give effect to the proposal.[67] A contract affects only parties to it and their successors in title and no one other than them can sue or be sued upon it. But there is an equitable exception to this rule where the contract is made in consideration of marriage and the intended beneficiary is within the marriage consideration.[68] In *Hill* v.

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60 (1933) A.C. 70, 1933 A.P.C. 2. This case was applied to a paralled situation by Falshaw J. in *Des Raj* v. *Concord of India Insurance Co.*, 1951 A.Punj. 114.

61 Where this intent is proved, the third party takes the benefits subject to any burdens: *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1954) 2 Q.B. 402.

62 (1934) Ch. 65.

63 *Foster* v. *Genowlan Shale Co.* (1895) 16 L.R. (N.S.W.) Eq. 59.

64 *Egel* v. *Drogemuller* (1936) S.A.S.R. 407.

65 *Okara Grain Buyers Syndicate Ltd.* v. *United Commercial Bank*, (1961) A.Punj. 66 affd. on app. (1968) A.SC. 1115.

66 *Ibid.*

67 *Hammersley* v. *De Biel* (1845) 12 Cl. & Fin. 45, 78.

68 *In re Cooks Settlement Trusts* (1965) 2 W.L.R. 179, 186.

Gomme[69] Cottenham L.C. described the children of the marriage as *quasi* parties to the contract—a marriage settlement. That is to say they are all treated for every purpose of settlement as though consideration moved from each one of them.[70] A child of marriage is treated as a party, who has given consideration, and equity will assist him to enforce any contract to settle property, which that settlement may contain.[71] But an intended beneficiary who is not an issue of marriage is not within the marriage consideration nor are children by a previous marriage unless their interests are interwoven with those of the children of marriage.[72] Even children of marriage would be strangers to a post-nuptial settlement.[73] Where the obligation to settle property has been assumed voluntarily no object of intended trusts can enforce the obligation,[72] e.g. where a spinster made a voluntary settlement in favour of herself and her issue which contained a covenant to settle after acquired property. She married and had children but they had, as volunteers, no right to enforce the convenant.[74]

Contract with third party—Limitation of liability.—The defendants cannot limit their liability to plaintiffs in tort by relying upon a contract between the plaintiffs and a third party to which they were not parties and for which they gave no consideration to plaintiffs. Therefore, stevedores, whose negligence results in damage to the goods of the consignee, cannot rely upon a bill of lading incorporating the U.S. Carriage by Sea Act clause limiting the liability of the carrier to £500.[75] The Australian High Court held that negligent stevedores were not protected by such a limitation in a bill of lading as they are complete strangers to the contract of carriage and had no concern with the bill of lading. [76] The Supreme Court of America held that the *Elder Dempster's* case[77] is no authority for the doctrine of vicarious immunity.[78] The word "carrier" does not include stevedores.[79] A carrier can stipulate by express words or by implication for exemption from liability not only for himself but also for those whom he engages to carry out the contract but the injured party must have assented to the exemption either expressly or by implication. This applies both to carriage of passengers and goods.[80] On the same principle, a master and crew are entitled to rely on a contract entered into by the owners and a third party.[81]

Marriage Settlement.—In equity a covenant for the settlement of property under a mar-

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69 (1841) 5 M. & C. 250, 254; (1835-42) All E.R. Rep. 118; *Krishna Lal Sadhu* v. *Pramila Bala Dassi*, 55 Cal. 1315, 1321.

70 Per Kay L.J. in *Attorney General* v. *Jacobs Smith* (1895) 2 Q.B. 341, 353 (C.A.); *Harvey* v. *Ashley* (1748) 3 Atk. 607.

71 *In re Cooks Settlement* (1965) 2 W.L.R. 179, 185-6; *Harvey* v. *Ashley* (1748) 3 Atk. 607.

72 *In re Cooks Trust* (1965) 2 W.L.R. 179, 186.

73 *Green* v. *Paterson* (1886) 32 Ch.D. 95.

74 *In re Kays Settlement* (1939) Ch. 329.

75 *Midland Silicones Ltd.* v. *Scruttons Ltd.* (1959) 2 Q.B. 171; (1959) 1 All E.R. 1394; (1959) 2 W.L.R. 761, 776. On appeal (C.A.) (1960) 3 W.L.R. 372; (1961) 1 Q.B. 106; (1960) 2 All E.R. 737; (1962) 2 W.L.R. 186 (H.L.) (Lord Denning contra p. 209); (1962) A.C. 446; (1962) 1 All E.R. 1; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*, 1915 A.C. 847, 853 (Lord Haldane); *Adler* v. *Dickson* (1955) 1 Q.B. 158 (per Jenkins & Morris L.JJ., Denning L.J. *contra*); *Wilson* v. *Darling Island Stevedoring & Co. Ltd.* (per Fullagar & Kitto JJ.) (1956) 95 C.L.R. 43; (1956) 1 LL.R. 346 (Australian case) A case of Stevedores. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297; (1951) 1 Lloyd Rep. 305; *Elder, Dempster & Co. Ltd.* v. *Paterson Zochonis & Co. Ltd.* (1924) A.C.522; (1924) All E.R. Rep. 135 (dist.). But see the Privy Council decision in *New Zealand Shipping Co. Ltd.* v. *A.M. Satterthwaite & Co. Ltd.* (1975) A.C. 154 (P.C.) & Jackson (1980) 2 All E.R. 556 (P.C.).

76 *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1956) 95 C.L.R. 43; (1956) 1 I.L.R. 346; *Adler* v. *Dickson* (1955) 1 Q.B. at p. 186 relied on; *Elder Dempster & Co. Ltd.* v. *Paterson Zochonis & Co. Ltd.* (1924) A.C. 522; *The Kite* (1953) p. 154; and the opinion of Denning L.J. in *White* v. *John Warwick & Co. Ltd.* (1953) 1 W.L.R. 1285 dist.

77 *Elder Dempster & Co. Ltd.* v. *Paterson Zochonis & Co. Ltd.* (1924) A.C. 522; (1924) All E.R. Rep. 135 (H.L.).

78 *Robert C. Herd & Co. Inc.* v. *Krawill Machinery Corporation*, 359 U.S. 297.

79 *Ibid.; Scruttons Ltd.* v. *Midland Silicones Ltd.* (1962) 2 W.L.R. 186, 189, 214; (1962) 1 All E.R. 1 (H.L.).

80 Per Denning L.J. in *Adler* v. *Dickson* (1954) 3 A.E.R. 397. See also *Gilbert Stokes* v. *Dalgety*, 48 S.R. (N.S.W.) 435.

81 *Alsey Steam Fishing Co.* v. *Hillman, The Kirkness* (1957) 1 A.E.R. 97, 107; *The Kirkness* (1957) 1 All

riage settlement can be enforced by persons "within the marriage consideration", that is, by husband, wife and the issue of the marriage, but not by the next of kin of the wife, or her children by a previous marriage.[82]

Damages for Discomfort to third party—The plaintiff booked a holiday with the defendants in Sri Lanka. Certain representation were made by the defendant respecting the quality of the Hotel, its cuisine and its appointments which turned out to be quite untrue. The plaintiff and his wife and children found the hotel most disappointing and their holiday was spoiled and on their return to England the plaintiff brought an action for damages in respect of the loss of his holiday for himself, his wife and two small children. The trial Judge said that he could only consider the mental distress to Mr. Jackson and not to his wife and children. On appeal it was held that it was a contract for the benefit of the whole party, that is contract by one for the benefit of third persons, the law being that only the plaintiff could sue and none of the others, the question arose what damages he could recover. Is it limited to his own loss or can he recover for others. It was held that the case falls within the principle stated by Lush L. J. in *Lloyd's* v. *Harper* (1880) 16 Ch.D.290, 321, where he said:—

"I consider it to be an established rule of law that where a contract is made with A for the benefit of B., A. can sue on the contract for the benefit of B., and recover all that B. could have recovered if the contract had been made with B. himself."

which was quoted with approval by Lord Pearce in *Beswick* v. *Beswick* (1968) A.C. 58 (H.L.). Applying the principle to this case it was held that the damages could be awarded for the wife and children also. There is thus authority for the view that a breach of contract made for the benefit of a third party may similarly give the promisee a right to recover substantial damages in respect of loss suffered by the third party.[83]

Stevedore—liability of.—The House of Lords in *Scruttons Limited* v. *Midland Silicones Ltd.*[84] per Lord Reid said:-

"I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedores is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome."

These four propositions were held to have been satisfied in *New Zealand Shipping Co. Ltd.* v. *A.M. Satterthwaite & Co. Ltd.*[85] In that case the Judicial Committee by a majority held that a stevedore was protected by a clause in the bill of lading which contained appropriate words exempting him from liability and which was stated to have been made by the carrier acting as agent on behalf of the stevedore and action against him by the consignee, therefore, failed. The question of the effect of the exemption clauses in contracts of carriage of fundamental breach and diffusion of Himalaya clause was considered in an Australian case *"The New York Star"*[86] in which the New South Wales Court of Appeal had to decide the important issue of the exemption clause and doctrine of privity. The facts were these. A bill of lading contained the 'Himalaya' clause, that is exemption clause expressed to be for the benefit of the carrier, his servant, agents and independent contractors and was inserted by the carrier as agent of or trustee for independent contractors of the carrier. The defendant Company was a stevedore engaged by the carrier to unload the goods and deliver them to the plaintiff. Due to the negligence of the defendant the goods were removed by a party who presented no shipping documents and were not entitled to take delivery of the goods. The consignees

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E.R. 97, 107; *Elder, Dempster & Co. Ltd.* v. *Paterson Zochonis & Co. Ltd.* (1924) A.C. 522; (1924) All E.R. Rep. 135 (H.L.).

82 Chitty on Contract, 24th Ed. Paragraph 1123. p. 529.

83 *Jackson* v. *Horizon Holidays Ltd.* (1975) 1 W.L.R. 1468 (C.A.). (1973) 3 All E.R. 92.

84 (1962) 1 All E.R. at p. 10 considered A.C. 446.

85 (1975) A.C. 154.

86 *In Salmond & Spraggon (Australia) Pty. Ltd.* v. *Joint Cargo Services Pty. Ltd.* (The New York Star) (1977) 51 A.L.J.R. 842. Revd by P.C. in (1980) 3 All E.R. 257.

were the plaintiffs and Stevedores the defendants. The suit was against the defendants as bailees who were not to deliver the goods except in exchange for shipping documents. The Stevedores relied on the Himalaya clause. It had been held by the Privy Council in *New Zealand Shipping Co. Ltd.* v. *A.M. Satterthwaite & Co. Ltd. (The "Eurymedon"*[87]) that Stevedores can take advantage of the exclusion clause if four conditions are satisfied. First, the bill of lading must contain the "Himalaya" clause; second, it must make clear that the carrier contracts for the Stevedore's protection as well as his own; third the carrier must have the Stevedore's authority so to contract or alternatively, the Stevedore must later ratify the carrier's action and fourth that the Stevedore must provide consideration for the protection extended to it. It was this condition which caused most difficulty in both the Privy Council case (supra) as well as in the case of the "*New York Star*"[86], the New South Wales case.

In the former case the transaction was held as involving an offer of exemption which the Stevedore accepted by providing the consideration by performing its obligation under its contract or a promise of exemption given in exchange for an act, namely the performance of those obligations, but in the later case there was no consideration because there was no evidence that the consignee had presented the shipping documents before unloading or misdelivery and the Stevedore had performed the act before the bill of lading was presented for delivery, and therefore, there was no acceptance of and consideration for offer and the Stevedores were deprived of the benefit of the exclusion clause in the bill of lading. Glass J. at page 449 observed that where conduct is relied on as the acceptance and consideration for an offer the acceptor must be shown to have acted in reliance of the offer. Therefore as there was no proof of reliance on the offer it was held that in doing the acts the Stevedores were carrying out their contractual duties already owed to the carrier. Thus the *New York Star Case* is a discouragement to the use of "Himalaya" clause.

Stevedore—whether entitled to benefit of bill of lading.—The Privy Council has held that a stevedore is entitled to the immunity which under the bill of lading attaches to the shipping carrier. In that case goods were shipped from Canada to Australia, Sydney, where according to the normal practice of the port the goods were discharged and placed in a shed by the Stevedore who normally acted for the shipping carrier. But the goods were delivered to a person who had no right to receive them. The consignee brought an action against the stevedore. The High Court of Australia on appeal held the stevedore liable as no consideration had moved from the stevedore and the immunity of the carrier did not extend to the stevedore.

On appeal the Privy Council reversed the decision. It held (1) It was established law that commercial practice required the contractual immunity of the carrier extended to the stevedore. In the particular case agency had been found as a fact and consideration by the stevedore proved according to established legal principles.[88]

Bankers' Commercial Credits—Sellers' position.—Bankers' commercial credits, in common parlance known as Letters of Credit, involve three transactions:

(1) A clause is inserted in the contract requiring payment in a particular manner. The buyer asks a bank to open a credit in the seller's favour, which shall remain irrevocable for a given time.
(2) The credit is opened in return for the buyer's promise to reimburse the bank, to pay a small commission and to give the bank a lien over the shipping documents.
(3) The buyer's bank notifies the seller that it has opened an irrevocable credit in his favour, to be drawn on as soon as the seller presents the shipping documents.

What is the legal position of the seller: should the bank refuse to honour its promise? If he sued the bank, he might be met by the objection that he is not a party to the contract. No bank has yet taken this objection but this business practice lacks legal sanction, although the English Court of Appeal has refused to interfere with this practice and its legalities.[89] In *Malas*

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87 (1975) A.C. 154; (1974) 1 All E.R. 1015; (1974) 2 W.L.R. 865.
88 *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spraggon (Australia) Pty. Ltd. The New York Star* (1980) 3 All E.R. 257, 261, 264. p. 6.
89 Cheshire and Fifoot: The Law of Contract (6th Ed.) pp. 383-4; *Malas* v. *British Imex Industries Ltd.* (1958) 2 Q.B. 127; (1958) 2 All E.R. 262.

v. *British Imex Industres Ltd.*[90] the Court of Appeal held that the opening of a confirmed letter of credit constitutes a bargain between the bank and the seller of goods which imposes on the banker an absolute bargain to pay irrespective of any dispute between the buyer and the seller in regard to quality of goods. But that was not a case where the bank repudiated its liability and the observations were obiter.

Malas case was this:

Two letters of credit were opened in accordance with a contract between a foreign buyer and a British seller one for each of the two instalments of delivery. Goods taken against one of the letters of credit were considered not to be of the quality specified and the buyers brought an action for injunction restraining the sellers from dealing with the second letter of credit. The action failed because the bargain between the bank and the seller was irrespective of any dispute between buyer and the seller and it would be wrong to interfere with the commercial practice established on that principle.

Implied Warranty.—The liability of manufactured products under inplied warranty has been the subject-matter of dispute in some recent American cases. In *Henningsen's* case[91] the plaintiff sued in implied warranty for personal injuries. She suffered when a car manufactured by the defendant and presented to her by her husband who had got it from a retailer made an unscheduled turn into a wall. The Court stressed the principle of justice to the consumer and upheld the plaintiff's action without proof of negligence and rejected the defendant's disclaimer because of its unfair and unbargained for quality.

The Court in *Henningsen* v. *Bloomfield Motors*[91] had to deal with a situation in which privity was twice removed. Firstly, the plaintiff was not a buyer but only a donee of the buyer. Secondly, the suit was brought against the retailer as well as the manufacturer and the Court upheld the warranty as running from the manufacturer. Thus warranty liability ran from a remote seller to a non-buyer. There have been cases where Courts have denied liability even in the case of a buyer against the remote seller or manufacturer.

In a case from *New York Randy Knitwear* v. *American Cyanamid Co.*[92] the defendant manufactured fabrics and had attached tags stating the fabric would not shrink. The plaintiff for the purpose of manufacturing his goods purchased the material from an intermediary. The fabric shrank. The Court decreed recovery for the resulted loss on the express warranty despite the absence of privity.

In 1963 in a case from California, *Greenman* v. *Yuba Power Products,*[93] a husband successfully recovered for personal injury caused by a defective home carpentry outfit made by the defendant and given to the plaintiff by his wife who had purchased it from a local retailer. No negligence was required. The Court granted damages on implied warranty grounds without privity.

There are three cases from New Jersey State.

In *Santor* v. *A.M. Karaghensian,*[94] the plaintiff had purchased a carpet from a retailer. He recovered damages directly from the manufacturer for the reduced value of the carpet caused by the appearance of unusual lines. The carpet had been sold as Grade I. The defendant argued that the liability under implied warranty of a manufacturer which was accepted in *Henningsen's*[91] case covered only products dangerous to life and did not extend to total or partial loss of value. The Court referring to justice for the ultimate consumer principle invoked implied warranty and that the rule in *Henningsen's*[91] case could not be fenced by considerations of personal injury to him but operated in cases of total or partial loss of value also.

In *Sely* v. *White Motor Co.*[95] the plaintiff sought to recover from a truck manufacturer for money paid to a retailer on the purchase price and for profits lost in his business when he was unable to make normal use of the truck. It was pleaded that there was an express warranty limited to making good at the factory any defective part. But the Court disregarded the limitation because the warrantor had repeatedly failed for 11 months to correct the defect.

A case from Oregon is *Price* v. *Gatlin.*[96] In that case, plaintiff sued the wholesaler for damages suffered in his absence because a new Ford tractor failed to perform adequately. The Court did not decree the claim for varying reasons, the main reason being that the rule in *Henningsen's*[91] case did not extend to liability for economic loss.

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90 *Malas* v. *British Imex Industries Ltd.* (1958) 2 Q.B. 127; (1958) 2 All E.R. 262.
91 32 N.J. 358; 161A. 2d 69 (1960).
92 11 N.Y. 2d. 5; 226 N.Y.S. 2d 363 (1962).
93 59 Cal. C. 2d. 57, 27 Cal. Rptr. 697 (1963).
94 44 N.J. 52 (1965).
95 Cal. Rptr. R. 17 (1965).
96 81 Ore. Adv. 169 (1965).

Oral Warranty.—The manager of a company made a statement to an intending purchaser of a harvesting machine that his experience was that the machine would be able to do 90 acres a day but this the machine could not do. It was held that the statement was, not a warranty and the suit for damages was dismissed.[97]

Past consideration.—In the same clause the words "*has* done or abstained from doing" call for special attention. They declare the law to be that an act done by *A* at *B's* request, without any contemporaneous promise from *B*, may be a consideration for a subsequent promise from *B* to *A*. Now, the general principle of the common law is that in the formation of a contract the consideration is given and accepted in exchange for the promise. Hence the acceptance of the consideration and the giving of the promise must be simultaneous, and, in order to have the effect of binding the party making it, a request must be the offer of a promise in return for some consideration, which offer will become a promise (if not meanwhile revoked)[98] if and when the consideration is furnished as requested. Thus the consideration must always be present at the time of making the promise, and there is no such thing as a past consideration. If a service is rendered without any immediate promise or understanding that it is to be recompensed, it is a merely gratuitous act having no legal effect except such transfer of property or the like as may be contained in the act itself. If there be such a promise, express by words or by tacit understanding, to be inferred from the circumstances, there is at once an agreement, in which, if the recompense be not specified, the promise is to give such reward as may be found reasonable. A subsequent promise specifying the reward will not make an obligation where there was none before, but will show what the parties thought reasonable; and there is generally no reason why the parties' own estimate, in a matter which concerns only themselves, should not be accepted. Such a promise "may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered".[99] In many common circumstances the fact of service being rendered on request is ample evidence of an understanding that it was to be paid for according to the usual course.

The use of the perfect tense in the clause now under consideration embodies in the law of India the exception to the general rule which is supposed to have been made by the seventeenth-century case of *Lampleigh* v. *Brathwait* (A.D. 1615).[1] There it was allowed that in general a service rendered without any agreement for reward at the time will not support a subsequent promise of reward—"a mere voluntary courtesy will not have [2] a consideration to uphold an assumpsit"—But it was said that if the service was "moved by a suit or request" of the promisor, the promise "couples itself with the suit before," or, as we should now say, is held to relate back to the original request, and accordingly is deemed to be made on good consideration. A promise to pay compensation for something already done is past consideration and is no consideration.[3]

It would seem that this fiction was really needless, and that the true account of such cases was given by Lord Bowen (following an earlier dictum of Erle C.J.)in the passage above cited. Our Act has adopted the doctrine of *Lampleigh* v. *Brathwait* in its current form. We shall come to another exception from the general principle in s.25, sub-s. (2), below. The manner in which the law of consideration is split up between s. 2 and ss. 10, 23, 24, and 25, and the discrepance of style already noticed in the first Preface, do not conduce to certainty in interpreting the intention of the Act as a whole on the subject.

Indian Courts have here followed. as they were bound to do, the terms of the Act. In *Sindha* v. *Abraham*,[4] the plaintiff rendered services to the defendant at his desire expressed during

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97 *Ross* v. *Allis Chalmers Australian (Pty) Ltd.* (1980) 55 A.L.J.R. 8.
98 As to revocation, see on s. 5, below.
99 Bowen L.J., *Re Casey's Patents* (1892) 1 Ch. 104, 115.
1 Hob. 105; 1 Sm. L.C. 148. The defendant's name is often miswritten in various ways in modern books.
2 *Sic*. One would expect "make".
3 *Re: Mc Ardle* (1951) 1 Ch. 669.
4 (1895) 20 Bom. 755; *cf. Ramacharya* v. *Shrinivasacharya* (1918) 20 Bom. L.R. 441; *Dungarmall* v. *Sambhu Charan* (1951) A.Cal. 55.

his minority, and continued those services at the same request after his majority. The question arose whether such services constituted a good consideration for a *subsequent* express promise by the defendant to pay an annuity to the plaintiff. The agreement was one to compensate for past services, and it was held that it could be enforced, as the services formed a good consideration within the meaning of this section. The Court was of opinion that the services were intended to be recompensed, though the nature and the extent of the proposed recompense were not fixed until the agreement sued upon was executed by the defendant. If so, there was a contract for reasonable recompense when the services were rendered, and the decision might have been put on that ground alone. It was chiefly rested, however, on the ground that, under the words of the present subsection, service *already rendered* at the desire of the promisor and such services *to be rendered* stood upon the same footing. It would seem that, under the Act, the decision must have been the same on this ground even if the services were rendered at the time gratuitously, though at the desire of the defendant. It was also said that if the services had been rendered without the desire of the defendant the case would be within s. 25 of the Act (see below). As to the conditions of suing in respect of services rendered by the plaintiff *voluntarily* without any request from the defendant, see s. 25 of the Act. It must be noted here that neither that section nor the clause now before us will enable a person who has purported to bind himself, when not competent to contract (s. 11), to repayment of a loan, to bind himself to it by a new promise when he is competent.[5]

"Or does or abstains from doing": Forbearance as Consideration.—The essence of consideration is that the promisee takes on himself some kind of burden, or "detriment," as the English authorities call it. Where the consideration is a present performance and not a promise (the only case now before us; promise as a consideration will be dealt with under the following words of this sub-section), the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility, or in foregoing the exercise of a legal right. It is not common experience that the exercise of one's legal rights is always profitable; nevertheless that which the law deems worthy of its protection must be presumed to be of some value. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. There need not be a total abandonment of the right, or an undertaking to suspend it for a definite time. Such an undertaking, if it exists, is of course not a performance, but a promise, and then the contract is formed by mutual or reciprocal promises (subs. (f), below). The class of cases now before us is that in which the defendant has requested the plaintiff to forbear the enforcement of a claim against him, and has offered a new promise in return, and the plaintiff, without any express acceptance of the defendant's terms, has in fact forborne for an appreciable time. Here the defendant's offer to pay or give security, or as the case may be,[6] is accepted by the performance of its conditions (see s.8, below), and that performance is a good consideration for the defendant's promise. And where the defendant has made an offer to pay in consideration of forbearance, with some other alternative offer, the plaintiffs forbearing to sue in fact is a sufficient acceptance of the first alternative.[7] A request to forbear suing or other proceedings, not specifying any length of time, is understood to be a request of forbearance for a reasonable time;[8] and this is in fact a common case. If it is asked at what moment the proposal conveyed by such a request becomes a promise, the answer is

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5 *Suraj Narain* v. *Sukhu Ahir* (1928) 51 All. 164; 112 I.C. 159; 1928 A.A. 440. The words are in themselves not clear, but if a merely void transaction could thus be in effect ratified, the intention of the Act would be frustrated.

6 See *Alliance Bank* v. *Broom* (1864) 2 Dr. & S. 289 as a good example of this class. See also *Fanindra Narain* v. *Kacheman Bibi* (1917) 45 Cal. 774; 41 I.C. 673; 22 C.W.N. 188.

7 *Wilby* v. *Elgee* (1875) L.R. 10 C.P. 497. But there is no forbearance, and therefore no consideration, where the offer of the defendant, though intended to secure fobearance, is withdrawn before the plaintiff is aware that it has been made; *Oliver* v. *Davis* (1949) 2 K.B. 727.

8 *Alliance Bank* v. *Broom, supra,* note (57); See *Fullerton* v. *Provincial Bank of Ireland* (1903) A.C. 309, 313, 314; *Glegg* v. *Bromley* (1912) 3 K.B. 474, 481. See also *Mohes Chandra* v. *Rajani Kanta* (1915) 22 C.L.J. 235; 31 I.C. 29; *Fanindra* v. *Kacheman* (1917) 22 C.W.N. 188; 41 I.C. 673; *Srinivasa Raghava Aiyangar* v. *Ranganatha Aiyangar* (1918) 36 Mad.L.J. 618; 51 I.C. 963; *Anant Krishna Modak* v. *Sarasvati Padmanabh Shetti,* 1928 A.B. 316; 30 Bom. I.R. 709; 111 I.C. 556.

that it does so whenever the other party has in fact forborne his rights for time which the Court considers long enough to amount to a reasonable compliance with the request. This appears to be a question of fact depending on all the circumstances, for which no general rule can be laid down. No great difficulty is found, so far as we are aware, in dealing with it in practice.

It will be found on examination that in many of the cases where forbearance to sue is said to be the consideration for a promise, that which is really given and accepted as consideration is a promise to forbear suing either for a definite time or for a reasonable time according to the circumstances, which promise may be express or inferred from the transaction as a whole.[9] Such cases really belong to the following head of contracts by mutual promises. Sometimes it is not easy to say whether, on the facts of a particular case, the consideration is actual forbearance or an agreement to forbear: in other words, whether the promise sued upon was exchanged for a promise of forbearance, or was an offer to be accepted by forbearance in fact, and became a promise when its condition was fulfilled by the plaintiff's forbearance for the specified time, if any, or otherwise for a reasonable time.[10] Where it was agreed at the time of partition that a particular co-sharer should realise arrears of rent due before partition, and distribute the amounts to the other co-sharers in proportion, and the particular co-sharer failed to realise the amounts, it was held that the other co-sharers could claim their share of the rent from him as there was consideration for the agreement.[11]

Carrying out Contractual duty.—The promisor Company[12] sold a building to the promisee company the consideration being the agreement to allot 4.2 million shares of the promisee company, the market value of each share was taken as $ 2.50 per share, and the promisor agreed not to sell or transfer 2.5 million shares out of the total for one year. But the latter agreement was replaced by an agreement of indemnity against loss on 2.5 million shares if their price went below $2.50 per share. This was done when the promisor threatened to breach the contract of sale unless the indemnity was given. The value of the shares did go down. The promisor enforced the indemnifying agreement and brought an action to recover the loss due to the slump and in the alternative for specific performance of the indemnity agreement. The promisee defendants pleaded (i) no valid consideration for the indemnity agreement as the consideration was past consideration, (ii) extrinsic evidence to prove additional security inadmissible and (iii) guarantee void on the ground that it was introduced by economic pressure. It was held that since the consideration expressed in the guarantee included by incorporation the promisor's promise in the agreement of sale not to sell the shares for a year the promisees' agreement of indemnity could not be treated as independent of the original promise. Since the promise not to sell for a year was made at the promisee-defendant's request the promise of indemnity was given to fulfil that intention and it is legally enforceable. Although the promisor plaintiffs' promise was antecedent to the guarantee it was a good consideration for the promisee defendant's promise of indemnity. Extrinsic evidence was held admissible. Although economic pressure was recognised as a factor to prove duress it was held that the act of the promisor plaintiff did not constitute economic distress.

Forbearance.—Forbearance to sue even though no definite time is allowed is a valuable consideration for a promise provided the promisee has a reasonable ground to believe that he has a good cause of action.[13] For forbearance to sue on a claim which is not only void but is also so known to the party forbearing is not a good consideration. Hence forbearing to sue in

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9 For example, *Amin Chand* v. *Guni*, 1929 A.L. 466; 119 I.C. 766.

10 See per Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 289.

11 *Nirbharam* v. *Sukhdeo* (1944) Nag. 212, 1944, A.N. 307.

12 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 74-75. Dictum of Bowen L.J. *in Re Casey's Patents, Stewart* v. *Casey* (1892) 1 Ch. 104, 114-115 appld.

13 *Guiness (Bob) Ltd.* v. *Salomensen* (1948) 2 K.B. 42; *Oldershaw* v. *King* (1857) 2 H. & N. 517 (forbearance to press for immediate payment); *Crowhurst* v. *Laverack* (1852) 8 Ex. 208 (mother of illegitimate children forbearing from affiliation proceedings); *Wilby* v. *Elgee* (1875) 10 C.P. 497 (forbearance to sue for doubtful claims sufficient); *Alliance Bank Ltd.* v. *Broom*, 2 Dr. & Sm. 289 & *Fullerton* v. *Provincial Bank of Ireland* (1903) A.C. 309 (forbearing by the bank to enforce existing debt on promise to give security); *Balteel & Colmore* v. *Parker & Baleels Trustees* (refraining from withdrawing balance of trust account from bank on bank's promise to give security).

respect of a void contract, e.g., a wagering claim is not a good consideration.[14] In *Guiness (Bob) Ltd.*v. *Salomonsen,*[15] *D* had incurred a void gaming debt to *P* who threatened to report to the Turf Protection Society unless he was paid. *D* promised to pay by instalments. After paying one instalment he ceased payment. *P* brought a suit for the balance. The suit failed as *P* never promised to forbear although he did forbear and had to prove fresh consideration the original debt being void. A promise to abstain from suing can be a consideration only when the person suing has a subsisting right to sue. Therefore non-payment of instalments of a debt fixed under the Debt Conciliation Act which had become barred under the Act cannot be a good consideration of a promise to pay these instalments by a third party.[16]The promise to forbear may be made absolutely or for a certain time or for no specified time at all. There need not be any express promise to forbear. It is sufficient if circumstances existed from which such a promise could be implied, and a forbearance has in fact followed. A compromise whereby the plaintiff forbears to proceed with a suit and the defendant avoids an adverse decision is for good consideration.[17]

In the *Alliance Bank Ltd.* v. *Broom,*[18]

the defendant was asked to give security for moneys owed by him to the bank and he promised to give title deeds to certain goods, which he failed to do. The bank sued for specific performance

which was decreed as the bank forebore for some time and the debtor did receive benefit of some degree resulting in the bank staying its hand for some time.

In *Crears* v. *Hunter,*[19]

F borrowed money from *C* on the promise that on attaining majority, his son *H* would become surety for the debt, which he did by joining in and executing a joint promissory note with his father. Interest was paid in the presence of *H* and *C* issued receipts in the joint names of himself and his son.

Lord Esher, M.R., relied upon the fact that the term of payment of interest in the future indicated that the note could not be sued upon for some time though there was no express request by *H* that *C* should forbear to sue *F*.

On the discovery of an irregularity in advancing a loan, the Agent and a clerk of a bank were asked to explain the irregularity. They executed an undertaking to see to the payment of the loan with a month and in default they held themselves liable for payment.

This agreement was held to be for valid consideration, e.g. forbearance to take action.[20]

Forbearance to sue for ejectment is good consideration for agreement to pay enhanced rent.[21] An act done or forbearance made in return for unilateral promise is a sufficient consideration to support the promise.[22] Forbearance on the part of a creditor to sue can operate as a sufficient consideration for promise even though it be for a limited time.[23] The Allahabad High Court in *Bittan Bibi* v. *Kuntulal*[24] by a majority held that in order to constitute a valid consideration, forbearance to sue should be at the request of the debtor whether express or implied. This was a case under the Stamp Act. A forbearance to sue for the enforcement of a

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14 *Poteliakhoff* v. *Teakle* (1938) 2 K.B. 816; (1938) 3 All E.R. 686, C.A.: *Hill* v. *William Hill (Park Lane) Ltd.* (1949) A.C. 530; (1949) 2 All E.R. 452.

15 (1948) 2 K.B. 42.

16 *Tulsabai Nathudas* v. *Narain Ajabrao Raut* (1974) A.B. 72, 73; (1975) Bom. 562.

17 *Seraj-ud-Din* v. *State of Orissa,* (1971) A.Cal. 414.

18 (1864) 2 Dr. & Sm. 289, 292; 34 L.J. (Ch.) 256. See also *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch.D. 267, 289-291; *Crears* v. *Hunter* (1887) 19 Q.B.D. 341; *Holt* v. *Heatherfield Trust Ltd.* (1942) 2 K.B. 1; *Horton* v. *Horton* (No. 2) (1961) 1 Q.B. 215; (1960) 3 All E.R. 649; (1960) 3 W.L.R. 914. (Amendment of a separation deed inserting a clause of paying £30 a month free of tax instead of just £30, the former being the true intention of parties, it being a compromise of a wife's possible action for rectification).

19 (1887) 19 Q.B.D. 341 reld. on in *Bittan Bibi* v. *Kuntulal* (1952) A.A. 996.

20 *Bank of India* v. *Govinda,* 1964 A.Ker. 267.

21 *Lakshmi Chand* v. *Niadar Mal* (1961) A.A. 295.

22 *Fazaladdin* v. *Panchanan Das* (1957) A.Cal. 92.

23 *Alliance Bank* v. *Broom,* 24 L.J.Ch. 256 (A case of giving security for a debt already advanced); *Board of Revenue* v. *Annamalai Co. Ltd.* (1967) 2 M.L.J. 515, 517. See *Crears* v. *Hunter* (1887) 19 Q.B.D. 341 refd. to in *Bittan Bibi* v. *Kuntulal* (1952) A.A. 998 (F.B.).

24 (1952) A.A. 998; *Crears* v. *Hunter* (1887) 19 Q.B.D. 341 refd. to.

contract for enhancement of rent[25] is a good consideration. Even forbearance for a limited time is a good consideration.[26] The withdrawal of pending proceedings for maintenance under s. 488 Cr. P.C. is a good consideration for an agreement to pay maintenance allowance.[27]

An actual forbearance, as opposed to an agreement to forbear to approach the court, is not a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request the forbearance is not in respect of the promise.[28] A wife's promise to forbear from applying to the Divorce Court for maintenance is no consideration because it is not binding on the wife and is worth nothing.[29] The party at whose request forbearance is granted is bound by its terms.[30]

Compromise.—The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration. But this seems to belong not to the definition of Consideration, but to the substantive law declared in s. 25 of the Act. We shall therefore deal with it under that section.

Apparent forbearance when really an act.—Actual performance is sometimes apparently passive. A trader exposes his goods for sale, the price being marked or otherwise well known. A customer comes in, takes the object he wants, and gives his name to the trader. The case is common enough. Here a captiously literal person might say that the consideration on the trader's part is forbearing to interfere with the customer's action. But what we do say, both in law and in common sense, is that the seller, by authorising the buyer to take the goods within his reach, in fact sells and delivers them by the buyer's own hand, and the act, though mechanically the buyer's, is in substance the seller's. This remark is needed only when the sale is on credit. If ready money is expected and given, there is no promise at all in the transaction, and therefore no contract; see the commentary on the next following words.

"Or promises to do or to abstain from doing something": Mutual Promises.—These words, supplemented by sub-ss. (e) and (f), convey in a somewhat indirect and inconspicuous manner the extremely important proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. In this case neither promise is of any value by itself, but each of them derives its value from the exchange which makes them both binding. This effect of mutual promises is not a logical deduction from the general notion of consideration,[31] but a positive institution of law required by the convenience of business in civilised life. In many archaic systems of law there is no obligation to perform a promise until there has been performance or at least some act done towards performance on the other side. The widespread custom of giving something by way of earnest "to bind the bargain" is a relic of this view.

Executory and Executed considerations.—A consideration which consists in performance (or so far as it consists in performance)is said to be executed. If and so far as it consists in promise, it is said to be executory. Some writers, especially in America,[32] speak of a contract in which the consideration on one side is executed as unilateral, and of a contract in which it is executory on both sides as bilateral. This terminology is concise and convenient. It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money

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25 *Laxmichand* v. *Niadar Mal,* 1961 A.A. 295; *Alliance Bank* v. *Broom,* 62 E.R. 631 a case of giving of security for money already advanced, reld. on.

26 *Morton* v. *Burn* 112 E.R. 378; *Alliance Bank* v. *Broom* (1864) 2 Dr. & Sm. 289.

27 *Kastoori Devi* v. *Chiranji Lal,* 1960 A.A. 446.

28 *Combe* v. *Combe* (1951) 2 K.B. 215, 221, 226-7; (1951) 1 All E.R. 767, 771, 774; see also *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130; (1956) 1 All E.R. 256.

29 *Combe* v. *Combe* (1951) 2 K.B. 215; (1951) 1 All E.R. 767.

30 *Ogle* v. *Earl Vane* (1868) 3 Q.B. 272; *Hichman* v. *Haynes* (1875) 10 C.P. 598; *Levey & Co.* v. *Goldberg* (1922) 1 K.B. 688.

31 For fuller theoretical exposition see Pollock, Prinicples of Contract, 13th ed., pp. 144-5.

32 See Langdell: Summary of the Law of Contracts; Harriman on Contracts, *passim.*

is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce.[33]

Distinction between contracts where consideration is executed or executory.—The Supreme Court has quoted with approval Chitty's distinction between the two classes of contracts where the consideration is either executed or executory.[34] If a contract has been fully and completely performed on both sides, no question of any further rights and liabilities under the contract is likely to arise. If however the contract is one in which the consideration is unilateral or executed only on one side, there will be a right on one side and an outstanding liability on the other. If the consideration is executory on both sides, i.e. bilateral, there will be outstanding rights and liabilities on both sides.[35] In the 23rd edition of Chitty on Contracts, paras 112 and 113, the difference between the two is stated thus:

(a) Consideration may be executory or executed but may not be past.

112. *Executory consideration.*—Consideration is executory when a promise is made by one party in return for a promise made by the other; in such a case each promise is the consideration for the other. The rule that consideration could consist in mutual promises was established by the end of the sixteenth century[36] and it was stated by Holt C.J. as follows:[37]

"A promise without a consideration is void, but where there is a promise against a promise, one promise is consideration of the other because each may have his action against the other for non-performance."

Where the consideration is executory, the contract is binding as soon as the promises are exchanged. Thus, if there is a contract for the sale of goods, delivery and payment to be made at some future date, the consideration consists in the promise to sell and to deliver on the one hand and in the promise to pay on the other; the contract becomes binding as soon as the promises are made, and does not depend upon delivery or payment being made.

113. *Executed consideration.*—Consideration is executed when an act is performed in return for a promise. Illustrations of this may be found in offers of rewards.[38] Where, for instance, the owner of a lost article offers a reward to the person who finds and returns it to him, the finder by returning the article both accepts the offer and furnishes the consideration for the offeror's promise. Where the consideration is executed, liability is outstanding on one side only; where, on the other hand, the consideration is executory, liability is outstanding on both sides.

Intention to enter into a Contract.—Even though there is consideration an agreement is not a contract without an intention of creating legal relation.[39] But in the case of ordinary commercial transaction it is not necessary to prove that there was such an intention onus being on the party disputing such an intention. To quote Lord Moulton again "not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown.[40]

Thus many social arrangements are not contracts as they are not intended to be legally binding; so also domestic arrangements. In *Balfour* v. *Balfour*[41] a husband in Ceylon (now Sri Lanka) promised to pay £30 a month to his sick wife. This she failed to get enforced because

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33 The possible existence of a collateral promise, e.g. a warranty on sale, does not affect the general truth of this agreement.

34 *Union of India* v. *Chaman Lal Loomba & Co.*, 1957 A.S.C. 652, 655 quoting Chitty on Contract, Vol.I (21st Ed.), pp. 43, 44; see (24th Ed. para 141) *Board of Revenue* v. *Annamalai & Co.* (1967) 2 M.L.J. 515.

35 *Union of India* v. *Chaman Lal & Co.* (1957) A.SC. 652. 655 quoting Chitty on Contract, Vol. I, (21st Ed.), pp. 43, 44. See Chitty on Contracts, Vol. I (24th Ed. para 141).

36 See, e.g. *Pecke* v. *Redman* (1552) 1 Dyer 113a; *Joscelin* v. *Shelton* (1557) 3 Leon 4; *Manwood* v. *Burston* (1586) 2 Leon. 203.

37 *Harrison* v. *Cage* (1698) 12 Mod. 214.

38 See also *Carlill* v. *Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256; *Budgett* v. *Stratford Co-operative and Industrial Society Ltd.* (1916) 32 T.L.R. 378.

39 Chitty: On Contract (24th Ed.) Paras 117 & 119.

40 *Heilbut Symons & Co.* v. *Bucklaton* (1913) A.C. 30, 47 (1911-13) All E.R. Rep 83.

41 (1919) 2 K.B. 571; (1918-19) All E.R. Rep. 860 (C.A.)

there was no consideration and the parties did not intend to be legally binding. But this does not apply to position where husband and wife have separated or are about to do so.[42] But where an estranged husband promised to pay £40 a month to his wife and told her to pay out of it the outstanding mortgage debt on the matrimonial house, the relevant papers of which he handed over to her, and agreed to transfer the house to her sole ownership after the mortgage was paid off and when the mortgage was paid off he reduced the monthly allowance to £25 per mensem and refused to transfer the house, the Court of Appeal affirming the judgment of Stamp J. held the agreement binding.[43] In all these cases it was observed the Court looks at the situation and asks itself whether the arrangement was intended to be binding.

Contractual Intent.—The plaintiffs were engaged to be married and the defendant promised the female plaintiff that he would pay her a sum of money as soon as pecuniary and other arrangements are made to constitute a legal marriage. The promise was held to be binding[44] but it is not clear what the consideration was whether the performance of marriage or the making of the pecuniary and other arrangements.

In another case where an uncle wrote to his nephew saying that he was glad that he the nephew, was marrying a particular lady and that he would pay the nephew £150 a year during his lifetime. The marriage did take place and the Court of Common Pleas by a majority held that the promise was binding the marriage having been performed.[45] The minority held that the promise was not meant with any contractual intent.

This supports the view that the performance of a contractual duty owed to a third party can be a good consideration for a promise. This view has recently been accepted by the Privy Council in *The Eurymedon*[46] where the facts were that a firm of Stevedores had unloaded goods from B's ship. Some of these belonged to 'C' who had promised the firm not to sue it for damaging the goods. It was held that the firm had provided consideration for this promise by unloading the goods even though he was bound by a contract with 'B' to do so.

Contractual relationship may be negatived by statements made in jest or anger. Thus where the defendant was a director of one company and of another company and the plaintiff company holding shares in this company resolved in the defendant's absence to sell their shares and later after a heated discussion rescinded the resolution and the defendant said that he would make good the loss which the plaintiff company might suffer by keeping those shares. He was held not liable on the undertaking. It was not recorded as a contract and not even put in the minutes of the meeting and the directors thought he was bound in honour.[47]

The agreement by which the plaintiffs were appointed the defendant's sole agents in the U.S. was as follows:

> "This agreement is not entered into nor is this memorandum written as a formal or legal agreement and shall not be subject to legal jurisdiction in the law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence—that it will be carried through by each of the three parties with mutual loyalty and friendly cooperation."

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42 *Meritt* v. *Meritt* (1970) 2 All E.R. 760(C.A.): see *Jones* v. *Padavatton* (1969) 2 All E.R. 616 (A case of possession of a house by a mother purchased out of mother's money against a daughter). See *Gould* v. *Gould* (1969) 3 All E.R. 728 (where the husband had promised to pay £12/ a week "as long as I can manage it" was held not to be binding.

43 *Merritt* v. *Merritt* (1970) 2 All E.R. 760 (C.A.); *Balfour* v. *Balfour* (1919) 2 K.B. 571 (C.A.); *Jones* v. *Padavatton* (1969) 2 All E.R. 616 (C.A.); *Gould* v. *Gould* (1969) 3 All E.R. 728 disting.

44 *Chichester & Wife* v. *Cobb* (1866) 14 L.T. 433.

45 *Shadwell* v. *Shadwell* (1860) 9 C.B.(N.S.) 159; 127 R.R. 604; 142 E.R. 62. cf. *De Cicco* v. *Schweitzer*, 221 N.Y. 413.

46 *New Zealand Shipping Co. Ltd.* v. *A.M. Satterthwaite & Co. Ltd.* (The Eurymedon) (1975) A.C. 154, 168; (1974) 1 All E.R. 1014; (1974) 2 W.L.R. 865. Contrary view in *McDevitt* v. *Stokes* (1917) 192 S.W. 671; 174 Ky. 515 (A was employed by 'B' to ride his horse in a race. 'C' who had owned some of the horse's relations promised 'B' to a sum of $ 1000 if he won the race which he did. But it was held 'B' could not recover from 'C').

47 *Licences Insurance Co.* v. *Lawson* (1896) 12 T.L.R. 501.

It was held that in social & family matters an intention of not creating a legal relationship is readily implied but there is no reason why in business matters also the parties should not intend to rely on each other's good faith and honor, and to exclude all ideas of settling disputes by any outside intervention. If they clearly express such an intention, there is no reason in public policy why effect should not be given to their intention.

The clause above given was interpreted by the Court of Appeal to mean that the clause was not intended to affect their legal relation or be enforceable in a Court of law, but it was held by Atkin L.J. that the order given by the plaintiffs & accepted by the defendants created an enforceable contract. The House of Laws accepted that.[48]

Irrevocable Power of Attorney.—An irrevocable power of attorney to the creditor to sell the hypothecated property and credit the same towards the loan advanced remains an executory promise of the debtor as long as the debt is outstanding and property not sold against the executed promise of the creditor. The consideration of the power of attorney is the loan advanced or remaining unpaid.[49] A somewhat similar case was decided by the Supreme Court where a bank was given by a debtor an irrevocable power of attorney to execute a decree and credit it to discharge the debt due to the bank from the debtor. The court held the power to be coupled with interest and hence not revocable.[50] It is not correct to say that as against the loan advanced the hypothecation of the property becomes a completed or executed promise. Hypothecation is only a step towards payment of the loan. But the promise of the debtor remains executory in character as against the executed promise of the creditor.[51] An executed consideration is within the definition of consideration within s.2(d) which consists in performance.[52]

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. It does not seem necessary or useful or indeed true to say that the promise of the party who accepts has ever been a proposal, though the language of sub-s. (b) does not seem to recognise the existence of promises which have not passed through that stage. Still it is true that, but for the counterpromise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act; and in this sense we may say, if we please, that the acceptance of an offered promise, by giving the reciprocal undertaking asked for, has itself the nature of a proposal, though it becomes a promise in the act of utterance, and there is no moment at which it exists merely as a proposal. But it does not appear that anything of practical importance can turn on this.

Promises of forbearance.—An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request. So a promise of forbearance may be a good executory consideration. The validity of such considerations, as distinct from their formal definition, will be spoken of, as above mentioned, under s. 25.

"Such act or abstinence or promise is called a consideration for the promise": Further requirements.—It will be observed that, according to the terms of the definition, it is only required that something—no matter what—should have been done, forborne, or promised at the request of the promisor. We shall find, however, that in some cases expressly provided for by the Act, and in others apparently not so provided for, but well known in the Common Law, and still recognised in Indian practice, the legal effect of consideration in making promises binding is withheld from acts, forbearances, and promises which are within the terms of the definition. English lawyers are accustomed to say, in some at least of such cases, that there is no consideration. This way of speaking would seem to be excluded by the Act. One would

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48 *Rose & Frank Co.* v. *J.R. Crompton & Bros. Ltd.* (1923) 2 K.B. 267 (C.A.): On appeal (1925) A.C. 445; (1924) All E.R. Rep. 245 (H.L.).

49 *Board of Revenue* v. *Annamalai & Co.* (1967) 2 M.L.J. 515. See *Seth Loon Karan Sethiya* v. *Ivan E. John* (1969) A.SC. 73.

50 *Seth Loon Karan Sethiya* v. *Ivan E. John*. See n. 34 *supra*.

51 *Board of Revenue* v. *Annamalai & Co.* (1967) 2 M.L.J. 515.

52 *Fazeladdin* v. *Panchanan Das*, 1957 A.Cal. 92.

expect the Act to say somewhere that, in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable"; that is to say, something which not only the parties regard, but the law can regard, as having some value.[53] This is a fundamental rule in the Common Law. Had the Act abrogated it, the consequences would have been extensive; but it seems to be beyond doubt that such was not the intention, and that the silence of the Act cannot be taken as altering the English law as it stood settled in India.[54] The principle may be broadly expressed thus: The law will not enforce a promise given for nothing, and if it is apparent to the Court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little), then there is no foundation for the promise, and we say either that there is not any consideration or that there is an "unreal consideration." The Act does say in s. 10 that agreements are contracts i.e., enforceable, if they are (amongst other conditions) made for a lawful consideration. In s. 23 it is declared that certain kinds of consideration are not lawful. In s. 25 agreements made without consideration are declared (special exceptions excepted) to be void. It is not anywhere stated in terms that consideration is not lawful, or otherwise not sufficient, if it is not "good"or "valuable" in the sense which those terms bear in English law. Further explanation is reserved for the commentary on the sections last mentioned.

Consideration lawful.—Where the plaintiff bona fide pleads his title to the property in the suit and then there is a compromise whereby the plaintiff agrees to buy the property and some other property from the defendant such a contract is lawful and for valid consideration. Besides it was beneficial to the defendant inasmuch as he got paid for his interest in the suit property the title to which was in dispute in the suit. Such forbearance as was shown by the compromise is in law a lawful consideration. See Promissory estoppel.[55]

Sub-ss. (e) to (j): Agreement and Contract.—The group of sub-ss. (e) to (j) may be considered together. By sub-s. (e) an agreement is either a promise or a group of promises,[56] and, therefore, it would seem that an executed consideration is not reckoned as part of the agreement. This is not according to the current use of language, which treats an agreement as an act of both parties, whether a legal obligation is incurred by one or both of them. A unilateral contract is not the less a transaction between two parties to which both must contribute something. It would not be difficult, however, to find arguments for the language of the Act if required. The expression 'agreement' in section 2(e) is essentially and exclusively consensual in nature but in the case of contracts with Government with respect to leases under the Abkari Act it is not always so.[57] Sub-s. (f) agrees with common usage, except that the adjective "mutual" is more common in English books.

The distinction between "agreement" and "contract" made by sub-s. (h) is apparently original; it is convenient, and has been adopted by some English writers. The distinction is apparent from s.2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement and by clause (h) an agreement enforceable by law is a contract. By clause (g) an agreement not enforceable by law is said to be void.[58] A contract can only be bilateral and the same party cannot be a party on both sides. Hence there cannot be a contract between *A* on one side and *A* & *B* on the other.[59] Nor can a partner be a servant of his own firm as a man cannot be his own employer.[60] A tender *inter alia* contained the following terms:

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53 *Good* consideration was in fact required by the original draft of the Act (s. 10).
54 Dr. Whitley Stoke's criticism of the language (Anglo-Indian Codes i. 497) was justified, but his fears have not been. See *Kanak Sunder Bibi* v. *Ram Lakhan* (1955) A.Pat. 458, 462.
55 *Smt. Indubala Devi* v. *Jitendra Nath Ghose* (1971) A.Cal. 411, 413. *Callisher* v. *Bischoffsheim* (1870) 5 Q.B. 449; and *Wade* v. *Simeon* (1846) 2 C.B. 548; 135 E.R. 1061 refd. to.
56 See *Abajisitaram* v. *Trimbak Municipality* (1903) 28 Bom. 66, at p. 72.
57 *Sunnam Sattiah* v. *State of Andhra Pradesh* (1980) A.AP. 18, 23.
58 *Harnath Kunwar* v. *Indar Bahadur Singh,* 50 I.A. 69, 75; 45 All. 179, 184.
59 *S. Magnus* v. *C.I.T.* (1958) A.B. 467; (1958) 33 I.T.R. 538.
60 Lindley on Partnership, p. 154 (11th Ed.), quoted in *S. Magnus* v. *C.I.T.* (1958) A.B. 467.

1. Requiring security deposit.
2. Orders for supply would be placed on the receipt of the intimation of the deposit of the security deposit with a nominated official.
3. The acceptor of the tender reserved the right to cancel the contract without calling up the outstandings on the unexpired portion.

Acceptance of this tender did not amount to placing an order for a definite quantity of goods on a definite date and therefore did not amount to a contract.[61] If bought and sold notes show a material variation, neither of them nor both of them taken together can be relied upon for the purposes of proving the terms of the contract and if the two notes agree, they would constitute a binding contract.[62] Acceptance of a tender with the condition of not purchasing from anyone else though with no condition of purchasing from the tenderer is a Contract.[63] Contribution to cost of petrol incurred by a friend in driving him on a journey by car does not create a legal contract of carriage, the arrangement between the parties to the journey being one not intended to create a legal relationship. It is more like a friendly or a gentleman's agreement to go on the trip[64] The distinction should be strictly observed in India, though lapses such as "void contract" sometimes occur. The conditions required for an agreement being enforceable by law are contained in Chap. II of the Act, ss. 10 *sqq.*, below, where it will also be seen that the absence of any such condition makes an agreement void, and certain defects will make a contract voidable. The duties of parties to a contract are set forth in Chap. IV of the Act. The manner in which contracts are, if necessary, enforced belongs to civil procedure. Where a commission is paid on sale of shares without specifying any service to be performed there is no contractual consensus as there is no valuable consideration.[65] Bids at an auction for *tehbazari* become a contract when the bids are accepted in accordance with the procedure of the Municipal Board.[66]

For difference between contract and standing offer, see *Manickam Chettiar* v. *State of Madras,* (1971) A.M. 221; (1971) 1 Mad 354

Bye Laws of Cooperative Society.—The bye laws of a Cooperative Society have no higher status than a contract entered into by two parties. But they do not have the force of a statute.[67]

Contract and Licence.—An arrangement under which "a liquor licensee" is allowed to sell liquor is not a contract but a privilege permitting him to sell a commodity which he otherwise would not have been allowed to do.[68]

For technical reasons, the language of sub-ss. (g) and (i) would not be accurate in England; it would be useless to dwell on this here. The state of things really indicated by sub-s. (i) is that one of the parties (or possibly more) can at his option maintain the contract, or resist its enforcement, or take active steps to set it aside and the other party has no such option. Such a contract is voidable.[69] When rescinded by a party entitled to rescind, it becomes void.

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61 *Union of India* v. *Thataiah* (1964) 3 S.C.R. 1774; *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.SC. 236 refd. to.

62 *Radhakrishna Sivadutta Rai* v. *Tayeballi Dawoodbhai* (1962) Supp. (1) S.C.R. 81; 1962 A.SC. 538, 544; *John Cowie* v. *William Remfry* (1845) 3 Moo.I.A. 448; 5 Moo.P.C. 232; *Sievewright* v. *Archibald* (1851) 117 E.R. 1221; 17 Q.B. 103; *Ah Shain Shoke* v. *Moothia Chetty,* 27 I.A. 30; 27 Cal. 403 (P.C.): *Fort Gloster Industries Ltd.* v. *Sethia Mercantile Private Ltd.* (1968) A.SC. 1308 (Contract not concluded if discrepancies between bought and sold notes). *Fort Gloster Industries Ltd.* v. *Sethia Mercantile,* (1971) A.S.C. 2289 (Case of minor variations but genuine notes.) *L.P. Narayan* v. *Government of Madras* (1971) A.M. 393 (Acceptance of tender with condition of not purchasing from any one else though no condition of purchasing from tenderer is a contract; *Century Spg. & Mfg. Co.* v. *Ulhasnagar Municipal Committee,* (1971) A.SC. 1021 (Acting on a representation of another).

63 *P. Narayan* v. *Government of Madras* (1971) A.M. 393.

64 *Buckpitt* v. *Oates* (1968) 1 All E.R. 1145, 1147; *Balfour* v. *Balfour* (1919) 2 K.B. 571, 578, 579; (1918-19) All E.R. Rep. 860, 864, 865 refd. to.

65 *Dickinson* v. *Abel,* (1969) 1 All E.R. 484; (1969) 1 W.L.R. 295.

66 *Ishwar Dyal Hingwasia* v. *Municipal Board* (1951) A.A. 143.

67 *Special Officer Amaravathi Cooperative Society* v. *Thirumala Swami* (1973) 2 Mad.L.J. 361; *Central Bank of India* v. *Addl. Industrial Tribunal* (1970) 1 S.C.R. 205; (1970) A.SC. 245 refd to.

68 *Muhammad Akbar Khan* v. *Province of West Pakistan* (1961) 3 P.S.C.R. 111; P.L.D. (1961) 1 S.C. 17 (Pak.).

69 *Raja of Venkatagiri* v. *State of Andhra Pradesh* (1958) A.A.P. 522, 529.

Nevertheless it is in the first instance a contract, being valid until rescinded. A contract obtained by fraud is the typical example of a voidable transaction. See ss. 19, 19A, 39; see also ss. 53, 55. The definition was not intended to alter, and does not alter, the substantive law.[70] In a recent case[71] their Lordships of the Privy Council observed that sub s. (j) did not declare every unenforceable contract void but only those unenforceable by law, and, by those words meant not unenforceable by reason of some procedural regulation, e.g., Limitation Act, but unenforceable by substantive law. "For example," observed their Lordships, "a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by s. 2(g), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by s. 2(j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void." A contract is concluded by tender and acceptance and therefore a clause in a contract between Government and another that in the event of vendor not being in possession of the goods, the contract would be deemed to be cancelled does not make the contract void by the non-availability of the goods.[72]

Concluded Contract.—Where there were five trustees for the sale of jewelleries and four out of them approved of the sale but the approval of the fifth non-participating trustee was not proved as required by sections 46 and 47, Trusts Act, it was held that the sale was not a concluded contract within section 2(h), Contract Act, as to be enforceable against and binding on the trustees or beneficiaries as the delegation of powers is not allowed by the Trusts Act.[73]

Where by correspondence the parties had reached a completed agreement the fact that a formal agreement had not been executed will not affect the validity of the agreement. The appellant had bought on hire purchase with the help of the respondent National Company Machine tools from the Hindustan Machine Tools Co. and was to execute a formal agreement with the National Company and make payments by instalments, but he did neither, the National Company was held entitled to recover the price.[74]

Contract with Government.—Even though no formal document was executed between the parties, the State and the others, there was a valid contract because of the correspondence which provided the other requirements of Article 299 which was thus complied with.[75]

Where an authority competent to enter into a contract accepts a tender for supply of goods specified in the tender from the tenderer during the period of the contract the contract is concluded. A condition in the tender that the authority may not purchase any of the specified goods is not fatal to the contract.[76]

No Contract.—But in case of contract for sale of land a contract is not concluded where the requirement is "subject always to preparation and execution of a formal contract for sale" and there is no such contract drawn up and executed.[77]

Contract.—The representation of an existing fact if it amounts to a representation as to some fact alleged at the time to be actually in existence raises an estoppel if another person

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70 E.g., a contract is not vitiated by a clause conferring an option on one party (objection hardly intelligible) *Chetoomal Bulchand* v. *Shankerdas Girdharilal,* 1929 A.S. 83; 118 I.C. 220.

71 *Mahant Singh* v. *U Ba Yi* (1939) 66 I.A. 198; 41 Bom.L.R. 742; 181 I.C. 1; 1939 A.P.C. 110 *Vishwanath* v. *Deokabai* (1948) Nag. 50, 1948 A.N. 382; *Venkatappa* v. *Chenappa,* 1945 A.M. 171, 221 I.C. 153.

72 *Arun & Co.* v. *Union of India* (1964) A.Punj. 230.

73 *Fatima Fauzia and another* v. *Syed Ul-Mulk* (1979); A.AP. 229, 239 *Man Mohan Das* v. *Janki Prasad* (1945) A.PC. 23; *Abdul Kayum* v. *Alibhai* (1963) A.SC. 309; *Atma Ram* v. *Gulam Husein* (1973) A.Guj. 113 referred to.

74 *Ram Metal Works* v. *The National Small Industries Corporation Ltd.* (1977) A.Knt. 24.

75 *Manickam Chettiar* v. *State of Madras* (1971) A.M. 221, 225; *Murray & Co.* v. *Union of India* (1966) 2 Mad. L.J. 251; 1966 A.M. 235; *Bhikrey* v. *Union of India* (1962) A.SC. 113; and *Union of India* v. *A.L. Ralliaram* (1964) 3 S.C.R. 164; (1963) A.SC. 1685 reld. on.

76 *L.P.K. Murthy & Bros.* v. *Govt. of Madras* (1971) A.M. 393, 399. *Queen* v. *Demers,* 1900 A.C. 103; *Percival Ltd.* v. *London County Council Asylums* (1918) L.J.K.B. 677, 679 reld. on.

77 *Bridle Estates Pty. Ltd.* v. *Myer Realty Pty. Ltd.* (1977) 51 A.L.J.R. 743.

alters his position relying upon that representation. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person, it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law, if the statute requires that the representation shall be in a certain form, no contract may result from the representation and acting therefor, but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation.[78]

In another Supreme Court case the Court held that Government is not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government.[79]

Lumpsum Contract.—A lumpsum (lump sum) contract is one where any certain specified sum is agreed to be paid on completion of the stipulated work.[80]

Contracts after filing of winding up petition.—Contracts except those that are *bona fide,* and in the ordinary course of business, entered into after the filing of a winding up petition are void and unenforceable being unsupported by a valid consideration.[81]

Unenforceability and voidness.—Unenforceability and voidness are not the same concept. When an agreement is wholly unenforceable as being contrary to English law, it would be void if the law applicable is English Law, Common Law or Statute Law. If, however, the agreement, though contrary to English law, e.g. marriage brokerage is not illegal by its proper law and it cannot properly be said to be void and thus no contract at all, it does give rise to rights and duties which are legally enforceable elsewhere than in England.[82]

Contract, making of.—Before a contract of sale comes into existence it must be shown that there was an agreement enforceable-in-law between the parties, and if the agreement was not made in accordance with Art. 299 of the Constitution it could not be enforced and was void against the State.[83]

Government Contract—formal deed not necessary—A contract with Government may be made otherwise than by a formal deed provided it is entered into by an officer duly authorised.[84]

When Contract subsists.—The Supreme Court held in *Chatturbhuj* v. *Moreshwar*[85] that in spite of its having been executed a contract for the supply of goods or for the execution of any works subsists until payment is made. In a later case the same Court held that the change in 1958 made in s. 7(1) of the Representation of Peoples Act of 1951 had made no difference in this respect.[86] But under the change made in 1966 by enacting s. 9A of that Act the contract ceases to exist if only payment by Government has not been made and to this extent the rule in *Laliteshwar's* case[86] had become ineffective.[87] But if the contract had been executed but payment was still due to Government from the contractor the contract would still subsist[87] and the rule in *Laliteshwar's*[86] case apply.

The parties to a "collateral" contract need not be the same as those to the "main" con-

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78 *Century Spinning & Manufacturing Co. Ltd.* v. *The Ulhasnagar Municipal Council and another* (1971) A.SC. 1021, 1024.
79 *Century Spg. & Mfg. Co. Ltd.* v. *Ulhasnagar M.C.* (1971) A.SC. 1021 *Union of India* v. *Messrs Indo-Afghan Agencies Ltd.* (1963) 2 S.C.R. 366; (1968) A.SC. 718; *Robertson* v. *Minister of Pensions* (1949) 1 K.B. 227 per Denning L.J. quoted with approval See also: *Howell* v. *Falmouth Boat Construction Co. Ltd.* (1950) 1 All E.R. 538.
80 *R.C. Thakkar* v. *The Bombay Housing Board* (1973) A.Guj. 34, 41.
81 *Sundaram Asari* v. *Abdul Hameed Sahib,* 1956 A.M. 692.
82 *Mackender* v. *Feldia A.G.* (1966) 3 All E.R. 847, 851.
83 *State of U.P.* v. *Mumtaz Hussain* (1979) A.A. 174, 181.
84 *State of Madras* v. *Ranganathan Chettiar* (1975) A.M. 290, 297.
85 (1954) S.C.R. 817; (1954) A.SC. 236. But see *Munishamappa* v. *Venkatarayappa* (1982) 3 SCC 260.
86 *Laliteshwar Prasad* v. *Bateshwar Prasad* (1966) 2 S.C.R. 63; (1966) A.SC. 580.
87 *Abdul Rahiman* v. *Sadasiv Tripathy* (1968) A.Or. 84, 92.

tract.[88] "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract.[89]

A collateral contract was thus described by Lord Moulton:

"...there must be a contract the consideration of which is the making of some other contract. 'If you make such and such contract I shall give you £100' is in every sense of the word a complete legal contract. It is collateral to the main contract."[90]

This passage was quoted by the House of Lords in *Esso Petroleum* v. *Commissioner of Customs and Excise*[91] where it was held by a majority of the House that by advertising the giving of World Cup coins even though of insignificant value by ESSO dealers and by ESSO advertising that one coin will be given to every purchaser of every 4 gallons of Esso petrol the intention was the creation of a contractual relationship and hence this sale fell within the provisions of purchase tax. Three members of the House said that the arrangement gave rise to a contract between the motorist and the dealer in Esso petrol but the other two held that contractual intention was negatived by the fact that coins were "going free" and by their minimal value.[91] The latter view is more logical. The case of *ESSO Petroleum Co. Ltd.*[92] was this:

The Esso Petroleum started a scheme of sale promotion by distributing medals with the faces of English Football team which went to play at Mexico. Millions of medals were prepared to the order of Esso and Esso petrol pumps were to give one medal to every buyer of 4 gallons of petrol and two to buyers of 8 gallons, i.e., one each for every 4 gallons purchased. The question was whether the goods were "produced for sale" for the purpose of the Purchase Tax Act. The object of giving these medals was that the motorists may purchase ESSO petrol. Free Collector Cards were offered to every purchaser and a pamphlet named "Free World Cup coins" was also prepared and distributed. Large posters 60 by 40 inches were provided to ESSO petrol dealers for display. But what effect the statements of this kind have it was held depends on whether they are "mere representations" or have contractual force. In this case they were held to be the latter and a contractual relationship was established. But the Lords were divided 3 to 2, two holding no relationship established.

Collateral contract where main contract defective.—Denning L.J. has held that the law is that although a man may have been guilty of offence which is absolutely prohibited so that he is answerable in a criminal Court, nevertheless if he has been led to commit that offence by the representation or by the promise of another, then in those circumstances he can recover damages for fraud if there is fraud or breach of contract or warranty if he proves such to have been given, provided always he himself has not been guilty of culpable negligence on his part disabling him from that. Thus where a builder brought a suit against the architect for work done for the architect of the value of £6395 and the licences obtained were for £2150 only, the architect pleaded that no suit could lie for the work as it was unlawful under the Defence of Realm Act and the builder replied by saying that there was a warranty or a promise by the architect that he would get supplementary licences and failing to get that he would stop the work and on the faith of that promise they did the work and so they could recover damages on the breach of that promise and in respect of it; it was held that as the plaintiffs were entirely innocent and led into the illegality on the representation of the defendant the suit was successful.[93]

Contract by Incorporation.—The appellants carried out the annual overhaul of the respondents electrical equipment every year. In their last order to the appellants for an overhaul (purchase order) there was reference to the respondents conditions of contract "24001, obtainable on request". There were three versions of these conditions, the latest being of March 1970, the order was in July 1970. It was held that the conditions of March 1970 being the latest were intended to be and were incorporated in the contract between the parties. If the appellants had asked for the conditions, they would have been supplied the latest version.[94]

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88 *Shamklin Pier Ltd.* v. *Detel Products Ltd.* (1951) 2 K.B. 854; (1951) 2 All E.R. 127 (case of paint manufactured by defendant used by plaintiff and found unsuitable).

89 *Webster* v. *Higgins* (1948) 2 All E.R. 127.

90 *Heilbut Symons & Co.* v. *Buckleton* (1913) A.C. 30, 47 (1911-13) All E.R. Rep. 83, 90; *Webster* v. *Higgins* (1948) 2 All E.R. 127; *Wells (Mecothan) Ltd.* v. *Buckland Sand & Silica Ltd.* (1965) 2 Q.B. 170; (1964) 1 All E.R. 41 (A case of sand of the defendants used by plaintiffs—tripartite situation).

91 Trietal: Outlines of Law of Contract (2nd Ed.) p. 56; (1976) 1 All E.R. 117.

92 *Esso Petroleum Co. Ltd.* v. *Comm. of Customs & Excise* (1976) 1 W.L.R. 1 (1976) 1 All E.R. 117.

93 *Strongman (1945) Ltd.* v. *Sincock* (1955) 2 Q.B. 525; (1955) 3 All E.R. 90; *Burrows* v. *Rhodes & Jameson* (1899) 1 Q.B. 816, 831 appld. In re: *Mahmoud & Isphahani* (1921) 2 K.B. 716 disting.

94 *Smith* v. *South Wales Switchgear Ltd.* (1978) 1 All E.R. 18, 21-23 (H.L.).

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

Communication acceptance and revocation of proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Scope of S. 3.—Sections 3 and 4 of the Contract Act deal with the communication, acceptance and revocation of proposals. In determining the place where a contract takes place, s. 2, the interpretation section, must be taken into account.[1]

What is communication?—As the words of this section stand it would seem that some sort of communication of a proposal, etc., is made by an act which is intended to communicate it, but in fact has not that effect, and that such an inchoate communication fails to have legal effect only because the specific provisions of s. 4 prevent it from being complete. It would seem both simpler and more rational to say that an act intended to communicate a proposal, etc, but failing to do so, is not a communication at all. To get this sense from the section before us we should have to read "and" for "or" in the last clause. There are not any corresponding words in the Commissioners' draft.

It is matter of the commonest experience that the communication of intentions may be effectually made in many other ways besides written, spoken, or signalled words. For example, delivery of goods by their owner to a man who has offered to buy them for a certain price will be understood by every one, unless there be some indication to the contrary, to signify acceptance of that offer. No words are needed, again, to explain the intent with which a man steps into a ferry-boat or a tramcar, or drops a coin into an automatic machine. It is also possible for parties to hold communication by means of pre-arranged signs not being any form of cipher or secret writing, and not having in themselves any commonly understood meaning. This does not often occur in matters of business. Means of communication which a man has prescribed or authorised are generally taken as against him to be sufficient. Otherwise an unexecuted intention to communicate something, or even an unsuccessful attempt, cannot be treated as amounting to a communication; much less can a mere mental act of assent have such an effect in any case.[2]

Communication of special conditions.—In recent times there has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated. This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions. English authorities have established that the first point to be considered is whether "the nature of the transaction is such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special

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1 *Bhagwandas* v. *Girdhar Lal,* 1966 A.S.C. 543; (1966) 1 S.C.R. 656.

2 *Brogden* v. *Metrop. R. Co.* (1877) 2 App. Ca. 666, at pp. 691, 692, per Lord Blackburn; and see *Felthouse* v. *Bindley* (1862) 11 C.B.N.S. 869; 132 R.R. 784; 135 R.R. Preface vii, judgment of Willes J. Silence to a letter does not amount to an acceptance of the terms proposed; *S.M. Bholat* v. *Yokohama Specie Bank,* 1941 A.R. 270; 197 I.C. 890; *Bank of India* v. *R.F. Cowasjee* (1955) A.B. 419, 430.

terms."[3] In short is the ticket a contract or a mere receipt?

Notice of Auction or for calling tenders.—Under R. 34 of the Rajasthan Minor Mineral Concession Rules it is mandatory for making Royalty Collection Contracts that they be made through auction or tenders for a maximum period of two years. Any other form will not be legal. But the rule as to the period of notice for auction or tenders is directory and a substantial compliance is sufficient.[4]

Doctrine of Fundamental breach—Fundamental term—evolution of.—The doctrine of fundamental term or fundamental breach has been evolved by the courts to defeat the rigours of an exemption clause even the most carefully drafted.[5] Every contract contains a "core" on fundamental obligation which must be performed. If a party fails to perform the fundamental obligation, he will be guilty of a breach of contract irrespective of exemption clause. A party cannot exempt himself from fulfilling the main purpose of the contract, and any loss sought to be covered by an exemption clause must fall within the four corners of the contract.[6]

The origin of the doctrine has been traced in an Australian case[7] to a series of decisions by Lord Devlin. According to a learned Australian writer,[8] the doctrine of fundamental breach was a judicial innovation inspired in some degree of the philosophy of necessity of some legal control to curb the oppression which one with a superior bargaining power is apt to practise. Although its overthrow in the *Suisse Atlantique Case* (1967) 1 A.C. 361; (1966) 2 All E.R.61, is generally accepted, there is much complexity and no little confusion in determining what is now the law. But judicial opinion in England favours this doctrine. Lord Denning M.R.[9] has said that a method of getting round the injustice of exemption or limitation clauses is by means of the doctrine of fundamental breach. This doctrine applies in standard form contracts where there is inequality of bargaining power. Whenever it can, the Court will construe the contract, so that the exemption clause avails the party when he is carrying out the contract in substance and not when breaking it in the manner which goes to the very root of the contract.

The Ontario Court[10] of Appeal said:

> "Whether the result is obtained by applying the doctrine of fundamental breach as a matter of contract construction or as an independent principle of law, it is clear that the phenomenon is alive and prospering in the law of this province."

This shows that the erosion of the doctrine as stated by some writers is not universally accepted.

Essential or Fundamental Fact.—Opinions may differ as to what is a fundamental fact. According to Lord Wright in *Norwich Union Fire Insurance Society* v. *Low H. Price Ltd.*[11] it is an "underlying assumption of the contract or transaction."[11]

Greene L.J. in *Craven Ellis* v. *Canons Ltd.*[12] described it as

> "A fact essential to the making of the agreement and the basis upon which parties purported to contract."

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3 Per Stephen J. in *Watkins* v. *Rymill,* 10 Q.B.D. 178, 189 (1883).
4 *Pursha Ram* v. *Modern Construction Co.* (1981) A.Raj. 47, 54.
5 Chitty on Contract (22nd Ed.) para 702. See 24th Ed. para 823 et seq.
6 *Glynn* v. *Margetson* (1893) A.C. 351, 355; (1891-4) All E.R. Rep. 693, 695. Chitty on Contract (22nd Ed) para 702; 23rd Ed. Paras 596, 734; A.G. Guest 77 L.Q.R. 98.
7 *Sydney Corporation* v. *West,* 114 C.L.R. 481 per Kitto J. at pp. 493 to 496.
8 *Harold H. Glass,* 46 A.L.J. 339.
9 *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* (1977) 3 All E.R. 498, 504; *United Fresh Meat Co. Ltd.* v. *Charterhouse Cold Storage Ltd.* (1974) 2 Lloyds Rep. 286.
10 *Heffron* v. *Imperial Parking Co.* (1974) 46 D.L.R. 642, 651. Quoted with approval in *Levison* v. *Patent Steam Carpet Clearance Ltd.* (1977) 3 All E.R. 498, 505.
11 (1934) A.C. 455, 463; (1934) All E.R. Rep. 352, 356.
12 (1936) 2 K.B. 403; (1936) 2 All E.R. 1066.

Lord Thankerton in *Bell* v. *Lever Bros. Ltd.*[13] put it thus:

"Something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter."

In *McRae case*[14] it was stated to be

A case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual relations.

Lord Diplock in *Photo Production Ltd.* v. *Secenricor Transport Ltd.* has defined fundamental breach as follows:

"Fundamental breach is one which entitles the party not in default to terminate the contract. On his doing so the contract comes to an end. Exclusion clause was part of the contract, so that also comes to an end. The party in default can no longer rely upon it."[15]

These requirements have been summed up as follows:[16]

1. A party cannot exempt himself from fulfilling the main purpose of the contract; and
2. Any loss sought to be covered by an exemption clause must fall within the four corners of the contract.

Although the terms "fundamental breach and fundamental term" are sometimes used as if their meaning was the same, fundamental breach differs from a breach of a fundamental term.[17] In the case of a "fundamental breach" the question is whether, having regard to the character of the breach, performance has become something totally different from what the contract contemplated, but a breach of a "fundamental term" goes to the root of the contract so that any breach of that term, without regard having to be had to other circumstances, entitles the party not in breach to repudiate the contract.[18] According to Lord Reid

the term "fundamental breach" means the type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract. One way of looking at it is to ask whether the party in breach has by the breach brought about a situation fundamentally different from anything which the parties could reasonably have contemplated when the contract was made.[17]

The doctrine was applied and elucidated in *Karsales (Harrow) Ltd.*v. *Wallis*[19] upon which most of the later decisions were founded. The following passage is taken from the judgment of Denning L.J. in *Karsales* case:

".....it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects....They do not avail him when he is guilty of a breach which goes to the root of the contract apart from the exempting clauses and see what are the terms, express or implied which imposes an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses."

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13 (1932) A.C. 161, 235; (1931) All E.R. Rep. 1, 36; *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 337, 409; *Porter* v. *Latec Finance (Q.L.D.) Pty. Ltd.* (1964) 111 C.L.R. 177; (1964) 38 A.L.J.R. 184, 194; *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066 (Greene L.J.); *Norwich Union Fire Insurance Society* v. *Low H. Price Ltd.* (1934) A.C. 455, 463; (1934) All E.R. Rep. 352, 356 (Lord Wright).

14 *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 377, 409; *Porter* v. *Latec Finance (Q.L.D.) Pty. Ltd.* (1964) 111 C.L.R. 177; (1964) 38 A.L.J.R. 184, 194.

15 "The Times" dated 20.2.1980. reported as (1980) 1 All E.R. 560. But in this case the House have rejected the doctrine of fundamental breach.

16 *Glynn* v. *Margetson & Co.* (1893) A.C. 351; (1891-4) All E.R. Rep. 693; *Alderslade* v. *Hendon Laundry Ltd.* (1945) K.B. 189, 192, 193; (1945) 1 All E.R. 244, 245; *J. Spurling Ltd.* v. *Bradshaw* (1956) 1 W.L.R. 461, 465; (1956) 2 All E.R. 121. 124-5. Chitty: On Contract (22nd Ed.) para 702; (23rd Ed.) paras 696-7, 734; Guest: 77 L.Q.R. 98; *Suisse Atlantique Societe d'Armement Maritime S.A.* v. *Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361, 422; (1966) 2 All E.R. 61.

17 *Suisse Atlantique Societe D'Armement Maritime* v. *N.V. Rotterdamsche Kolen Centrale* (1966) 2 All E.R. 61, 68 (H.L.); (1967) 1 A.C. 361.

18 *Suisse Atlantique Societe D'Armement Maritime* v. *N.V. Rotterdamsche Kolen Centrale* (1966) 2 All E.R. 61, 68, 86 per Viscount Dilhorne and Lord Upjohn; (1967) 1 A.C. 361, 393, 421; referring to *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son. & Co.* (1953) 2 All E.R. 1471, 1473 (Devlin J.) and *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki K.K. Ltd.* (1962) 2 Q.B. 26, 63; (1962) 1 All E.R. 474, 483 (C.A.); *Harbutts Plasticine* v. *Wayne Tank Co. Ltd.* (1970) 1 All E.R. 225; *Harbutts Plasticine* v. *Wayne Tank Co. Ltd.*, (1970) 1 All E.R. 225 (C.A.) (How to determine fundamental breach. The contract is automatically ended by fundamental breach).

19 (1956) 1 W.L.R. 936; (1956) 2 All E.R. 866, 868.

In the language of the Privy Council[20]

'fundamental' obligation and the breach of it is the doing of an act which "runs counter to the main object and intent of the contract" and "there will be found a breach which evinces a deliberate disregard of their bounden obligations". So that the act which led to the loss was itself a breach of the contract.

Therefore a very serious breach, which even though within the four corners of the contract, cannot be covered by the exemption clause if it goes to the root of the contract.[21] That case concerned the release of goods against a banker's guarantee, when those who so released them well knew they ought not to do so except against the appropriate bills of lading. The exemption clause was therefore limited and modified so that the shipping company should not be permitted to deliberately disregard its obligation as to delivery.[22] There are other cases where the loss was preceded by an act which was such a departure from a breach of the contractual terms that the exemption clauses were held to have ceased to apply.[23]

Fundamental term.—"Fundamental term" in Chitty on Contracts para 825 has been described thus: The expression "fundamental term"[24] is also used in two different senses. It indicates a term of the contract which by reason of the intention of the parties or as a result of the operation of a rule of law, is considered to be so important that any breach of it entitles the innocent party to treat himself as discharged.[25] In this sense it is equivalent to a "promissory condition". Secondly, in relation to an exemption clause it has been used to denote a term which "is narrower than a condition of the contract" and which "underlies the whole contract so that if it is not complied with, the performance becomes totally different from that which the contract contemplates."[26] Such a term is said to be "core" of the contract, and howsoever extensive the exemption clause may be, it has no application if there has been a breach of the fundamental term.[27]

Rule of Construction.—The correct approach to questions raised in cases of fundamental breach is to see whether on a proper construction of the exemption clauses the act which caused the loss is covered by them. Next, if it is so covered, to consider whether there was an antecedent breach of the contract or perhaps some collateral breach which precludes the defendant from relying on those clauses. Where it is suggested that the act causing the loss is itself a fundamental breach of contract, then it is on the question of construction that there arises the issue whether the act is so contrary to the main intent and object of the contract as a whole that the court is justified in limiting the general words used.[28] In *U.G.S. Finance* v. *National Mortgage Bank of Greece,*[29] Pearson L.J. said:

Fundamental breach "is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties as reasonable men must have intended it to have."

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20 *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* (1959) A.C. 516; (1959) 3 All E.R. 182 (P.C.) distinguished in *Hollins* v. *J. Davy Ltd.* (1963) 1 Q.B. 844; (1963) 1 All E.R. 370, 374; *Cf. Alexander* v. *Railways Executive* (1951) 2 K.B. 882; (1951) 2 All E.R. 442.

21 *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd.,* 1959 A.C. 576; (1959) 3 All E.R. 182.

22 *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.,* 1959 A.C. 576; (1959) 3 All E.R. 182, 185; *Glynn* v. *Margetson & Co.* (1893) A.C. 351, 357; *G.H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama* (1961) 1 All E.R. at p. 222; (1956) 3 All E.R. at p. 961 (H.L.); *The Cap Palos* (1921) P. 458 at p. 471 refd. to; *Chartered Bank of India, Australia and China* v. *B.I.S.N. Co. Ltd.* (1909) A.C. 369 dist.

23 *Hollins* v. *Davy Ltd.* (1963) 1 All E.R. 370, 373. *Cf. Bontex Knitting Works Ltd.* v. *St John's Garage* (1943) 2 All E.R. 690; affd. (1944) 1 All E.R. 381n (C.A.).

24 Chitty on Contracts (24th Ed.) Paragraph 825. Vol I.

25 *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361; (1966) 2 All E.R. 61.

26 *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* (1953) 1 W.L.R. 1468, 1470.

27 *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 1 W.L.R. 936, 941.

28 *Holins* v. *J. Davy & Co. Ltd.* (1963) 1 Q.B. 844; (1963)1 All E.R. 370, 374.

29 (1964) 1 Lloyds Rep. 446 (C.A.). at p. 543; approved in *Suisse Atlantique Societe D'Armement* v. *N.V. Rotterdamsche* (1966) 2 All E.R. 61, 68 (H.L.), See also *Tappenden* v. *Artus* (1963) 3 W.L.R. 685, 690; *Singer Manufacturing Co.* v. *London & South-Western Ry. Co.* (1894) 1 Q.B. 833, 837;

In *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* the statement of Pearson L.J. above set out was approved. The view that the topic of fundamental breach is a matter of construction only was adopted by the House of Lords whereas Viscount Dilhorne observed—

> "In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract, and in the older cases I can find no trace of it. In each case not only have the terms and scope of the exempting clause to be considered but also the contract as a whole."[30]

It is a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract.[31]

General rules for application and construction of an exemption clause are:

1. No exemption from liability for negligence of servants unless adequate words used.
2. The liability of a defendant apart from the exempting words must be ascertained.
3. The particular clause in question must be considered.
4. And if the only liability of the party pleading exemption is a liability for negligence, the clause will more readily operate to exempt him.[32]

The abrogation of the doctrine of fundamental breach means that the protection of an exception clause will not be lost by a party in radical breach irrespective of what the clause provides. It mean that whether the clause affords him protection or not depends upon a judicial determination as to—

(i) the proper construction of the agreement including the exception clause,
(ii) the events which have happened;
(iii) the application to such events of an agreement properly construed in the setting of the general law of contract.

The clause is construed strictly against the party for whose benefit it was inserted.[33]

P.C. Malik J. in *Mukul Dutta* v. *Indian Airlines Corporation,*[34] accepted the following three conditions in the case of air passengers:

1. If the person receiving the ticket did not see or know that there was any writing on the ticket, then he is not bound by the conditions,
2. If he knew that there was a writing, and knew or believed that the writing contained conditions, then he is bound by the conditions even though he did not read them and did not know what they were.
3. If he knew that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the party delivering the ticket has done all that can reasonably be considered necessary to give notice of the term to persons of the class to which he belongs.

The third condition which is most difficult in its application, is known as the test of "reasonable sufficiency of notice".

Brian Coote: 40 A.L.J. 336, 341, 344.

30 (1967) A.C. 361; (1966) 2 All E.R. 61, 67.

31 *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son & Co.* (1953) 2 All E.R. 1471, 1473; (1953) 1 W.L.R. 1468; A.G. Guest: Fundamental Breach of Contract (1961) 77 L.Q.R. 98; *Suisse Atlantique Societe D'Armement Maritime* v. *Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361. *Kenyonson* v. *Baxter Hoare Co. Ltd.* (1971) 2 All E.R. 708 (Performance totally different. Goods bailed damaged by rats due to negligence of bailee).

32 *Rutter* v. *Palmer* (1922) 2 K.B. 87, 92; *Raynolds* v. *Boston Deep Sea Co.,* 38 T.L.R. 429 (C.A.); *The Ballyalton* (1961) 1 W.L.R. 929, 935; (1961) 1 All E.R. 459.

33 *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.* (1956) 95 C.L.R. 43, 86, (Harold H. Glass, 46 A.L.J. 339, 341.)

34 1962 A.Cal. 311, 314; Anson's Law of Contract (25th Ed.) (should be 21st Ed.) p. 149 accepted. In the 22nd Edition, the rules are at p. 143, Chitty on Contracts (23rd Ed.) p.590. *Cf. Singhal Transport* v. *Jesaram* (1968) A.Raj. 89; *Raipur Transport Co.* v. *Ghanyshamdas* (1956) A.N. 145.

In *Parker's case*[35] the plaintiff deposited a bag in a cloak room of the defendant railway and he received a paper ticket. On the cloak room ticket there were on the face of it the words "See back". On the back were a number of conditions including one limiting liability to £10. [35] He was held bound although he had not read the conditions. The onus to prove adequacy of notice is on the person claiming exemption.[36] Whether such notice has been given or not is a question of fact. The test is highly objective and a non-legal disability is immaterial; e.g. inability to speak English, blindness or illiteracy, provided notice is sufficient for the class of people to which he belongs so that the degree of intelligence to whom a ticket is offered is relevant.[37] In a Calcutta case[38] the plaintiff purchased a ticket which was in French and it was held that in the case of first class passengers a French company is entitled to assume that he would know sufficient French and if he does not ask for a translation he is willing to accept the contents. *Quaere* what presumption is there, if any, as to educated persons in India being acquainted with any particular language. In an hire purchase agreement there was an exclusion clause about warranties. A motor bike taken on hire purchase was so defective that it had to be sent to the dealer for repair and even then it remained defective resulting in its chainbreaking and damaging the crank case. It was held that the defects were a fundamental breach disentitling the defence of exclusion clause as the defects made it unsafe to use the bicycle. Moreover the defendant had not affirmed the contract as he complained from the very beginning.[39]

The plaintiffs were the owners of a costly carpet. They gave it for cleaning to the defendants and signed an agreement which *inter alia* contained a term that the goods were accepted at owners risk. The costly carpet was lost. The plaintiffs claimed damages for the full value. The defendants relied upon the agreement. It was held by the Court of Appeal that the defendants were guilty of fundamental breach and the onus was on them as bailees, to show how they had dealt with the carpet. Further exemption clause should not be applied where there is inequality of bargaining power.[40]

Thus between 1951 and 1966 the Courts developed a substantive doctrine of fundamental breach, i.e. they have held that an exemption clause could not as a matter of substantive law protect a party from the liability for a fundamental breach even if as a matter of construction the words of the clause did apply to the breach which had occurred.[41] Although the substantive doctrine was an important protection for private consumers it created considerable uncertainty in commercial contracts and it was in that context that the House of Lords in 1966

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35 *Parker* v. *South Eastern Railway* (1877) 2 C.P.D. 416.

36 *Hood* v. *Anchor Line (Henderson Bros.) Ltd.* (1918) A.C. 837; (1918-19) All E.R. Rep 98 (Onus on the Shipping Company which was held discharged; pointed attention drawn to the conditions); *Penton* v. *Southern Railway* (1931) 2 K.B. 103; *Raipur Transport Co.* v. *Ghanshyamdas* (1956) A.N. 145; *Watkins* v. *Rymill* (1883) 10 Q.B.D. 178 (Notice to depositors of goods prominently exhibited on the premises and words printed on the receipt drawing attention to conditions exhibited); *Henderson* v. *Stevenson* (1875) 2 H.L. Sc.App. 470. where an endorsement on a steamboat ticket was not refd. to on its face; *Sheikh Dawood* v. *S.I. Ry. Co. Ltd.* (1945) Mad. 174; *Raipur Transport Co.* v. *Ghanshyamdas* (1956) A.N. 145.

37 *Thompson* v. *L.M.S. Ry. Co.* (1930) 1 K.B. 41; (1929) All E.R. Rep. 474; *Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416; *Richardson Spence & Co.* v. *Rowntree* (1894) A.C. 217; (1891-94) All E.R. Rep. 823 (Case of a semi-illiterate steerage passenger who fell off the board during the voyage. The ticket was folded up so that no writing was visible unless it was unfolded; nothing being indicated to draw the passengers' attention to the conditions inside): See *Madras Railway Co.* v. *Govinda Rau,* 21 Mad. 172, 174; *Henderson* v. *Stevenson* (1875) 2 H.L.Sc. App. 470 (where endorsement on a steamboat was not refd. to on its face); *Sheikh Dawood* v. *S.I. Ry. Co. Ltd.* (1945) Mad. 174; Chitty on Contracts (23rd Ed.) para 592; *Sugar* v. *L.M.S. Ry.* (1941) All E.R. 172 (where the words for conditions etc. were obliterated by date stamp).

38 *Mackillican* v. *Compagnie des Messageries Maritime de France,* 6 Cal. 227.

39 *Farnworth Finance Facilities* v. *Attryde* (1970) 1 W.L.R. 1053; (1970) 2 All E.R. 174.

40 *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* (1977) 3 All E.R. 498, 502, 506 (C.A.); *Spurling Ltd.* v. *Bradshaw* (1956)2 All E.R. at 125 applied; *Hunt* v. *Winterbotham (West of England) Ltd.* v. *BRS (Parcels) Ltd.* (1962) 1 All E.R. 111 distinguished; *Gillespie Bros & Co. Ltd.* v. *Roy Bowles Transport Ltd.* (1973) 1 All E.R. at p. 200 applied (exemption clause not to be given effect to in case of inequality of bargaining power).

41 *Alexander* v. *Railway Executive* (1951) 2 K.B. 882; *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 2 All E.R. 866.

reverted to the view that in general the doctrine of fundamental breach was a rule of construction.[42]

This is an authority for the proposition that liability even for a fundamental breach can be limited and probably excluded, but there are three qualifications (1) there is a strong presumption against construing exemption clauses in a manner to cover fundamental breaches; (2) it is possible that certain breaches are so serious that substantive doctrine of fundamental breach will continue to apply to them, and (3) the House of Lords in *Suisse Atlantique case* (1967) 1 A.C. 361 stressed that the shipowners might have terminated the contract on account of the Charterer's delay, but that they had failed to do so and thus by implication affirmed the contract.[43]

The substantive doctrine will continue to apply where the injured party terminates the contract because in that case the exemption clause ceases to have effect for the benefit of the party in breach. This theory is not only supported but a recent decision in *Harbutt's Plasticine Ltd.* v. *Wayne Tank & Pump Co. Ltd*[44] takes this theory further. In that case contractors put up a plasticine making plant in a factory under a contract with liability limited to the cost of the contract. But in the fabrication they made a serious blunder and the plant caught fire burning down the whole factory causing a very much bigger loss. It was held that the breach was fundamental and even though expressly the factory owner had not repudiated the contract, he was entitled to recover the full loss because in the circumstances he had no alternative but to do so.

Similar reason was used in a later case[45] where a guard of a security firm engaged to guard a factory lit a fire which set the factory on fire. The firm was held not to be protected.

If the contract has been completed before the party discovers the breach, the only course open to him i.e. the innocent party is to sue for breach and he can do so on the footing that he is entitled to treat the contract at an end.[46]

The doctrine of fundamental breach was applied by the Court of Appeal in 1977 to a case[47] where the facts were these. One 'L' gave a carpet worth £900 for cleaning to the cleaners, the defendants. While in possession of the cleaners it got stolen. There was an exemption clause and a limitation clause in the contract between the parties which was a standard form. The exemption clause was "All merchandise is expressly accepted at owner's risk". This was held not to be sufficiently clear to give exemption from liability which was due to the cleaners fundamental breach of the contract.

The doctrine of fundamental breach has considerably been eroded, if not eclipsed by the recent judgment of the House of Lords in *Photo Production Ltd.* v. *Secenricor Transport Ltd,*[48] and by the Privy Council[49] where the rule of construction is that there is no rule of law by which exclusion clauses are eliminated or deprived of the effect regardless of their terms where there has been fundamental breach of contract. The question whether and to what extent an exclusion clause is to be applied in any breach of contract is a matter of construction of contract. (Per Lord Wilberforce). For a discussion of this doctrine of fundamental breach see below.[50]

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42 See *Suisse Atlantique* (1961) A.C. 361.

43 Trietal: An outline of the Law of Contract (1977) pp. 86-87.

44 (1970) 1 Q.B. 447; (1970) 1 All E.R. 25; (1970) 2 W.L.R. 198. (C.A.) overruled in (1980) 1 All E.R. 556 (H.L.).

45 *Photo Production Ltd.* v. *Securicor Transport Ltd.* (1978) 3 W.L.R. 856 revd. on appeal (1980) 1 All E.R. 556 (H.L.).

46 *U.G.S. Finance Ltd.* v. *National Mortgage Bank Greece* (1964) 1 Lloyds Rep. 446. 450; *Wathes (Western) Ltd.* v. *Austin (Menswear) Ltd.* (1976) Lloyds Rep. 14, 24.

47 *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* (1977) 3 All E.R. 498, 503, 504; *Adelaide* v. *Hendon Laundry Ltd.* (1945) 1 All E.R. 244 refd. to; *Suisse Atlantique Case* (1966) 2 All E.R. 61, 67, 71, 76, 78, 92, 94 folld.

48 'The Times' dated 20.2.1980 since reported (1980) 1 All E.R. 556 (H.L.); *Harbutt's Plasticine Ltd.* v. *Wayne Tank & Pump Co. Ltd.* (1970) 1 Q.B. 447; (1970) 1 All E.R. 225; (1970) 2 W.L.R. 198 overruled.

49 (1978) 3 W.L.R. 856 reversed. *Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spratt (Aust) Pty. Ltd.* (1980) 3 All E.R. 257.

50 (1979) 53 A.L.J. 289.

The Case of the House of Lords[51] **was this.**—In a contract between a factory owner, the plaintiff, and a Security Company, the defendant there was an exception clause to the effect that under no circumstances were the defendants to be responsible for any injurious act or default by any employee..... unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the defendants as his employer; nor in any event were the defendants to be responsible for loss suffered by the plaintiffs..... through fire or any other cause except in so far as such loss (was) solely attributable to the negligence of the defendants, employees acting within the course of their employment...."

One night one of the employees lit a small fire which could not be controlled as a consequence of which the factory and the goods therein caught fire and were destroyed. No negligence was alleged in employing that employee. The House of Lords held against the finding of fundamental breach saying that (i) there was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect, regardless of the terms of the contract; because the parties were free to accept what ever exclusion or modification of their obligations they chose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract including any exception clause and because (per Lord Diplock) the parties were free to modify or reject any express words both their primary obligations to do that which they had promised and their secondary obligations to pay damages on the breach of any primary obligation. Although the defendants[52] were in breach of their implied obligation to operate their service with due and proper regard to the safety and security of the plaintiffs premises, an exception clause was clear and unambiguous and protected the defendants from liability. In this context attention is drawn to a judgment of the Supreme Court[53] where distinction was drawn to the difference between cases of loss due to negligence and loss caused by acts of volition e.g. theft of goods pledged.

The Privy Council in a case[54] from Australia where a Stevedore had stored goods after they were off loaded from the ship and later delivered to a person unauthorised, rejected the plea of "fundamental breach" raised by the consignees on the ground of construction of clause 17 of the bill of lading which dealt with the liability of the shipping carrier and gave it immunity from all liability if a suit for loss or damage was not brought within a year of the delivery of the goods or the date when the goods should have been delivered. Said their Lordships:

"It is quite unreal to equate this clause (clause 17) with those provisions in the contract which relate to performance. It is a clause which comes into operation when contractual performance has become impossible, or has been given up; then it regulates the manner in which liability for breach of contract is to be established. In this respect their Lordships found it relevantly indistinguishable from an arbitration clause or a forum clause which on clear authority survives a repudiatory breach. See *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) 1 All E.R. 337; *Photo Production Ltd.* v. *Secenricor Transport Ltd.* (1980) 1 All E.R. 556, 567; (1980) 2 W.L.R. 283, 295."

The Privy Council also pointed out that "the proposition that an exception clause may be inapplicable to certain breaches of contract was a matter of construction as held by the House

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51 *Photo Production Ltd.* v. *Secenricor Transport Ltd.* (1980) 1 All E.R. 556, 560, 561, 565, 566, 567, 570: Decision in (1978) 3 All E.R. 146 revd. See also (1979) 53 A.L.J. 289; *Swisse Atlantique Societe D'Armamente Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361; (1966) 2 All E.R. 61 (1966) 2 W.L.R. 944 explained and appld; *Charterhouse Credit Co. Ltd.* v. *Tolly* (1963) 2 All E.R. 432; *Harbutt's Plasticinc Ltd.* v. *Wayne Tank & Pump Co. Ltd.* (1970) 1 All E.R. 225. *Watches Western Ltd.* v. *Austins Menswear Ltd.* (1976) 1 Lloyds Rep. 14 overruled.

52 *Photo Production Ltd.* v. *Secenricor Transport Ltd.* (1980) 1 All E.R. 554, 564, 568, 569, 570. (1978) 3 All E.R. 146 rev.

53 *State Bank of Saurashtra* v. *Chitranjan Ramnath Raja* (1980) A.S.C. 1528, 1532 (See ct. of App. judgment (1978) 3 All E.R. 146.

54 *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spragott (Australia) Pty. Ltd.* (1980) 3 All E.R. 257, 261, 264.

of Lords in *Suisse Atlantique Societe D'Armamente Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361; (1966) 2 All E.R. 61. and *Photo Production Ltd.* v. *Securicor Transport Ltd.* (1980) 2 W.L.R. 283; (1980) 1 All E.R. 556 and endorsed by Windeyer J. in *Thomas National Transport (Melbourne) Pty. Ltd.* v. *May & Baker (Australia) Pty. Ltd.* (1966) 115 CLR 353, 376".

It is submitted that in view of the interpretation given by the Supreme Court, the doctrine, as enunciated by Lord Denning M.R. in the Court of Appeal, should be accepted by Courts in India particularly in cases where, as suggested by Treital, the breaches are so serious that the substantive doctrine of fundamental breach continues to apply e.g. in cases of deliberate lighting of fire in an explosive or inflammable factory or godowns, to deliver goods to a person who is a total stranger, to put a poor lock on a locker for valuables and so forth. Besides regard should be had to the standards of care or cases of want of it. It is submitted that the interest of the common consumer will be seriously jeopardised by accepting the strict operation of the standards laid down by the House of Lords and the Privy Council. Further there are cases of gross negligence which are destructive of the protection of an exemption clause.

Fundamental breach—burden of proving.—The burden of proving the absence of fundamental breach where the defendant pleads a condition limiting the liability for loss "however sustained" is not on the defendant.[55] All exemption clauses are construed *contra proferantum* so that if there are two reasonable constructions of a word or a phrase, then the construction least favourable to the defendants will be adopted.[56] (Defendants relying on the clause.) Courts would as a last resort disregard as nonsense what commercial men had agreed upon. Where a paramount clause in its setting cannot be construed without results so incongruous that it could not be supposed that the parties ever intended to produce them, the clause must be rejected *in toto* as insensible.[57] Denning L.J. in *John Lee & Son Ltd.* v. *Railway Executive*[58]

where a lease contained an exemption clause couched in extravagantly wide language, said that if the wide construction on the exemption clause is correct, there would be a serious question whether the courts will enforce it. "...the vigilance of Common Law while allowing freedom of contract, watches to see that it is not abused."

The Court held that the term should be confined to liability arising by reason of the relationship of the landlord and the tenant. It also held the clause to be ambiguous and construed it against the lessor. In a later case, *Bonsor* v. *Musicians Union,*[59] Denning L.J. repeated the suggestion in a different context. There the relationship between the union and its members was contractual but the rules which members had to accept were more like bye-laws. Denning L.J. said that any rule found to be contrary to natural justice or to what comes to the same thing to what is fair and reasonable will be held invalid. Against this are dicta in some cases.[60]

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55 *Hunt & Winterbotham (West of England) Ltd.* v. *B.R.S. (Parcels) Ltd.* (1962) 2 W.L.R. 172, 184; (1962) 1 All E.R. 111 (a case of construction of clause) C.A.

56 *Hollins* v. *J. Davy Ltd.* (1963) 201, 205; (1963) 1 All E.R. 370, 373; *J. Lee & Son (Grantham) Ltd.* v. *Railway Executive* (1949) 2 All E.R. 581, 583—(Lease contained an exemption clause couched in extravagantly wide language).

57 *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamsons Shipping Co. Ltd.* (1957) 2 W.L.R. 968, 978-980; *John Lee & Son Ltd.* v. *Railway Executive* (1949) 2 All E.R. 581, 584.

58 (Per Denning L.J.) *John Lee & Son Ltd.* v. *Railway Executive* (1949) 2 All E.R. 581, 584; *Parker* v. *S.E. Ry. Co.* (1877) 2 C.P.D. 416, 428 (a passenger would not be bound by conditions which were unreasonable to the knowledge of the Ry. Company); *Thompson* v. *L.M.S. Ry. Co.* (1930) 1 K.B. 53, 56; (1929) All E.R. Rep. 474, 482, 483 (if the conditions are unreasonable they would not be binding); *Bonsor* v. *Musicians Union* (1954) Ch. 479, 485; (1954) 1 All E.R. 822, 826, See also *Lee* v. *Showmans Guild of Great Britain* (1952) 2 Q.B. 329; (1952) 1 All E.R. 1175; contra *Grand Trunk Rail Co. of Canada* v. *Robinson* (1915) A.C. 740, 747; (1915) A.PC. 53, 55. (Such a contract cannot be pronounced unreasonable by a Court of Law); *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo Mexican P.P. Co. Ltd.* (1916) 2 A.C. 397, 404.

59 1954 Ch. 479, 485; (1954) 1 All E.R. 822, 826. See also *Lee* v. *Showmans Guild of Great Britain* (1952) 2 Q.B. 329; (1952) 1 All E.R. 1175. (Judgment of Romer L.J. at p. 1185).

60 *Grand Trunk Rail Co. of Canada* v. *Robinson* (1915) A.C. 740, 747, F.A.; *Tamplin S.S. Co. Ltd.* v. *Anglo American Petroleum Products Co. Ltd.* (1916) 2 A.C. 397, 404; *British Movietonews Ltd.* v. *London & District Cinemas Ltd.* (1951) 2 A.E.R. 617, 624; (1952) A.C. 166, 183; Diplock L.J. in *Faramus* v. *Film Artistes Association* (1963) 1 A.E.R. 636, 650-2; Lord Denning did not express an

A fortiori where an exemption clause is relied upon to exempt from liability, its terms must be clear, effective and precise.[61] Where an act done is so contrary to the main intent and object of the contract as a whole the court is "justified in looking at the main object and content of the contract and in limiting the general words used having in view that object and intent."[62]

The plaintiff garaged a car with the defendant under a contract which relieved the defendants of "all liability ...for ...however caused" and the defendants did "not accept responsibility for loss or misdelivery of ...any vehicle ...arising from any cause including negligence". The car was lost because the garage attendant allowed a thief to drive away the car because of honest belief that the thief represented the plaintiff.

The defendants were held exempted from liability.[63] The negligence of the garage attendant was not such a deliberate disregard of the obligation of the contract as to amount to a fundamental breach precluding the defendants from relying upon the exemption but his oral assurance will override exemption clause.[63] A fundamental breach e.g. selling a defective motor cycle disentitles the seller from realising unpaid balance of price. *Farnworth Finance Facilities Ltd.* v. *Attryde,* (1970) 2 All E.R.774. After the decision of the House of Lords in *Suisse Atlantique Case* there is no reason for any special rule as to burden of proof to be formulated. In accordance with general principles of contract it would be for the plaintiff to prove the defendant's breach of contract. But he may have the advantage of a particular rule of law that the bailee in detinue may have to prove that the loss occurred without his negligence. Upon the plaintiff's proof to establish the breach, the Court will decide as a matter of construction whether the exemption clause applies.[64]

But in a very recent case[65] the burden of proof has been given thus. Where a fundamental breach of contract is alleged by the bailor of goods the burden of proof is on the bailee that the loss had not occurred in consequence of a fundamental breach of contract since he was in a better position than the bailor to know what happened to the goods while they were in the bailees' possession. Since they had not explained how the article bailed had been lost they had not disproved that the loss was due to a fundamental breach and hence not entitled to rely on the exemption clause.[66] The rule of burden of proof applies to gratuitous bailees also.[67]

Principle of deviation.—If a man promises to keep a thing at a particular place but instead keeps it at a different place, he cannot rely on the exemption clause.[68] This principle has been extended to cases where a man promises to perform his contract in a particular way and instead performs it in a totally different way. He too cannot rely on the exemption clause because it is construed only when he is carrying out his contract in the stipulated way. These cases still stand and are in no way diminished in authority by *Suisse Atlantique Case* (1967) 1 A.C. 361. Therefore where a garage keeper agreed to keep the car locked up and instead he left it unlocked and his servant stole a suit case, he could not rely on the exemption clause.[69]

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opinion on the point, but reiterated it in *Boulting* v. *Association of Cinematograph, Television & Allied Technicians* (1963) 1 All E.R. 716, 724.

61 *Anglo Saxon Petroleum Company Ltd.* v. *Adamsons Shipping Co.* (1957) 2 W.L.R. 968, 980; *Petrofina S.A. of Brussels* v. *Compagnia Italiana* (1937) 53 T.L.R. 650; 57 Ll.L Rep. 247.

62 *Hollins* v. *J. Davy Ltd.* (1963) 2 W.L.R. 201, 205; *Glynn* v. *Margetson* (1893) A.C. 351, 354 (per Lord Herscell). See also *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* (1959) A.C. 576; (1959) 3 All E.R. 182, 185 (P.C.). *Harbutts Plasticine* v. *Wayne Tank Co. Ltd.* (1970) 1 All E.R. 225 (C.A.) To determine fundamental breach events resulting from breach to be seen).

63 *Hollins* v. *J. Davy* (1963) 2 W.L.R. 201 (Sachs. J.); *Ashby* v. *Tolhurst* (1937) 2 K.B. 242 (C.A.) reld. on. But see *Council of the City of Sydney* v. *West* (1965-66) 39 A.L.J.R. 323 and *Mendelssohn* v. *Normand Ltd.* (1969) 2 All E.R. 1215. *W. & J. Lane* v. *Spratt,* (1969) 3 W.L.R. 950 (Loss due to theft by driver of a transport vehicle as employer has no duty to verify honesty of his employee).

64 Chitty: On Contract (24th Ed.) para 841. (page 840)

65 *Levison & another* v. *Patent Steam Carpet Cleaning Co. Ltd.* (1977) 3 All E.R. 498, 505, 506.

66 *Ibid; Woolmer* v. *Delmer Price Ltd.* (1955) 1 All E.R. 377 approved; *Spurling (J) Ltd.* v. *Bradshaw* (1956) 2 All E.R. 121; appld. *Hunt & Winterbotham* v. *BRS (Parcels) Ltd.* (1962); 1 All E.R. 111 disting. *Gillespie Brothers & Co. Ltd.* v. *Ray Bowles Transport Ltd.* (1973) 1 All E.R. 193, 200 appld.; *United Manufacturers Ltd.* v. *W.A.F. Co. Ltd.* (1964) E.A. 233 (East Africa Court of Appeal) noted with approval: See 2 Halsbury's Law (4th ed.) Para 1540.

67 *Port Swettenham Authority* v. *T.W. Wu & Co.* (1978) 3 All E.R. 337 (P.C.).

68 *Gibaud* v. *G.E. Ry.* (1921) 2 K.B. 426.

69 *Mendelssohn* v. *Normand Ltd.* (1969) 3 W.L.R. 139, 144. (1969) 2 All E.R. 1215.

The condition on the back of the garage ticket was "The Garage Proprietor will not accept responsibility for any loss or damage sustained by the vehicle, its accessories or contents however caused..." was held to be ambiguous even though due to a printing error.[70] This was a case where an owner had temporarily parked his car in the garage and was not allowed to lock it even though he told the servant that there were costly things in a suit case.

Fundamental Breach.—A party to a contract may be precluded from relying on the exemption clause in a contract where he has been guilty of fundamental breach or of a "breach of fundamental term". At the present moment there is considerable doubt concerning scope and even existence of this principle.[71] But the Court of Appeal have in a recent case[72] applied the Doctrine

Exception clause—when operative.—An exception clause in an agreement of lease that the landlord "shall not in any circumstances be liable for damage caused by ...water to any goods, whether in possession of landlord or not", was held wide enough to protect the landlord for his "own" admitted negligence in regard to a water closet on a higher floor possession whereof was retained by the landlord.[73] The principle, like the *ejusdem generis* rule, is that "any goods" does not mean "any goods whatsoever" but may mean a class or genus of goods which the parties had in mind as covered by the contract.[74]

The list of breaches enumerated by Delvin J. in *Smeaton Hanscomb & Co* v. *Sassoon I. Setty*[75] was soon added to by others. Cheshire and Fifoot added the undertaking as to title implied by s. 12(1) of the Sale of Goods Act.[76] K.W. Wedderburn postulated total failure of consideration.[77] Deliberate misconduct was added by the Privy Council in *Sze Hai Tong Bank* v. *Rambler Cycle Co.*,[78] e.g. acting contrary to main object and intent of the contract and the main objects of the contract.[79] Deviation is a fundamental breach.[80] An exemption clause would not exclude the liability of a seller where in a contract for sale of bags of copra cakes, they contain a liberal admixture of castor beans which is dangerous to cattle[81] or if a man offers to sell beans to another and he sends him oats.[82] The concept of fundamental term is not confined to contracts for sale of goods and hire purchase. It was applied to laundering of handkerchiefs.[83] An express provision in the agreement will exclude a stipulation regarding the same subject which would otherwise be implied. General words in the exception clause may be given limited operation to accord with the main object and intent of the contract.[84]

Thus where a banker's instructions from his customer are ambiguous or unclear, the bank commits no breach of contract with the customer if he has construed them in a reasonable sense, referred to.[85]

Contractual documents.—Contractual documents must be of a class which the party receiving it would expect to contain contractual conditions.[86] Thus a turnpike ticket,[87] a ticket

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70 *Ibid.* p. 143.
71 Chitty on Contracts, 24th Ed. Pr. 823.
72 *Levison* v. *Pertent Steam Carpet Cleaning Co. Ltd.* (1977) 3 All E.R. 498.
73 *Akreib* v. *Booth & Others Ltd.* (1960) 1 W.L.R. 454. On appeal (1961) 1 W.L.R. 367 reversed on another point.
74 *Akreib* v. *Booth & Others Ltd.* (1961) 1 W.L.R. 367, 371, 372 (C.A.) reversing the judgment of Jones J.
75 (1953) 1 W.L.R. 1468; (1953) 2 All E.R. 1471. (The Rise and Fall of Fundamental Breach) Brian Coote: (1967) 40 Aust.L.J. 336.
76 Cheshire & Fifoot: The Law of Contract (1964) 6th Ed. , p. 143.
77 Sutton & Shannon on Contracts (5th Ed.), pp. 306, 307 (1956).
78 (1959) A.C. 576 (P.C.); (1959) 3 All E.R. 182, 185 (P.C.).
79 Wedderburn (1957) Camb.L.J. 16.
80 *Suisse Atlantique Societe D'Armement Maritime* v. *N.V. Rotterdamsche Kolen Centrale* (1966) 2 A.E.R. 61, 67, 71 (H.L.).
81 *Pinnock Brothers* v. *Lewis & Peat* (1923) 1 K.B. 690.
82 (1838) 4 M. & W. 399, 404 (per Lord Abinger).
83 *Alderslade* v. *Hendon Laundry Ltd.* (1945) K.B. 189, 193; (1945) 1 All E.R. 244.
84 *Glynn* v. *Margetson & Co.* (1893) A.C. 351, 335.
85 *Commercial Banking Company of Sydney Limited* v. *Jalsard Trading Company* 46 A.L.J.R. 436.
86 Chitty on Contract, para 567 (22nd Ed.), para 587 (23rd Ed.) Para 677 (24th Ed.).
87 *Parker* v. *South Eastern Ry.* (1877) 2 C.P.D. 416, 422.

for a deck-chair[88] and a ticket handed at a public bath[89] are not such documents and the party receiving it can put it in his pocket unread.[87] The same is the case with a cheque book.[90] On the other hand, a railway[91] or steamship[92] ticket or a receipt for goods deposited[93] have been held to be contractual documents.[86]

A clause in a contract for the hire of a crane, providing that the driver supplied by the owners "shall be responsible for driving or operating the plant but shall use it and be under the direction and supervision of the hirer who shall be responsible for his action as though the driver were in the hirer's direct employ",

was construed to mean that the hirer making use of the services of the driver is vicariously liable as a master, and it applies in the case of rehiring also,[94] so also where in a similar contract the term is "claims arising in connection with the operation of the plant" [95]

Amongst the exemptions from bridge-toll one was "in respect of military on duty or their equipment baggage or transport" which by a majority of the House of Lords was construed to mean that when the driver of a military vehicle was a soldier performing his military duty in driving it that vehicle was exempt from toll even though all the passengers were persons not on military duty.[96]

Conditions printed in small print.—Conditions printed in small type on the back of a "landing account" which included the "London lighterage" clause exempting the bailee from liability for any loss, damage or detention occasioned by the default of themselves, their servants or agents is a sufficient notice of the clause to make it a term of the contract and would protect the warehouseman against allegations of negligence *simpliciter*.[97]

The Indian Airlines Corporation, at the door of its Calcutta office, affixed a board on which the conditions of carriage were given in bold letters. In the ticket issued to the passengers it was stated that the ticket was issued subject to the conditions of carriage which were printed inside the cover page in very small letters.

It was held that the conditions displayed on the board gave reasonably sufficient notice of the conditions and must be deemed to have been accepted by a person buying the ticket.[98]

A ticket showing receipt of 2*d*. as hire for a deck chair is merely a receipt evidencing payment and anything printed on its back limiting liability for damage caused is not binding on the holder of the ticket. It has not the same implication as a railway ticket.[99]

Carrier's case.—An exempting clause can be invoked only where the loss has arisen in the course of performance of the carriage of goods according to the contract[1] and not in deviation of it.[2] The word "loss" in the exemption clause includes larceny and "misdelivery".[3] In 1915,

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88 *Chapelton* v. *Barry U.D.C.* (1940) 1 K.B. 532.
89 *Taylor* v. *Glasgow Corpn.* (1952) S.C. 440.
90 *Burnett* v. *Westminster Bank* (1966) 1 Q.B. 742; (1965) 3 All E.R. 81 (notice appeared on new cheque books which had not appeared on previous cheque books).
91 *Thompson* v. *L.M.S. Ry.* (1930) 1 K.B. 41; (1929) All E.R. Rep. 474.
92 *Hood* v. *Anchor Line (Henderson Bros.) Ltd.* (1918) A.C. 837.
93 *Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416.
94 *Herdman* v. *Walker (Tooting) Ltd.* (1956) 1 W.L.R. 209 at p. 212; *Mersey Docks & Harbour Board* v. *Coggins* (1947) A.C. 1; (1947) 2 All E.R. 345.
95 *Arthur White (Contractors) Ltd.* v. *Tarmac Civil Engineering Ltd.* (1967) 1 W.L.R. 1508 (H.L.) (Case of excavator)—(1966) 1 All E.R. 209 (C.A.) reversed.
96 *Nyali Ltd.* v. *Attorney General* (1956) 3 W.L.R. 341 (H.L.).
97 *J. Spurling* v. *Bradshaw* (1956) 1 W.L.R. 461. See *Mukul Dutta* v. *Indian Airlines Corporation* (1962) A.Cal. 311. Also *Richardson* v. *Rowntree* (1894) A.C. 217 (A case of sea voyage ticket to a steering passenger who was semi-illiterate and the ticket was folded and nothing to indicate on the outside of the existence of conditions).
98 *Mukul Dutta* v. *Indian Airlines Corporation,* 1962 A.Cal. 311; *Hood* v. *Anchor Line,* 1918 A.C. 837, 842-3.
99 *Chapelton* v. *Barry Urban Distt. Council* (1940) 1 K.B. 532; *Thompson* v. *London Midland & Scottish Ry. Co.* (1930) 1 K.B. 41, 53 dist.
1 *Hunt & Winterbotham Ltd.* v. *B.R.S. (Parcels) Ltd.* (1962) 2 W.L.R. 172, 175 (C.A.).
2 *Suisse Atlantique Societe D'Armement* v. *Rotterdamsche Kolen Centrale* (1966) 2 All E.R. 61, 67.
3 *Hollins* v. *J. Davy Ltd.* (1963) 2 W.L.R. 201, 207.

Lord Haldane in *Grand Trunk Ry. Co. of Canada* v. *Robinson*[4] observed that the liability of a carrier can be superseded by a specific contract which either enlarges, diminishes or excludes it. If the law authorises it such a contract cannot be pronounced unreasonable by a court of justice. The specific contract with its incidents either expressed or attached by law becomes in such a case the only measure of the duties between the parties.

Being unable to read.—Being unable to read does not avail the holder of an excursion ticket against the conditions on which it was issued. It bore on the face of it "issued subject to the company's time tables and notices..." and the time table contained the conditions.[5] But if the ticket is printed in such a way or is delivered to a passenger in a state as not to give reasonable notice on the face of it that it embodies special conditions, the railway cannot take advantage of it. In that case the words "for conditions see back" were obliterated by a date stamp.[6] Or if it is given not at the commencement of the journey but after the goods had been carried to their destination, it can have no restrospective effect.[7]

If the carrier—the Railway—agrees to carry perishable fruits by a special or a faster train and it does not do so not because it could not do so, it cannot rely upon the risk note excluding its liability except on the ground of misconduct on the part of the railway servants, because carriage by a fast train is of the essence of the contract and damages could be claimed without proof of misconduct.[8]

If a carrier employs a known thief and puts him in charge of goods that would be a fundamental breach. But if he employs a driver without reasonably investigating his antecedents that would not amount to a repudiation of the contract. It may be carrying it out negligently. Such conduct of the carrier does not take it out of the category of ordinary negligence to which the limiting clause is designed and apt to apply.[9]

A pass was issued by a Corporation free to an old woman passenger upon the express condition that the Corporation and its servants shall be under no liability either contractual or otherwise to the pass-holder.

This was held by the Court of Appeal to contain no express agreement not to sue an employee of the Corporation and no such condition could be inferred as the condition had to be construed against the Corporation.[10]

In *Graham's case*[11]

a contractor agreed to carry for the plaintiff copper wire from London to Glasgow; there was an oral agreement incorporating the Road Haulage. Association conditions of carriage. The contractor sub-contracted without the knowledge of the plaintiff. The sub-contractor gave the name of a non-existing firm, took the goods, from the premises and vanished. No proper check was made of the man's credentials.

The exemption clause was held inapplicable because the contract did not authorise sub-contracting without the leave of the plaintiffs and this amounted to fundamental breach. In a contract to carry goods forthwith and immediately to their destination the goods were stolen from a van while its driver left it unattended to go to lunch, the carrier was not protected.[12]

In a time charterparty where the owners placed a vessel at the charterers' disposal for a fixed time for which they paid their hire, there was a clause that the vessel was not to be ordered to nor continue in any place or on any voyage which would bring her within a dangerous zone as a result of war, actual or threatened. At the time of negotiating the charterparty, both parties realised that the Suez Canal may be closed. The vessel entered the Suez Canal and was trapped.

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4 (1915) A.C. 740; 1915 A.P.C. 53, 55. Halsbury's Laws of England, pp. 186-8 (3rd Ed.).
5 *Thompson* v. *L.M.S.R. Co.* (1930) 1 K.B. 41; (1929) All E.R. Rep. 474. See also *Mackillican* v. *Compagnie de Messageries Maritime de France* (tickets in French) 6 Cal. 227.
6 *Sugar* v. *L.M.S.R. Co.* (1941) 1 All E.R. 172.
7 *Raipur Transport Co.* v. *Ghanshyamdas* (1956) A.N. 145.
8 *Dominion of India* v. *Gaya Prasad* (1957) A.A. 193; *Gunyon* v. *South Eastern & Chatham Railway Co.* (1915) 2 K.B. 370; B.B. & C.I. Rly. v. *Muhamadbhai* (1929) A.B. 355.
9 *John Carter Ltd.* v. *Hanson Haulage Ltd.* (1965) 2 W.L.R. 553, 571 (C.A.) but see p. 565 (Seller L.J.) dist. in *Garnham Harris & Elton* v. *Alfred Ellis* (1967) 1 W.L.R. 940; *The Albion* (1953) 1 W.L.R. 1026 (1953) 2 All E.R. 679; *Spurling (J) Ltd.* v. *Bradshaw* (1956) 1 W.L.R. 461; (1956) 2 All E.R. 121.
10 *Gore* v. *Van der Lann* (1967) 1 All E.R. 360. See also cases under "Third Parity"
11 *Garnham Harris & Elton* v. *Alfred W. Ellis* (1967) 1 W.L.R. 940.
12 *Bonter Knitting Works Ltd.* v. *John's Garage* (1944) 1 All E.R. 381n confirming (1943) 2 All E.R. 690.

The charterers were held to be in breach of war clause when they ordered her to enter the canal.[13]

Carriage by air being governed by Common Law, the carrier can escape liability by an exemption clause exempting on the ground of misconduct or negligence of its servants.[14]

Delivery of goods without production of a way bill by a common carrier, cannot be sued upon by the holder, a bank which has advanced money against the goods and the goods are redelivered to the sender, because no right is created in its favour.[15]

Parking lots.—The High Court of Australia has discussed the doctrine of "fundamental terms" and "fundamental breaches" in the *Council of the City of Sydney* v. *West*.[16]

In that case[16] a car left at a municipal parking station was misdelivered to a person giving a fictitious name. The conditions of the parking station were: no responsibility for loss or damage and no surrender of the car except against presentation of the ticket.

Act of delivery was held to be negligent, neither authorised nor permitted by the contract and the municipality was held liable. Whether to hand a ticket to the driver of a moving vehicle in a stream of traffic at the entrance to the parking station was a reasonably satisfactory course to adopt in order to give notice of an exempting condition on the ticket was held to be a question of fact in each case.[16] See also under the heading "Principles of Deviation," *supra*.

Bailee and sub-bailee, and exemption clause:—

A fur cleaner, who was a sub-bailee, was held not protected by the clause: "not responsible for loss or damage howsoever caused" in the case of theft by his servant because they were responsible for the manner in which a servant or an agent carried out his duties which would include theft by a servant or a stranger.[17]

The defendant to whom a uniform of an officer was given for cleaning sent it to a sub-contractor to be cleaned, the exempting clause was held inapplicable; the clause was held applicable to personal handling.[18] The protection of an exemption clause will be lost to a bailee if the goods are stored in a place or in a manner other than that authorised by the contract or if the bailee consumes or destroys them instead of storing them[19] or by mistake he sells the goods bailed or stores them in a wrong place.[20] Whether the bailee has authority to deliver possession to a third party depends in each case upon the purpose of the bailment and terms of the contract (if any) under which the goods are bailed to him.[21]

An exemption clause avails when carrying out the contract not deviating from it. Rough handling warranting inference of indifference to safety would be a fundamental breach but momentary inadvertence would be within the clause.[22] This is because negligence *simpliciter* is

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13 *The Eugenia* (1964) 2 W.L.R. 114, 120, 124; (1964) 2 Q.B. 226.

14 *Indian Airlines Corporation* v. *Sm. Madhuri Chawdhari* (1965) A.Cal. 253; *Rukmanand* v. *Airways (India) Ltd.* (1960) A.Asm. 71; *Air Carrying Corp.* v. *Shibendra* (1964) A.Cal. 396; *Indian Airlines Corporation* v. *Keshavlal Gandhi* (1962) A.Cal. 290; Contra *Mukul Dutta* v. *Indian Airlines Corporation* (1962) A.Cal. 311. See cases of Carriage by air under section dealing with Bailees.

15 *Canara Industrial & Banking Syndicate* v. *Ramachandra* (1968) A.Mys. 133.

16 (1965-66) 39 A.L.J.R. 323; *Tozer Kemsley & Millbourn Ltd.* v. *Colliers Inter-State Transport Service* (1956) 94 C.L.R. 384. (A case of bailee delivering goods to a third party) folld.

17 *Morris* v. *C.W. Martin & Sons Ltd.* (1965) 3 W.L.R. 276, 284; cf. also *Garnham Harris & Elton* v. *Alfred E. Ellis* (1967) 1 W.L.R. 940.

18 *Davies* v. *Collins* (1945) 1 All E.R. 247.

19 *Council of City of Sydney* v. *West* (1965-66) 39 A.L.J.R. 323, 325 (per Barwick C.J. and Taylor J.).

20 Per McNair J. in *Woolmer* v. *Delmer Price Ltd.* (1955) 1 Q.B. 291; (1955) 1 All E.R. 377.

21 *Tappenden* v. *Artus* (1963) 3 W.L.R. 685, 690; (1963) 3 All E.R. 213; *Singer Manufacturing Co.* v. *London & South Western Rly. Co.* (1894) 1 Q.B. 833, 837 (adopted. A hirer deposited a sewing machine in a cloak room and the owner claimed the machine. The railway claimed a warehouseman's lien). See also *Canara Industrial & Banking Syndicate Ltd.* v. *Ramachandra* (1968) A.Mys. 133 (a case of a way bill with condition of delivery against way bill but goods delivered to consignor).

22 *J. Spurling Ltd.* v. *Bradshaw* (1956) 1 W.L.R. 461, 466 (per Denning L.J.); (1956) 2 All E.R. 121, 124, 125; *Woolmer* v. *Delmer Price Ltd.* (1955) 1 Q.B. 291; (1955) 1 All E.R. 377 (dist.); *Bontex Knitting Works Ltd.* v. *St. Johns Garage* (1944) 1 All E.R. 381 (C.A.).

not a breach which goes to the root of the contract[23] and more than non-payment by itself is such a breach.[24]

Corporation, if can defend employees negligence.—A Corporation has no interest entitling it to a stay of proceedings for damages against its servant for his negligence where it is not legally bound to indemnify its servant.[25]

Exemption clause and previous course of dealings.—When a party assents to a document proving the whole or part of a contract he is bound by the terms read or unread, signed or unsigned simply because they are in the contract.

There can be no condition in any contract unless they are brought into it by expression, incorporation or implication. They are not brought into it simply because one party had inserted them into similar transactions in the past and has not given the other party any reason to think that he will not want to insert them again.[26]

In *McCutcheon case*[27]

A car was consigned for carriage by a vessel and a receipt for freight was given. The normal practice of giving a risk note was not followed on one occasion. The vessel sank through the negligence of the ship's employees. The Company pleaded previous practice and knowledge of the consignor of the car for exemption from liability.

This was rejected because in the absence of any contractual document a consignor of goods cannot, by a previous course of dealing, be bound by conditions of which he is generally aware but the specific terms of which he has no knowledge. Nor can a consignor be bound by the exemption conditions merely by posting copies of the conditions on the pier and on board a vessel.[27]

Hire-purchase.—Transactions by way of hire-purchase are of two kinds—(1) where the chattels are purchased by the financier from the dealer and the financier obtains a hire-purchase agreement from the customer under which the latter becomes owner of the chattel on payment of all the instalments of the stipulated hire and exercising his option to purchase the chattel on payment of a nominal sum.[28] (2) Where the customer is the owner of the chattel and with a view to get his purchase financed he enters into a hire-purchase agreement with the financier but in substance it is a loan subject to a hiring agreement under which the lender has the right of seizure.[29] The former is a sale within the Sales Tax Act, the latter is not.[30]

In an ordinary hiring agreement of a specific chattel there is an implied condition that the chattel is fit for the purpose of its hiring except in cases where the defect is apparent to the hirer and he does not rely on the skill and judgment of the owner.[31] Exemption in war risks policy due to infringement of customs regulations does not cover confiscation of a ship by a judicial tribunal if its order is caused by political or executive act of government but the onus to prove this is on the shipowners because the presumption is that the tribunal was acting according to the law of the foreign country. *Panamanian Steamship Corpn.* v. *Wright,* (1971) 2 All E.R. 1028.

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23 *J. Spurling Ltd.* v. *Bradshaw* (1956) 1 W.L.R. 461, 485; (1956) 2 All E.R. 121; *Swan Hunter and Wigham Ltd.* v. *France Fenwick Tyne and Wear Ltd. The Albion* (1953) 2 All E.R. 679.

24 *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.* (1884) 9 App. Cas. 434.

25 *Gore* v. *Van der Lann* (1967) 1 All E.R. 360.

26 *McCutcheon* v. *David Macbrayne Ltd.* (1964) 1 W.L.R. 125, 131, 134, 136 (H.L.) S.C. *Holler* v. *Rambler Motors Ltd.* (1972) 1 All E.R. 399.

27 *Ibid.*

28 *K.L. Johar & Co.* v. *Dy. Commercial Tax Officer* (1965) 2 S.C.R. 112; (1965) A.S.C. 1182; *Sundaram Finance Ltd.* v. *State of Kerala* (1966) A.S.C. 1178. See infra under s. 74 dealing with clauses for compensation for depreciation and under s. 148 bailment.

29 *Sundaram Finance Ltd.* v. *State of Kerala* (1966) A.S.C. 1178; *In re Watson, ex parte Official Receiver* (1890) 25 Q.B.D. 27 (Court can see the substance of transaction); *Polsky* v. *S.A. Services Ltd.* (1951) 1 All E.R. 185 (Court can see behind the documents to see if it is a loan on security); also see p. 1062 (C.A.) on app. Both these cases are under the Bill of Sales Act.

30 *Sundaram Finanace Ltd.* v. *State of Kerala* (1966) A.S.C. 1178. See infra "under Bailment".

31 *Yeoman Credit Ltd.* v. *Apps* (1961) 3 W.L.R. 94, 102; (1961) 2 All E.R. 281; (1962) 2 Q.B. 508: dictum of Parker L.J. in *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 1 W.L.R. 936, 943 (1956) 2 All E.R.

An exemption clause in a hire-purchase agreement that there was no warranty of roadworthiness or age or fitness of a vehicle cannot be relied upon in a case where the car was in a deplorable condition requiring £150 for being put right, although when first shown it was "in an excellent condition." This was a breach of a fundamental condition going to the root of the contract of delivering the car in substantially the same condition as at the time of inspection.[32] The Court of Appeal held that it was an implied condition that the car was fit for the purpose it was hired, that the unusable condition of the car was a breach of the fundamental condition of the agreement not excluded by the exemption clause and the hirer was entitled to repudiate the agreement; but there was not a total failure of consideration, since the hirer had taken possession of the car and paid instalments and therefore he was entitled to damages but had to pay instalments for the period before repudiation.[33] If the accumulated defects in a car, purchased under a hire-purchase agreement, are such as to destroy the workable character of the car, there is a breach of the fundamental condition of the agreement to provide a functioning and usable car. The owner company is not protected by the exemption clause (given in the agreement in *Yeoman's case*) and the hirer can repudiate the agreement.[34]

Election in case of fundamental breach.—If a party to a contract had broken a fundamental term, an election by the other party to affirm the contract and sue for damages, does not of itself re-entitle the party in breach to rely on an exemption clause which he has disentitled himself from relying on by his breach of the fundamental term of the contract.[35]

A car taken by a hirer was found to have a defective back axle, defective tyres and other less serious defects making it unroadworthy and unsafe to drive. The defects in the car were held to be a breach of the term implied at common law to supply a roadworthy car and a defeat of back axle constituted a fundamental breach of contract against which the exemption clause that it "do not supply the vehicle with a subject to any warranties or conditions either express or implied by statute" could not avail the owners who were in breach.[36]

In some cases, there are a number of faults, which taken together add upto a fundamental breach. In another case, one important item which is defective may destroy the basis of a contract and a defective back axle is such a defect.[36] But if the hirer, in spite of defects, does not repudiate the agreement and approbates it by paying instalments and keeping the car there is not a total failure of consideration for the payments made; but if when the hirer refuses to pay the owners, the owners are still in breach of their obligation under the agreement, and the hirer is entitled to repudiate, he would be entitled to damages but he must pay the instalments due upto the date of repudiation.[37]

Strike Clause.—There is no settled rule of construction that a specific exception such as strikes or war cannot be relied upon if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port: It must depend on the proper construction of the contract.[38]

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866 applied. *Farnmouth Finance Facilities* v. *Attryde,* (1970) 2 All E.R. 774 (Selling defective motor cycle, the seller is not entitled to balance).

32 *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 1 W.L.R. 936 (C.A.); (1956) 2 All E.R. 866.

33 *Yeoman Credit Ltd.* v. *Apps* (1961) 3 W.L.R. 94 (C.A.); *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 1 W.L.R. 936 (C.A.); and *Pollock & Co.* v. *Macrae* (1922) S.C. (H.L.) 192 applied.

34 *Yeoman Credit Ltd.* v. *Apps* (1961) 3 W.L.R. 94 (C.A.); *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 2 All E.R. 866; (1966) 1 W.L.R. 936 (C.A.) and *Pollock & Co.* v. *Macrae* (1922) S.C. (H.L.) 192 applied.

35 *Charterhouse Credit Co. Ltd.* v. *Tolly* (1963) 2 All E.R. 432, 438 (C.A.); *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 2 All E.R. 866; *Pollock & Co.* v. *Macrae* (1922) S.C. (H.L.) 192; and *Wallis, Son and Wells* v. *Pratt and Haynes* (1911-13) All E.R. Rep. 989; (1911) A.C. 394 appd. *Harbutts Plasticine* v. *Wayne Tank Co. Ltd.,* (1970) 1 All E.R. 225 (Automatic ending of contract).

36 *Charterhouse Credit Ltd.* v. *Tolly* (1963) 2 W.L.R. 1168, 1173, 1179, 1184; (1963) 2 All E.R. 432, 438 (C.A.); *Karsales (Harrow) Ltd.* v. *Wallis* (1956) 1 W.L.R. 936 (C.A.).

37 *Yeoman Credit Ltd.* v. *Apps* (1961) 3 W.L.R. 94, 105, 106, 107.

38 *Reardon Smith Line Ltd.* v. *Ministry of Agriculture & Food* (1961) 3 W.L.R. 110, 129 (Seller L.J.); *S.S. Induna Co. Ltd.* v. *British Phosphatic Commissioners* (1949) 2 K.B. 430; (1949) 1 All E.R. 522.

In the sale of a car on hire-purchase, the provision of a log book is a suspensive condition on which the existence of the contract depends and until that is provided there is no contract of hire-purchase and no instalments fall due. But this condition can be waived.[39]

Contract in English.—A hire purchase agreement in English was signed by the hirer in Hindi, he not knowing the English language, and not all the clauses were explained to him by the owner. The agreement does not bind the hirer.[40]

Exemption clause—Authorities not reconcilable:—The authorities upon the applicability of an exemption clause are not easy to reconcile. In *Alexander* v. *Railway Executive*[41] Devlin J. held that an exemption clause in a cloakroom ticket did not protect the defendants in respect of a delivery of the goods to a dishonest stranger. In *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.*[42] (No. 1) Devlin J. said:

> "I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates.

While in *Hollins* v. *J. Davy*[43] Sachs J. held that a garage proprietor was protected by the exemption clause in respect of an innocent delivery of the plaintiff's car to a thief. In order to amount to a fundamental breach of contract, a breach had to be wilful or deliberate. In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.,*[44] Lord Denning's observations show that a fundamental breach disentitling a party from relying upon an exemption clause occurs if an act amounting to a complete departure from the contract is done which can be imputed to the contracting party himself as opposed to an act for which the contracting party is vicariously responsible as having been committed by one of his servants. In other words, there must be something amounting to a deliberate breach of the contract which can be attributed to the contracting party himself.[45] In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.,*[46] the exemption clause was very comprehensive: but its extent was limited and modified by the Privy Council because if such an extreme width were to be given to the exemption clause, it would run counter to the main object and intent of the contract, e.g., the proper delivery of the goods by the Shipping Company, "unto order or his or their assigns", against production of the bill of lading. It would defeat the object entirely if the shipping company were at liberty to deliver the goods to somebody else, not entitled at all, without being liable for the consequences. The clause must, therefore, be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: See *Glynn* v. *Margetson & Co.,*[47] and *Renton & Co. Ltd.* v. *Palmyra Trading Corpn. of Panama.*[48] A wide exemption clause, therefore, has to be limited so as not to permit a shipping company deliberately to disregard its obligations as to delivery. The shipping company's agents did something in such

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39 *Bentworth Finance Ltd.* v. *Lubert* (1967) 3 W.L.R. 378; (1967) 2 All E.R. 810; C.A.

40 *Tirathraj Pandey* v. *Amar Credit Corpn.*, 72 C.W.N. 243, 262-3, 264: *Parker* v. *South Eastern Railway* (1877) 2 C.P.D. 416; and *L'Estrange* v. *F. Graucob Ltd.* (1934) 2 K.B. 394; (1934) All E.R. Rep. 16 dist. Cheshire & Fifoot: Law of Contract (2nd Ed.) p. 92 not applied, (6th Ed.) 112. But see *Mackillican* v. *Compagnie de Messageries Maritimes de France* (1880) 6 Cal. 227 (where terms in French were held binding on persons travelling in I class by boat); *Sugar* v. *L.M.S.* (1941) 1 All E.R. 172 (where a ticket containing words "For conditions see back" were obliterated by the date stamp. There was no reasonable notice); *Thompson* v. *L.M.S. Ry.* (1930) 1 K.B. 41; (1929) All E.R. Rep. 474 (case of illiterate women).

41 (1951) 2 K.B. 882; (1951) 2 All E.R. 442.

42 (1953) 1 W.L.R. 1468, 1470; (1953) 2 All E.R. 1471. See *John Carter (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.* (1965) 2 W.L.R. 553, 571.

43 (1963) 1 Q.B. 844, 852; (1963) 2 W.L.R. 201; (1963) 1 All E.R. 570.

44 (1959) A.C. 576; *Chartered Bank of India* v. *B.I.S.N. Co. Ltd.* (1909) A.C. 369 dist. *United Africa Co. Ltd.* v. *Saka Owoade* (1955) A.C. 130; (1957) 3 All E.R. 216.

45 *John Carter Ltd.* v. *Hanson Haulage Ltd.* (1965) 2 W.L.R. 553 at page 568.

46 (1959) 3 All E.R. 182, 185 (P.C.); (1959) A.C. 576.

47 (1893) A.C. at p. 357.

48 (1956) 1 All E.R. at p. 222; (1956) 1 Q.B. at p. 501; H.L. (1956) 3 All E.R. at p. 961; (1957) A.C. at p. 164.

circumstances that their acts were the acts of the shipping company itself and they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos;*[49] *Chartered Bank of India, Australia & China* v. *British India Steam Navigation Co. Ltd.;*[50] and *United Africa Co. Ltd.* v. *Saka Owoade.*[51]

Incorporation of prospectus in a policy of assurance.—The question of the effect to be given to the prospectus of a company which was incorporated by reference in a policy of life assurance arose some time ago in Madras case[52] in connection with the onus of proof of age of the assured. In the course of the judgment, Bhashyam Ayyangar J., said: "As regards the effect to be given to the prospectus as a part of the contract of insurance, I think it will have the same effect as if it had been reproduced in the policy itself, and it is quite unnecessary to prove that the prospectus had been read by the assured or that it was specially brought to his notice by the company apart from the reference made to it in the policy itself. A policy of insurance being a contract entered into between the insurers and the assured, and the terms of such contract resting entirely upon the contract itself, and not in the main or even in part upon the common law or upon the statute, the assured, who makes the proposal, enters into the contract, and signs the policy, has in the very nature of things notice that the policy contains all the terms and conditions of the contract." The learned Judge proceeded to cite and rely on *Watkins* v. *Rymull*[53] and the test there laid down[54] by Stephen J. already cited *(supra)*. B. Ayyangar J. concluded that the signatory was bound. Although it would not affect the decision, as the signatory was in any case held liable, a situation such as this, where the defendant has *signed* a document, should have been sharply distinguished from the ticket cases: a *signatory* is bound, unless there has been some misrepresentation, or it is a case of *non est factum: L'Estrange* v. *Graucob.*[55]

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Communication when complete.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete—
as against *A*, when the letter is posted;
as against *B*, when the letter is received by *A*.

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49 (1921) P. 458, p. 471.
50 (1909) A.C. 369, dist.
51 (1955) A.C. 130; (1957) 3 All E.R. 216. (Case of theft by a servant—master and servant).
52 *Oriental Government Security Life Assurance Co.* v. *Narasimha Chari* (1901) 25 Mad. 183, 205, 206.
53 10 Q.B.D. 178.
54 *Ibid.*, at p. 189.
55 (1934) 2 K.B. 394. See also *Chimanram Motilal* v. *Divanchand Govindram* (1932) 56 Bom. 180, 189.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A*, when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

This section is really in the nature of an interpretation clause to s.5 and might, perhaps, have more conveniently followed it.

Agreement between parties at a distance.—No difficulty arises on the first paragraph[56] To bring about a concluded contract the acceptance must be communicated in some perceptible form which may be by speech, writing or other acts both offer and acceptance must be unqualified and unconditional. If it is conditional parties can withdraw at any moment. But where there is a statutory rule having force of law precluding withdrawal of a bid before its acceptance or refusal to communicate to the bidder the position may be different.[57] Whether a proposal has or has not come to the knowledge of the person to whom it was made is purely a question of fact. The rest of the section is intended, as shown by the illustrations, to meet the questions raised by the formation of agreements between parties at a distance. It has done this, as regards acceptance by enacting (in combination with s. 5) that for a certain time—namely, while the acceptance is on its way—the receiver shall be bound and the sender not. The proposal becomes a promise before it is certain that there is any consideration for it. This can be regarded only as a deliberate and rather large departure, for reasons of convenience, from the common law rule which requires the promise and the consideration to be simultaneous. No such departure has been found necessary in England. The case of an acceptance being "put in a course of transmission to" the proposer, but failing to reach him, is not expressly dealt with. It seems to result from the language of the second paragraph that the proposer must be deemed to have received the acceptance at the moment when it was despatched so as to be "out of the power of the acceptor," and that accordingly it becomes a promise on which the acceptor can sue, unless some further reason can be found why it should not. If the consideration on the acceptor's part was not promise but performance—for example, the sale of goods despatched at the proposer's request without previous negotiation—the failure of consideration may supply such a reason in the case proposed. The Act certainly does not say that the intending purchaser must be deemed to have received goods which have never arrived; it says at most that he must be deemed to have been aware of their despatch. But if the consideration on the acceptor's part was a promise, it would seem that the proposer cannot say he has not received that consideration; for he cannot say that the acceptance has not been communicated to him, and there is no difference between having the communication of a promise and having the promise itself. Consequently, where the agreement is to consist in mutual promises, a binding contract appears to be formed by a letter of acceptance despatched in the usual way, even if it does not arrive at all, unless the proposal was expressly made conditional on the actual receipt of an acceptance within a prescribed time, or in due course, or unless the acceptor sends a revocation as provided for by the latter part of the section and explained by illustration (c). This last qualification is probably, though not certainly, a departure from English law. Apart from the question of a possible revocation, the total result, on the words of the Act, is in accordance with the existing English authorities. Those authorities, however, are of later date than our Act, and in 1872 the current of opinion was rather the other way. It seems uncertain whether the framers of the Act really omitted to consider the case of an acceptance not arriving at all, or meant it to be an implied exception, on the ground that the want of any final consent between the parties (see s. 10) would prevent the formation of a contract, or how otherwise. The draft of 1866 appears to have assumed that actual communication was necessary.[58] When the proposal and acceptance are made by letters, the contract is made at the

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56 Transactions conducted in a summary manner, as by telegraph, may raise doubt as to what, according to the usual course of business, the communication implied. Such questions are really of construction—e.g., *Radha Kanta Dass* v. *Baerlein Bros.* (1929) 56 Cal. 118; 32 C.W.N. 1101; 1929 A.Cal. 97; 117 I.C. 540.

57 *Linga Gowder* v. *The State of Madras* (1971) A.M. 28, 32; *K.P. Chowdhry* v. *State of Madhya Pradesh* (1966) 3 S.C.R. 919; (1967) A.SC. 203 disting.

58 "3. A proposal to enter into a contract may be retracted, or the terms of it altered by the party making it, at any time before it is accepted.

time when and the place where the letter of acceptance is posted.[59]

English rules.—The rules as now settled in England are as follows:-

The general rule is that an acceptance must be communicated to the offeror. (*Holwell Securities Ltd* v. *Hughes* (1974) 1 W.L.R. 155). Accordingly, there is no contract where the acceptance is not communicated to the offeror, the reason being that it would be unfair to hold the offeror bound by an acceptance of which he has no knowledge. Therefore, if the offeror knows of the acceptance, there can be a contract even though the acceptance was not brought to the notice of the offeror by the offeree. However, there can be no contract where a third party without the authority of the offeree communicates the acceptance to the offeror.[60]

Therefore, if the letter of defendant constituted an offer to take over the contract made with the company of which the defendant was the Managing Director, the absence of any response by the plaintiff to that offer could not be construed as an acceptance capable of binding the defendant. Such a result would only flow from an estoppel operating against the offeror. But the cause of action of the plaintiff could not be founded on an estoppel. Therefore, the claim in contract failed.[61]

In *Entores, Ltd.* v. *Miles Far East Corporation*[62] it was said:-

> "The ordinary rule of law, to which the special considerations governing contracts by post or exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree"

The rule of acceptance by post applies if it is reasonable to use the post. It may be reasonable to use the post even though the offer was made orally if immediate acceptance was not required and the parties lived at a distance.[63] On the other hand, it would not normally be reasonable to accept a telegraphic offer by posting a letter.[64]

Acceptance by Silence and Conduct.—The Supreme Court[65] in a recent case has considered the question of acceptance of an offer by Silence reinforced by conduct. It has observed that the general rule is that an offer is not accepted by mere silence on the part of the offeree. But in the facts of a given case acceptance of a suggestion may be *sub silentio* reinforced by subsequent conduct. There may be further facts which taken with the offeree's silence, may constitute acceptance. One such case is where at the negotiation stage the offeree disputed a part of the offer and the offeree communicated that fact to the offeror showing that he understood the offer in a particular sense, which would probably be a counter offer which in the case of the offerer will constitute his acceptance.

If there is a mistake as to the terms of a document and amendments are made in the draft, the signatory to the original contract is not estopped from denying his signatures and saying that he intended to make an offer in terms of the document, with amendment suggested.

"*Explanation.*—A proposal is said to be accepted when an expressed acceptance of it has been communicated to the proposer, or when a letter of acceptance is posted or a telegraphic message delivered at the proper office, and the acceptance by letter or telegram is not cancelled by some communication which reaches the proposer before or at the same time with the letter or telegram of acceptance, or when acceptance is to be inferred from the circumstances of the case."

59 *Kamisetti Subbiah* v. *Katha Venkataswamy* (1903) 27 Mad. 355. English authority, so far as it goes, is to the same effect. See also *Sepulchre Bros.* v. *Khushaldas* (1941) 2 M.L.J. 481; 1942 A.M. 13; *Protap Chandra* v. *Kali Charan,* 1952 A.Cal. 32; *Manilal* v. *Venkatachalapathy* (1944) Mad. 95; *Baroda Oil Cakes* v. *Parshottam,* 1954 A.B. 491.

60 Chitty: On Contract, 24th Ed. para 54 (vol.1) p.33; *Fairlines Shipping Corp.* v. *Adamson* (1974) 2 All E.R. 967, 974.

61 *Fairlines Shipping Corporation* v. *Adamson* (1947) 2 All E.R. 967, 974; *Felthouse* v. *Bindley* (1862) 11 C.B. & S. 869 appl.

62 (1955) 2 Q.B. 327. (1955) 2 All E.R. 493; (1955) 3 W.L.R. 48.

63 *Henthorn* v. *Fraser* (1892) 2 Ch. 27.

64 Chitty: On Contract, Vol. 1, para 65, p. 34.

65 *Ramji Davawala & Sons (P) Ltd* v. *Invest Import* (1981) A.S.C. 2085, 2092; 70 Cal. W.N. 199 (revd.) Halsbury Laws of England (4th ed.) Vol. 9 para 251, 288 quoted.

Therefore where a contract is in a number of parts, it is essential that the parties should have assented to them or be taken to have assented to them i.e. to the same thing in the same sense or they should be *consensus ad idem*.

"A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn.[66] In other words, the revocation of a proposal is effectual only if actually communicated before the despatch of an acceptance; and the time when the revocation was despatched is immaterial.[67] But where an acceptance, without notice of the offer being revoked, is despatched in due course by means of communication, such as the post, in general use and presumably within the contemplation of the parties, the acceptance is complete from the date of despatch, notwithstanding any delay or miscarriage in its arrival from causes not within the acceptor's control".[68] It seems[69] this is independent of the rule that, if the proposer of an agreement has prescribed or authorised any particular mode of communicating acceptance (cf. s. 7, sub-s. 2), he cannot dispute the sufficiency of that mode, and must take any risks of delay or miscarriage attaching to the acceptor's action in conformity with the request or authority. One of the conditions in a contract of sale by giving option to the buyer was that the option should be exercised by a notice given by registered post. The buyer gave notice by ordinary post which was held to be sufficient. The Court of Appeal laid down the following rules:

(1) An offeror may state the mode of acceptance.
(2) Whether it is mandatory or not is a matter of construction.
(3) If mandatory the mode must be acted upon but not necessary if it is declaratory.[70]

Offer to sell a house was made in the form of an option to be exercised by notice in writing to the intending Vendor. Such a notice was posted but did not arrive, and it was held that there was no contract of sale. The offer on its construction required actual communication of acceptance.[71]

In *Household Fire Insurance Co. Ltd.*v. *Grant* (1879) 4 Ex.D.216 the defendant applied for shares in the plaintiff Company. A letter of allotment was posted but it never reached the defendant. The Company went into liquidation, and it was held three years later that the defendant was a shareholder and liable for calls on the shares.[72]

Offer upto when Capable of acceptance.—An unconditional offer remains capable of acceptance until the offeree is made aware of its withdrawal.

Where the parties must, from the context, have reasonably assumed that the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.[73]

A letter of acceptance misdirected by the acceptor's fault cannot be deemed to have been effectually put in a course of transmission to the proposer;[74] this case was properly distinguished by the Allahabad High Court from that of an insufficient address furnished by

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66 Lord Herschell in *Henthorn* v. *Fraser* (1892) 2 Ch. 27, 31, confirming *Byrne* v. *Van Tienhoven* (1880) 5 C.P.D. 344.
67 It is literally possible to read the words of s. 4 of the Act, par. 3, as giving only one chance of sending a revocation, so that if a man first sends a written acceptance by a slow ship, then sends a written revocation by a faster ship, and then returns to his first mind and confirms the acceptance by a telegram arriving before either letter, the revocation is operative, and the confirmation cancelling it is not. But this cannot be seriously entertained, and seems sufficiently excluded by the terms of s. 5.
68 *Henthorn* v. *Fraser, supra,* note 23; *Household Fire, etc., Insurance Co.* v. *Grant* (1879) 4 Ex.D. 216. A contract made by teleprinter is not concluded until notice of acceptance is received by the offeror (1955) 2 All E.R. 493 (C.A.); n. 36 *infra.*
69 *Henthorn* v. *Fraser, supra,* n. 23.
70 *Yates Building Co. Ltd.* v. *R.J. Pulleyn & Sons.* The Times Feb. 27, 1975.
71 Chitty: On Contract, 24th Ed. Para 65.
72 (1879) 4 Ex.D. 216.
73 *Henthorn* v. *Fraser* (1892) 2 Ch. 27.
74 *Ram Das* v. *Official Liquidator, Cotton Ginning Co.* (1887) 9 All. 366, 385.

the proposer himself.[75] There the proposer's own want of care obviously cannot extenuate, but will if possible aggravate, the risk imposed on him by the general rule of law.

Whether a particular letter or writing has been posted, delivered, or actually received by the addressee, is a question of fact having no more to do with the law of contract than any other matter of fact which it may be needful to prove in order to establish or contradict the formation of any kind of contract.[76]

Exclusion of Postal Rule.—Postal rule can finally be excluded by the terms of the offer, and whether it is excluded or not the question is one of construction.[77] If it is expressly agreed that the acceptance to be binding must not only be in writing but had to reach the offeror the mere posting not being enough, there will be no contract till the condition is fulfilled.[78]

It is not thought useful for Indian purposes to enter upon the history of the English doctrine, or to discuss the earlier cases, whose results, so far as not over-ruled are embodied in later decisions.[79]

Operation of the Rule.—The English authorities support the application of the postal rule in three situations—

(1) a postal acceptance prevails over a withdrawal of an offer which was posted before the acceptance but which had not reached the offeree when the acceptance was posted;

(2) a postal acceptance takes effect even though it never reaches the offeror because it is lost through an accident in the post, and

(3) the same rule applies where an acceptance is merely delayed through an accident in the post.[80]

Revocation arriving before acceptance.—One point remains unsettled in England. It has never been decided whether, a letter of acceptance having been despatched by post, a telegram revoking the acceptance and arriving before the letter is operative or not. A negative answer seems to be required by the reasoning of the English decisions.[81] If it can be said that every acceptance in writing is subject to an implied condition that it may be cancelled by a revocation arriving sooner or at the same time, it might as easily be held that every proposal expecting an answer by letter includes a condition that the answer shall actually be received in due course. But this suggestion has been definitely rejected.

In India, however, such a revocation is made valid by the express terms of ss. 4 and 5 of the Act.[82]

Statutory consents.—The validity of consents required by special statutory provisions, and revocations thereof, is governed by the terms of the statute, and, in case of difference, not by this or the following section.[83]

Contracts inter absentees.—The draftsmen of Contract Act did not envisage use of telephone as a means of personal conversation between parties separated in space and could not have intended to make any rule in that behalf.[84] *A fortiori* it will apply to modern telecommunication means still less. An offer is accepted by the communication of the acceptance to the offeror. The rule is modified where contracts are made through the post, for an offer

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75 *Townsend's Case* (1871) L.R. 13 Eq. 148. Several dicta in this case are founded on authority since overruled; the decision is good law, though it would now be put on shorter grounds.

76 Cf. Evidence Act, ss. 16 and 114.

77 *Holwell Securities Ltd.* v. *Hughes* (1974) 1 W.L.R. 155. (1974) 1 All E.R. 161.

78 *Ibid.*

79 See Appendix to Pollock: Principles of Contract, 13th ed., pp. 554, seq.

80 See especially the judgment of Thesiger L.J. in *Household Fire Insurance Co.* v. *Grant*. 4 Ex.D. 216, at p. 222, Finch, Sel. Ca. at p. 137. The same view is taken in New Zealand; *Wenkheim* v. *Arndt*, 1 J.R. 73. *Dunlop* v. *Higgins* (1848) 1 H.L.C. 381. Chitty: On Contract, paras 67 to 69 (24th Ed.) p. 35.

81 Salmond and Williams: Law of Contracts, 2nd edn. 85, prefer this rule for English Law.

82 *Lingo Ravji Kulkarni* v. *Secretary of State* (1928) 111 I.C. 278; 30 Bom.L.R. 570; 1928 A.B. 201.

83 *Bhagwandas* v. *Girdhari Lal & Co.* (1966) A.SC. 543 at p. 550; (1966) 1 S.C.R. 656.

84 See 8 Halsbury's Laws (3rd Ed.), 78, 79.

made by letter may be accepted by letter and the Post Office is in effect the agent of the offeror for the purpose of communicating the acceptance.[85] But the Court of Appeal have not extended this exception from the general rule to the case of contracts made by the Post Office Telex services.[85] In a contract concluded on the telephone or by teleprinter, the parties will be taken to be in the presence of each other and the place of acceptance will be the place where the acceptance is received or where the offeror was.[85] The rule of instantaneous communications between the parties is different from the rule about the post. In the case of communications by post an acceptance is complete as soon as it is put in the post box and that is the place where the contract is made. In the ease of instantaneous communications, the contract is only complete when the acceptance is received by the offeror and the contract is made when the acceptance is received. This is the rule in most of the European countries. But in the United States, the rule is the same as postal communications.[86]

Post Office Agent of Payee.—Where the debtor sends a bank draft well in time but it reaches the creditor after the stipulated time, the Post Office will be considered an agent of the creditor if it is reasonable to assume that in normal course it would be sent by post.[87]

Telephone.—In America, the rule is that even in the case of telephones and telex, the contract is made in the District where the acceptance is spoken. This is based on the deep rooted principle of common law that where the parties impliedly or expressly authorise a particular channel of communication acceptance is effective when it enters that channel of communication.[88] The rule in *Entores case* has been accepted in India in a majority judgment of the Supreme Court.[89] Hidayatullah J. in his minority judgment in *Bhagwandas* v. *Girdhari Lal & Co.*[90] applied the rule of the communication being put in the channel of communication accepted in U.S.A. In Canada also acceptance over the telephone is of the same effect as if the person accepting it had done so by posting a letter or by sending off a telegram. In *Entores case*[91] it was held that in the case of oral communication or by telex or telephone an acceptance is communicated when it is actually received by the offeror. The rule is sound and practical because the oral acceptance may be drowned by the noise of a flying aircraft, or the telephone goes dead or feeble and indistinct that it is not heard. There is consequently no contract.

In that case[92] the offer was made in Amsterdam and notification of the acceptance was received in London; the contract resulting thereupon was held to be made in London.

Where the parties are in the presence of each other the method of communication will depend upon the nature of the offer and the circumstances in which it is made. When an offer is orally made by an oral reply, but even a nod or other act which indubitably intimates acceptance may suffice. If the parties are not in the presence of each other and the offeror has not prescribed the mode of acceptance insistence upon communication of acceptance of the offer by the offeree would be inconvenient when the offer is made by post by a letter. In the case of negotiations by post, the contract is complete when acceptance of the offer is put into the course of transmission to the offeror.[93] If regard be had to the essential nature of communica-

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85 *Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 All E.R. 493; (1955) 2 Q.B. 327; Halsbury's Laws of England, Vol. 8 (3rd Ed.) p. 73, para 126; n. 25 *supra*. Chitty: On Contract, Vol. I, para 65 (24th Ed.).

86 *Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 A.E.R. 493; Prof. Winfield: 55 L.Q.R. 514; Williston: Contracts I.s. 82.

87 *Joseph Verghese* v. *Annamma* (1971) 1 Ker. 494; *Hairoon Bibi* v. *United India Life Insurance Co. Ltd.* (1947) A.M. 122 reld. on.

88 Williston on Contracts (3rd Ed.), Vol. 1, p. 271. See *Bhagwandas* v. *Girdhari Lal* (1966) A.SC. 543; (1966) 1 S.C.R. 656.

89 *Bhagwandas* v. *Girdhari Lal & Co.* (1966) A.SC. 543; (1966) 1 S.C.R. 656; *F. Kanhaya Lal* v. *Dinesh Chandra* (1959) A.M.P. 234.

90 (1966) A.SC. 543, 553; (1966) 1 S.C.R. 656; *Carrow Towing Co.* v. *The Ed McWilliams,* 46 D.L.R. 506 (Canada).

91 *Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 Q.B. 327, 332, (1955) 2 All E.R. 493.

92 *Ibid.*, observations of Hill J. in *New Comb* v. *De Roos,* 2 E. & E. 271 at p. 275; 121 E.R. 103 diff. from.

93 *Bhagwandas* v. *Girdhari Lal* (1966) A.SC. 543; (1966) 1 S.C.R. 656;*B. Kedia* v. *Purushottam* (1966) 1

tion by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other and negotiations are completed by instantaneous communication of speech, communication of acceptance is a necessary part of formation of contract and the exemption of the rule imposed by commercial expediency (of post and telegraphs) is inapplicable.[94]

Telex—time of receipt of message.—A message sent by telex is taken to have been received by the addressee when the message is received by the telex machine and not when the addressees attention is drawn to it. He cannot rely on his own or his servants failure to take cognizance of the message in the normal business-like manner. Therefore notice of withdrawal of a vessel for nonpayment of hire will be taken to have been received when the message was received if not when it was brought to the notice of charterers. If it was before the payment of hire the withdrawal would be valid.[95]

Payment by Telex.—Where a ship's hire is sent by the charterers by telex, it will be deemed to have been received when the bank receiving the telex message debits the charterers and credits the ship owners in accordance with the ordinary banking practice. Mere receipt of the telex message does not amount to payment.[96]

Telegrams.—The rule in regard to telegraphs is the same as in the case of letters by post, i.e. the acceptance is complete when the letter is put in the post or the telegram is handed for dispatch to the telegraph office.[97] When by agreement, course of conduct or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into course of transmission by the offeree posting a letter or dispatching a telegram.[97] An offer is completed at the place where it was received and not at the place from where it was sent. Under s 4 of the Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.[98] But this view has been dissented from because according to the more recent view the communication of the receipt of the acceptance is not part of the cause of action.[99]

Withdrawal of bid by telegram.—The expression "telegraphic instructions regarding bids and conditions of the Bangalore Coffee Board auctions for export in the context of the condition was held not to include withdrawal or retraction of bids by telegrams" *(M. Latchia Setty & Co. Ltd.,* v. *Coffee Board Bangalore* (1981) A.SC. 162, 166.)

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to *B*.
B accepts the proposal by a letter sent by post.
A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.
B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A* but not afterwards.

S.C.A. 177 (oral proposal accepted by a nod).

94 *Ibid., Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 Q.B. 327; (1955) 2 All E.R. 493.

95 *The Brimnes—Tenax Steamship Co. Ltd.* v. *Owners of M.V. Brimnes* (1974) 3 All E.R. 88, 100.

96 *The Brimnes—Tenax Steamship Co. Ltd.* v. *Owners of MV Brimnes* (1974) 3 All E.R. 88, 99-100.

97 *Bhagwandas* v. *Girdhari Lal & Co.* (1966) A.SC. 543; (1966) 1 S.C.R. 656; *Cowan* v. *O'Connor,* 20 Q.B.D. 640 (Telegraph); *Tinn* v. *Hoffman & Co.,* 29 L.T. 271, 274, 278.

98 *F. Kanhayalal* v. *Dinesh Chandra,* 1959 A.M.P. 234; *Baroda Oil Cakes Traders* v. *Parshottam,* 1954 Bom. 1137; 1954 A.B. 491.

99 Mulla C.P.C. (13th Ed.). p. 145.

Revocation of Offers.—It is implied in this section that the proposer of a contract cannot bind himself (unless by a distinct contract made for a distinct consideration) to keep his offer open for any definite time, and that any words of promise to that effect can operate only for the benefit of the proposer and as a warning that an acceptance after the specified time will be too late (s. 6, sub-s. 2). Such is undoubtedly the rule of the Common Law. The reason is that an undertaking to keep the offer open for a certain time is a promise without consideration, and such a promise is unenforceable. *A* gives an undertaking to *B* to guarantee, for twelve months, the due payment of *M*'s bills, which may be discounted by *B* at *A*'s request. This is not a binding promise, but a standing proposal which becomes a promise or series of promises as and when *B* discounts bills on the faith of it. *A* may revoke it at any time, subject to his obligations as to any bills already discounted. "The promise"—or rather offer—"to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend".[1] *Z* offers to take *A*'s house on certain terms, an answer to be given within six weeks. *A* within that time writes *Z* a letter purporting to accept, but in fact containing a material variation of the terms (see s. 7, sub-s. 1, below); *Z* then withdraws his offer: *A* writes again, still within the six weeks, correcting the error in his first letter and accepting the terms originally proposed by *Z*. No contract is formed between *Z* and *A*, since *A*'s first acceptance was insufficient, and the proposal was no longer open at the date of the second.[2] Similarly a proposal to sell goods allowing eight days' time for acceptance may be revoked within the eight days unless the promise to keep the offer open was supported by consideration.[3] An offer can be revoked before acceptance.[4] Therefore, a hirer can, before his offer under a hire-purchase agreement is accepted by a Financing Company, revoke his offer and no contract will result therefrom.[5] But when it is accepted the contract is concluded and binds the parties.[6] In *Financings Ltd.* the case was this:

> Before signing the hire-purchase agreement for car which was a condition of the agreement, the hirer returned the car to the dealer offering to forfeit the deposit. The car was stolen from the dealer's premises. The dealer, it was held, had authority to receive the hirer's revocation and there was therefore no concluded contract and this amounted to revocation before acceptance.[7]

In a Scottish case it was held that an acceptance sent by post would be revoked if before its reaching the offeror, the offeree were to revoke it by a telegram for instance.[8]

A statutory power to make rules for the conduct of departmental business will, however, justify a local government in prescribing, among the conditions of tenders for public service, that a tender shall not be withdrawn before acceptance or refusal.[9]

Revocation—option for value.—An option give for value is not revocable.[10] It is an offer together with a contract that the offer will not be revoked during the time, if any, specified in the option. If the offer is accepted within the time specified, the contract is made; but if the offeror purports to revoke the offer it is ineffectual to prevent the formation of a contract.[11]

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1 *Offord* v. *Davies* (1862) 12 C.B.N.S. 748; 133 R.R. 491. The much-discussed earlier case of *Cooke* v. *Oxley* (1790) 3 T.R. 653; 1 R.R. 783; is now received authority only so far as it decides this. See *Stevenson* v. *McLean* (1880) 5 Q.B.D. 346, 351; *Head* v. *Diggon* (1828) 3 M. & R. 97 (in which the parties were face to face, and it is not clear whether the defendant did or did not signify his revocation before the plaintiff signified his acceptance) cannot be taken as going farther. The reason there given is clearly wrong, for it is supposed that on the acceptance of a proposal it is necessary for the proposer to make some fresh declaration of consent, which is contrary both to principle and to all recent authority.

2 *Routledge* v. *Grant* (1828) 4 Bing. 653; 29 R.R. 672.

3 *Schonlank* v. *Muthunagana Chetti* (1892) 2 Mad.L.J. 57.

4 *Financings Ltd.* v. *Stimson* (1962) 1 W.L.R. 1184; (1962) 3 All E.R. 386; *Raghunandan* v. *State of Hyderabad* (1963) A.A.P. 110.

5 *Financings Ltd.* v. *Stimson* (1962) 1 W.L.R. 1184; (1962) 3 All E.R. 386.

6 *Raghunandan* v. *State of Hyderabad,* (1963) A.A.P. 110.

7 *Financings Ltd.* v. *Stimson* (1962) 1 W.L.R. 1184, 1188, 1190; (1962) 3 All E.R. 386, 389; *Discount Co. Ltd.* v. *Gall* (1961) 1 Q.B. 431; (1961) 2 All E.R. 104 dist.

8 *Dunmore* v. *Alender* (1930) 9 Shaw (Ct. of Sess) 190. Chitty on Contract (24th Ed.), para 72.

9 *Secretary of State* v. *Bhaskar Krishnail* (1925) 49 Bom. 759; 89 I.C. 498; 1925 A.B. 485.

10 Per Farwell J. in *Bruner* v. *Moore* (1904) 1 Ch. 305, 309 followed in *Goldsbrough Mort & Co. Ltd.* v. *Quinn* (1910) 10 C.L.R. 674.

11 *Commissioner of Taxes (Queensland)* v. *Campin* (1937) 57 C.L.R. 127, 132-4

Sale by Auction, etc.—The liberty of revoking an offer before acceptance is well shown in the case of a sale by auction. Here the owner of each lot put up for sale makes the auctioneer his agent to invite offers for it, and "every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." Hence a bidder may withdraw his bid at any moment before the fall of the hammer.[12] It is common to insert in conditions of sale a proviso that biddings shall not be retracted, but it seems that such a condition is inoperative in law[13] for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it, even if he could be supposed to assent by attending the sale with notice of the conditions.[14]

The English rule that a bid may be withdrawn at any time before the fall of the hammer is followed in India.[15] When the bid of an agent at an auction sale was accepted by the auctioneers *kutcha-pucca* (subject to sanction of the owner of the goods), and the agent agreed thereto, it was held that this did not preclude the principals of the agent from exercising their right of retracting the bid before it was accepted by the auctioneers.[16] In this case an attempt was unsuccessfully made to prove a usage of trade according to which, if a bid were accepted *kutcha-pucca,* the bidder could not retract it until it had been finally accepted or refused. If such a usage were established, it would have been, no doubt, inconsistent with the terms of the present section. But, so far as the express enactments of the Act are concerned, such a usage is saved by the last clause of s. 1. It would remain to be seen whether it would not be disallowed as contrary to the general principles of the law. Where offer and acceptance "culminating in a contract" are themselves subject to a condition there is no completed contract till the condition is fulfilled. Therefore an offer before the fulfilment can be withdrawn.[17]

In two Madras cases, it has been held that where a bid has, to the knowledge of the bidder, been conditionally accepted, the agreement is complete once the condition has been fulfilled, and no communication to the offeror of the absolute acceptance is necessary. In *Chitibobu Adenna* v. *Garimalla Jaggarayadu,*[18] a bench decision, *D,* a bidder for a piece of land, was notified of *X*'s acceptance of his bid 'subject to the approval and orders of the special agent *V*'. *V* did approve, and a document embodying his approval was drawn up, but was not communicated to *D,* and the land was sold by *X* to *P*. *P* sought to eject *D,* relying on s. 4, but the Court held for *D,* on the ground that the contract was complete on the fulfilment of the condition subsequent. The decision was followed in *Rajanagram Village Co-operative Society* v. *Veerasami.*[19] There property was knocked down to *P,* the highest bidder at an auction, 'subject to the approval of the C.D. bank'. The bank passed a resolution accepting the bid, but rescinded it before it was communicated to *P*. The Court nevertheless gave specific performance in favour of *P,* on the ground that communication of acceptance twice was not needed, once when the conditional acceptance was given and again when the condition was fulfilled

It is submitted that these two cases were wrongly decided. In the 1916 bench decision, the Court misunderstood the nature of a condition subsequent. A condition subsequent predicates a pre-existing obligation, which is to terminate upon the occurrence of some event. It is a resolutive condition, as distinct from a suspensive condition or condition precedent, which prevents the existence of any obligation until the condition is satisfied. Yet the court clearly decided that there was no binding agreement at any rate until *V,* the special agent, approved. In other words, their Lordships held that the condition was a condition precedent, for had the condition been a condition subsequent, there would have been a binding contract the

12 *Payne* v. *Cave* (1789) 3 T.R. 148; 1 R.R. 679; *Raghunandan* v. *State of Hyderabad* (1963) A.A.P. 110.
13 Such was Lord St. Leonards' opinion: Dart, V. & P., 8th ed. i. 122; *Linga Gowder* v. *State of Madras* (1971) A.M. 28.
14 *Somasundaram* v. *Provinical Government of Madras* (1947) Mad. 837, 1947 A.M. 366 (The question whether the offer could have been withdrawn if the condition had statutory force did not arise in the case). *Union of India* v. *Narain Singh,* 1953 A.Punj. 274.
15 *Agra Bank* v. *Hamlin* (1890) 14 Mad. 235.
16 *Mackenzie* v. *Chamroo* (1889) 16 Cal. 702.
17 *Raghunandan* v. *State of Hyderabad,* 1963 A.A.P. 110.
18 1916 A.M. 55.
19 1951 A.M. 322.

moment *D*'s bid was accepted, liable to be defeated by *V*'s failure to approve. Appropriate wording to impose a condition subsequent would have been to the effect that the bid was accepted, but if *V* should not approve the contract was to be at an end.

It is submitted that in both cases there was a condition precedent, and that the bidder could have retracted his offer before the final acceptance by *V* and the C.D. bank respectively, as in *Somasundaram* v. *Provincial Government of Madras.*[20] S. Rao J. in the *Rajanagram Case* seeks to escape from this conclusion by drawing a distinction, which he purports to find in the *Somasundaram Case,* between a provisional and a conditional acceptance. An acceptance, in his opinion, is provisional where the offeree has no authority to accept the bid: he is a mere conduit-pipe like the Sub-Collector in the *Somasundaram Case.* In the meantime, the offeror can withdraw his bid. But where the offeree has full power to accept the offer, yet gives only a qualified acceptance, although the offeree is not finally bound, the offeror cannot withdraw. This reasoning is, with respect erroneous. An acceptance is either absolute or conditional. There is no halfway house between the two. If an acceptance is conditional, the offeror can withdraw at any moment until absolute acceptance has taken place. Authority, if it be needed, is supplied by the English case of *Hussey* v. *Horne-Payne.* There *V* offered land to *P,* and *P* accepted 'subject to the title being approved by my solicitors'. *V* later refused to go on, and the Court of Appeal held that the acceptance was conditional and there was no binding contract: *V* could withdraw at any time until *P*'s solicitors had approved the title. According to the reasoning of S. Rao J. this would be a case of conditional rather than provisional acceptance, as clearly *P* was no 'conduit-pipe', but the prospective owner of the property, with full power to accept *V*'s offer if he chose. S. Rao J. would hold that *V* cannot withdraw, contrary to the decision of the Court of Appeal.[21]

Once it is established that there is no agreement binding on either party, at any rate until *V* or the C.D. bank respectively gives its approval, the only question remaining for determination is whether communication of this approval to the offeror is necessary before the agreement becomes binding. The general rule under s. 4 is that communication is required. Section 8 provides an exception, but this applies where the offeror expressly or implicity dispenses with the requirement of express communication.[22] It seems that the offeror gave no such express or implied dispensation in either of the two Madras cases, and that there was no contract concluded until the approval of *V* and the C.D. bank respectively had been communicated.

Tender acceptance of concluded contract:—Where the tender notice required the tenderer to quote the rates and make a deposit which was complied with and the other party accepted the tender, the contract was complete and the mere fact that the formal agreement had yet to be executed between the parties within the specified time did not affect the factum of the completion of the contract.[23]

A tender submitted by 'S' was accepted by Government and acceptance communicated by letter. Before the letter reached 'S' he by telegram revoked the tender but it reached Government after the letter of acceptance had been posted.

It was held that the contract was complete as soon as the letter of acceptance was posted.[24]

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20 (1947) Mad. 837, 1947 A.M. 366. See also *Union of India* v. *Narain Singh,* 1935 A.Punj. 274.

21 (1878) 8 Ch.D. 670. This case is discussed at length (*infra*), and the law as to the effect of an agreement 'subject to the approval of the purchaser's solicitor' is considered. There are two lines of decisions, one based on the Court of Appeal in this case, holding that such words import a condition, the other, based on the view of Lord Cairns in the same case in the House of Lords, that the words do not import a condition at all. In this edition, the Court of Appeal view is preferred, but even if Lord Cairns is right, this does not destroy the value of the Court of Appeal decision as an authority contrary to the view of S. Rao. J. in (1947) Mad. 837. Criticism quoted with approval in *Raghunandan* v. *State of Hyderabad* (1963) A.A.P. 110, 114.

22 See *State of Bihar* v. *Bengal C. & P. Works,* 1954 A.P. 14; *Hindusthan Co-operative Insurance Society* v. *Shyam Sunder,* 1952 A.Cal. 691.

23 *Maheshwari Metals & Metal Refinery* v. *Madras State Small Industries Corp. Ltd.* (1974) A.M. 39, 42; *Von Hatzfeldt-Wildenburg* v. *Alexander* (1912) 1 Ch. 284, 289 approved by Privy Council in *Shankar Lal Narayanlal* v. *New Muffasil Co. Ltd.* (1946) A.P.C. 97.

24 *Sadhulal Motilal* v. *State of Madhya Pradesh* (1972) A.A. 137, 139; *Baroda Oil Cakes Traders* v. *Parshottam Narayandas Bagulia* (1954) A.B. 491 reld upon.

The plaintiff was the highest bidder at an auction sale of a lease in two forests. The terms and conditions of the sale notification were to form part of the agreement to be executed but the sale was subject to the confirmation of D.F.O. or the Conservator of Forests. The plaintiff had deposited the entire sale price together with security deposit as required by rules, but the bid was not confirmed by the District Forest Officer and the sale price was ordered to be refunded and second auction was held. The amount of sale price and security deposit were deposited in Court in the second sale. (The plaintiff brought a suit for declaration against the State that he was entitled to the amount deposited in Court on second sale and also to refund of the security deposit.

It was held that the auction sale of a successful bidder would be one which was not only the highest but also to a person to whom intimation or confirmation of the sale had been sent.[25]

At an auction sale the highest bid was accepted by the D.F.O. subject to confirmation. The confirmation was not communicated to the highest bidder and was later settled with a third party.

It was held that there was no concluded contract between the government and the highest bidder, and, therefore, the settlement with the third party was invalid on that ground.[26] Where after the auction but before the acceptance Government leased a forest to another person the claim of the highest bidder who had deposited his instalment of bid money was negatived by the High Court as there was no enforceable ground.[27] The mere fact that a person makes the highest tender cannot entitle the tenderer to claim acceptance.[28]

Where an auction sale was held on the express condition that the acceptance of the highest bid would be subject to the confirmation by a particular authority, the highest bidder can withdraw the offer in time before confirmation in spite of the fact that the bid was provisionally accepted or that he had desposited the earnest money or even the first instalment as per terms of the auction sale.[29]

And a clause disallowing the withdrawal of bid cannot take away that legal right in the absence of any rule or statute.[30] In an auction for tehbazari dues, it was knocked down to a bidder and affirmed by the Municipal Committee. That constituted a contract and was binding on the parties.[31]

Revocation before acceptance of bid.—A bidder at an auction sale of a liquor contract is not bound by his bid even though accepted if the bid is not binding on the Government for one month during which the Excise Commissioner under the conditions of sale can suspend or revoke the acceptance by his subordinates. The bidder can also withdraw his offer in spite of his depositing the sale price of the liquor shops.[32] Such a condition, i.e. the option of the Commissioner to suspend or cancel an auction is not a condition subsequent.[33]

An auctioneer receives money from the highest bidder as a stakeholder for the vendor and the purchaser; it being his duty to pay to the party ultimately entitled, and to hold it till the contract is completed or rescinded. But he cannot withhold the money from the purchaser in case of rescission. He may sue the vendor for loss suffered by him but the auctioneer alone can be compelled to reimburse the purchaser. If the vendor has not received the earnest money, he cannot be made to reimburse the purchaser.[34]

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25 *State of Madras* v. *R. Ranganathan Chettiar* (1975) A.M. 298; *State of Madhya Pradesh* v. *Hakim Singh* (1973) A.M.P. 24; *Sri Durga Saw Mills* v. *State of Madhya Pradesh* (1973) A.Or. 41.

26 *Haridwar Singh* v. *Begum Sumbrui and others* (1972) A.S.C. 1242, 1245; (1972) 3 S.C.R. 629.

27 *Nilgiri Construction Society* v. *State of Orissa* (1975) A.Or.33; *S. Raman Goud* v. *Andhra Pradesh* (1970) and W.R. 342 diss. from *Union of India* v. *Anglo Afghan Agencies* (1968) 2 S.C.R. 368; (1968) A.S.C. 718 disting; *Haridwar Singh* v. *Begum Sumbrui* (1972) A.SC. 1242 reld on.

28 *U.P. State Electricity Board* v. *Goel Electric Stores* (1977) A.A. 494.

29 *The State of Madhya Pradesh* v. *Hakim Singh* (1973) A.M.P. 24; *Sri Durga Saw Mill* v. *State of Orissa* (1978) A.Or. 41.

30 *Rajendra Kumar Verma* v. *State of Madhya Pradesh* (1972) A.M.P. 131.

31 *Ishwardas Hingwas* v. *Municipal Board Rath* (1980) A.A. 143.

32 *Raghunandan* v. *State of Hyderabad,* 1963 A.A.P. 110; *Agra Bank* v. *Hamlin,* 14 Mad. 235; and *Somasundaram Pillai* v. *Provincial Govt. of Madras* (1947) Mad. 837; (1947) A.M. 366 reld. on; Pollock & Mulla: Contract Act (8th Ed.), pp. 44 & 45 refd. to with approval; *Rajanagram Village Co-operative Society* v. *Veerasami* (1951) A.M. 322; and *Chitibobu Adenna* v. *Garimalla Jaggarayadu,* 28 M.L.J. 617; (1916) A.M. 75 diss. from; *Abdul Rahim* v. *Union of India* (1968) A.P. 438 following *Bombay Salt & Chemical Industries* v. *Johnson* (1958) A.SC. 289 (case of auction of Evacuee property and bid being subject to approval of Settlement Commissioner).

33 *Raghunandan* v. *State of Hyderabad,* 1963 A.A.P. 110.

34 *Nannho Bibi* v. *Ram Swarup,* 1965 A.A. 533.

Resignation—revocation of.—In the absence of any statutory rules a resignation is like a proposal. It is complete when it is put in course of communication so as to be out of reach of the proposer and as against the person to whom it is made, when it comes to his knowledge.[35]

A resignation of an office holder can be withdrawn before it becomes effective. Therefore where a Secretary of a School Committee resigned and asked for its acceptance by calling a meeting of the Society at an early date and before its acceptance by the meeting withdraws it, the resignation becomes ineffectual.[36]

Standing offers.—A writing whereby *A* agrees to supply coal to *B* at certain prices and up to a stated quantity, or in any quantity which may be required for a period of twelve months, is not a contract unless *B* binds himself to take some certain quantity, but a mere continuing offer which may be accepted by *B* from time to time by ordering goods upon the terms of the offer. In such a case, each order given by *B* is an acceptance of the offer; and *A* can withdraw the offer, or, to use the phraseology of the Act, revoke the proposal, at any time before its acceptance by an order from *B*.[37] Such a transaction may be reduced to a statement by the intending vendor in this form: "If you will send me orders for coal, I shall supply it to you for a period of twelve months at a particular rate." This is merely a proposal from *A* to *B*. If in reply to such a proposal, *B* says to *A*, "I agree," it does not constitute an acceptance of the proposal. An acceptance can take place only by *B* sending an order to *A*. If, however, there is an undertaking on the part of *B* not to send orders for coal (or whatever the goods in question may be) to any other person than *A* during a specified time, there is a good consideration for a promise by *A* to supply such coal as *B* may order on the specified terms and up to the specified extent. The same principle was affirmed by the Privy Council on an appeal from the Province of Quebec, where French-Canadian law, now codified, is in force. A printer covenanted to execute for the Government of the Province, during a term of eight years, the printing and binding of certain public documents on certain terms expressed in a schedule. In the course of the same year the Lieutenant-Governor cancelled the agreement. The printer sued the Crown by petition of right, and it was ultimately held, reversing the judgment below, that he had no ground of action.

"The contract ...does not purport to contain any covenant or obligation of any sort on the part of the Crown. The respondent undertakes to print certain public documents at certain specified rates. For all work given to him on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff. But the contract imposes no obligation on the Crown to pay the respondent for work not given to him for execution. There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work, or such part as they think fit to any other printer".[38]

In another similar case in England where a town council had accepted a tender for the supply of certain goods for twelve months a Divisional Court held that a contract was formed by the acceptance of the tender.[39] One of the Judges thought there was an implied obligation on the council's part not to order goods of that kind elsewhere during the term. The case before the Privy Council which we have just mentioned was not cited. Unless some sufficient

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35 *Janardhan Mishra* v. *State of U.P.* (1981) A.A. 213, 216.

36 *Managing Committee of Sree Ganesh Etc.* v. *State of Bihar* (1981) A.P. 271, 272; *Union of India* v. *Gopal Chandra* (1978) A.S.C. 694 reld on *Shukhdev Narayan* v. *Municipal Committee* (1956) A.P. 367. refd. to.

37 *The Bengal Coal Co.* v. *Homee, Wadia & Co.* (1899) 24 Bom. 97, following *G.N.R. Co.* v. *Witham* (1873) L.R. 9 C.P. 16; *Kundan Lal* v. *Secretary of State for India* (1904) Punj. Rec. No. 72; *Joravia Mell Champalal* v. *Jeygopaldas Ghanshandas* (1922) 43 Mad.L.J. 132; *Chaturbhuj Vithaldas* v. *Moreshwar Parashram*, 1954 A.S.C. 236.

38 *R.* v. *Demers* (1900) A.C. 103, 108. Followed in a closely similar case, where the real difference between the parties was of construction, *Secretary of State* v. *Madho Ram* (1929) 10 Lah. 493; 1929 A.L. 114.

39 *Gloucester Municipal Election Petition* (1901) 1 K.B. 683. The point arose in a curious manner, the question being whether the tradesman had an interest in a contract with the council (apart from any goods being actually ordered) which disqualified him for election as a town councillor.

distinction can be discovered in the facts (which the present writer[40] has failed to do), it is submitted that this judgment is contrary to both principle and authority, and ought not to be followed.

The defendant in reply to a tender issued by a Railway Company for the supply of certain goods at a fixed price and such quantities as the Company may require during the year, offered a tender. The tenderer after some time refused to supply. He was held liable for breach of contract as he had made a standing offer which the Company accepted whenever during the year it ordered goods.[41]

Advertisements of rewards and other so-called "general offers" have also raised questions whether particular acts were proposals of a contract capable of being promises by acceptance, or merely the invitation of proposals. This will be more conveniently dealt with under s.8

Indian Oaths Act.—It has been held that if *A* offers to be bound by a special oath taken by *B*, and *B* accepts the offer, *A* cannot resile from the agreement;[42] Having regard, however, to the provisions of the Indian Oaths Act, *B* may be allowed by the Court to resile from the agreement.[43]

Offer to abide by a statement of opposite party or another.—An offer of a party to litigation to abide by a statement made by the opposite party or one of them if accepted is binding and cannot be resiled from. But if sufficient cause is shown the Court may allow the withdrawal of the offer or acceptance as the case may be.[44]

6. A proposal is revoked—

Revocation how made.

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Notice of Revocation.—Here sub-s. 1 appears to make it a condition of revocation being effectual that it shall be communicated by the proposer or (which is the same thing) by his authority. This was probably intended to correspond with the law of England, but a few years after the Act was passed the Lords Justices James and Mellish in *Dickinson* v. *Dodds*[45] used language apparently involving a different rule, though that case actually decided only that if an owner of immovable property makes a proposal to sell it to one man, and before that proposal is answered agrees to sell it to another, and the first, with the knowledge of this fact, then formally tenders an acceptance, the purchaser who first actually accepts has the better right to specific performance. It was not decided (though the Judges seem to have thought) that knowledge, not communicated by the proposer, that the property was sold to some one

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40 The Rt. Hon'ble Sir Frederick Pollock.

41 *Great Northern Railway* v. *Witham* (1873) 9 C.P. 16.

42 *Saheb Ram* v. *Ram Newaz*, 1952 A.A. 882 (F.B.).

43 *Mahadeo Prasad* v. *Srjug Prasad*, 1952 A.P. 208.

44 *Mrs. Florabel Skinner* v. *Jai Bajrang Mala Mandir* (1980) A.Punj. 284 (F.B.); *Ram Chand* v. *Dunichand* (1926) A.L. 246 (*Oath's* case); *Allah Rakha* v. *Punnun* (1941) A.L. 173; *Manohar Lal* v. *Onkar Das* (1959) 61 Pg: L.R. 651; *Kundan* v. *Kartara* (1967) 69 P.L.R. 651 appvd.; *Moniram* v. *Harichand* (1955) 57 P.L.R. 327; *Gian Chand Sharma* v. *Bansi Lal* (1961) A.Punj. 31; *Thakur Singh* v. *Inder Singh* (1976) A.Punj. 287 overruled.

45 (1876) 2 Ch.D. 463.

else was such a revocation of the first proposal as in itself made acceptance by the person to whom it was made impossible. Acceptance of a proposal which the proposer has made it impossible to fulfil is not necessarily unmeaning or inoperative; the fact that an obligation cannot be specifically performed is consistent with the promisor being bound to pay damages for his default. Many obligations are from the first incapable of specific performance so far as any power of the Court is concerned. It would be absurd to hold that a promisor is to go scotfree because by his own action he has reduced the possibilities of his obligation from a higher to a lower level. The reasons given for the decision in *Dickinson* v. *Dodds* have been freely criticised in England; but, as the decision itself is not of positive authority in India in a matter covered by the terms of the Contract Act, it does not seem useful to pursue the discussion here. The true principle of such cases is stated by Langdell.[46] "An offer to sell property will not be revoked by a sale of the property to some one else. As evidence of a change of mind on the part of the offeror, such an act cannot be put higher than a letter of revocation sent to the offeree by mail; and yet it is well settled that a letter of revocation will not be operative until it is received by the offeree.[47] Nor will subsequent sale of the property to some one else consitute any legal obstacle to the continuance of the offer. The original offeree and the subsequent purchaser cannot, indeed, both acquire the property, but they can both acquire a right to it as against the seller, together with the alternative right to damages; and this is all that a contract secures to one in any case." It has, indeed, been suggested by writers entitled to respect.[48] that an act of the proposer inconsistent with his original intention will be operative, if it comes in any way to the knowledge of the offeree, as an act which, under s.3, "has the effect of communicating" a revocation of the proposal. If this were so, *Dickinson* v. *Dodds* would be good law in India to the full extent of the reasons there given. But, with all submission, the act of selling to one man property already offered to another cannot be itself an act which has the effect of communicating notice to that other. Such notice must be the effect of some other act or event. As in *Dickinson* v. *Dodds,* a stranger may inform the original offeree that the new transaction, or some such transaction, has taken place.[49] This is no act of the party supposed to be revoking, and therefore its effect, if any, cannot depend on the words of s.3. It is perhaps needless to consider what would be the result if the first offeree in person were to overhear a conversation between the vendor and the new purchaser constituting an agreement inconsistent with the first offer. We have already expressed a doubt whether the true meaning of s.3 was to ascribe the effect of communicating proposal, revocation, or acceptance, to acts done without any such intent. On the whole, we are unable to follow the learned commentators to whose interpretation we have referred.

Revocation not presumed.—As Lord Justice James said "*prima facie* every contract is permanent and irrevocable, and it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination".[50] This dictum, and the Indian case cited in our note, really belong to the subject of interpretation, in cases

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46 Summary of the Law of Contract, s. 181.

47 A cheque is not effectually countermanded by a telegram delivered at the bank on which it is drawn but not in fact brought to the banker's notice: *Curtaile* v. *London City & Midland Bank* (1908) 1 K.B. 293, C.A.

48 Cunningham and Shephard's Indian Contract Act, 9th ed., p. 25.

49 The informant was not in fact a stranger, but the agent of the plaintiff, the original offeree.

50 *Llanelly Ry. & Dock Co.* v. *L. & N.W.R. Co.* (1873) L.R. 8 Ch. 942, at p. 949. Accordingly, where a contract was made between the widow of a Gayawal priest and the defendant whereby the widow adopted the defendant, a married man, as her son in order that the defendant might get his feet worshipped by the *clientele* of her deceased husband and receive emoluments from them for the benefit of himself and the widow, and the contract itself specified the circumstances under which it might be cancelled, it was held that, though the adoption was invalid, the contract was not determinable at the mere choice of the widow so as to affect the rights created thereby in favour of the defendant. The Court said: "We are unable to accept the suggestion that the contract in this case was a contract of service, terminable upon reasonable notice. The contract itself indicates some of the circumstances under which it may be terminated, and it is impossible to hold that the parties intended that the contract should be terminable merely at the option of one of the parties": *Lachmi Dai Mohutain* v. *Kissen Lall* (1906) 11 C.W.N. 147, citing James L.J. as above.

where it is alleged that an option to determine a completed contract is conferred by the terms of the contract itself. But the principle that an intent to revoke what has once been deliberately uttered will not be lightly presumed or too readily inferred appears to be equally applicable to proposals. Moreover, the Act does not explicitly deal with interpretation anywhere. The Lord Justice went on to point out that many contracts, those of employment, agency, and the like, are by their nature not expected to be of indefinite duration. The agreement before him was an agreement for running powers between two railway companies.

Lapse of time for acceptance.—The rule laid down by sub-s. 2 is now elementary. We have already had to cite some of the authorities which recognise it. On the point of an acceptance after the expiration of a reasonable time being too late, there is one direct English authority, where it was held that a person who applied for shares in a company in June was not bound by an allotment made in November;[51] and this case has been followed by the Bombay[52] and Nagpur High Courts.[53] In another English company case an underwriting letter contained the words "This engagement is binding on me for two months"; they were incapable of operating as a promise, and it was held, with some doubt, that their real effect was an offer with a limit of two months for acceptance.[54]

Lapse of time without repudiation.—Lapse of time without any steps towards repudiation does not by itself constitute affirmation but is proof of it and when the lapse is great it probably would in practice be treated as conclusive evidence of an election to recognise the contract,[55] e.g. lapse of five years would bar the right of rescission.[56]

Acceptance of an offer where no time fixed.—In an English case it was held that where an offer is made without fixing any time for acceptance the offer must be accepted within a reasonable time to make a contract.[57] This case was applied by Allahabad in a case where the facts were the respondents made an offer by asking the petitioner to sign the fresh draft agreement by December 5, 1971, and in January 1972 wrote a letter to the petitioner renewing the proposal by saying that parallel supply agreement will be renewed if the petitioner signed the draft agreement earlier. The letter did not contain any period within which to sign the agreement. Thus the second part of s.6 (2) will apply and acceptance has to be in a reasonable time.[58]

Conditional Offer.—A conditional offer to pay certain amount by the employer to the employees lapses when the condition is not accepted[59] condition being the immediate withdrawal of strike notice.

Condition precedent to acceptance.—As to sub-s. 3, it is not very easy to see what a condition precedent to acceptance means. The words (like several other of the less felicitious phrases in the Act) appear to have been borrowed without much reflection from the draft Civil Code of the State of New York, completed in 1865 and never adopted in its own State. There is nothing in the original context to throw light on them. A man proposing a contract may request either a single act, or several acts, or a promise or set of promises, or both acts and promises, as the consideration for a promise which he offers. The other party may do something obviously inconsistent with performing some or one of the things requested. This amounts to

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51 *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866) L.R. 1 Ex. 109.
52 *Indian Co-operative Navigation Trading Co.* v. *Padamsey Premji,* 1934 A.B. 97; 36 Bom L.R. 32; 150 I.C. 645.
53 *Ramlalsao* v. *Malak,* 1939 A.N. 225; 183 I.C. 748.
54 *Hindley's Case* (1896) 2 Ch. 121, C.A.
55 *Clough* v. *L. & N.W. Rly. Co.* (1871) 7 Ex. 26. 35.
56 *Leaf* v. *International Galleries* (1950) 2 K.B. 86; (1950) 1 All E.R. 693.
57 *Manchester Diocesan Council for Education* v. *Commercial and General Investments Ltd.* (1970) 1 W.L.R. 241; (1969) 3 All E.R. 1593 quoted in *Hindustan Aluminium Corporation Ltd.* v. *The U.P. State Electricity Board* (1973) A.A. 263, 267.
58 *Hindustan Aluminium Corporation* v. *U.P. State Electricity Board* (1973) A.A. 263, 266; *Manchester Diocesan Council for Education* v. *Commercial & General Investment Ltd.* (1970) 1 W.L.R. 271; (1969) 3 All E.R. 1593.
59 *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdoor Union* (1956) S.C.R. 872, 884; 1957 A.S.C. 95.

a tacit refusal, and accordingly the proposal is at an end (see notes on s. 5, "Revocation of offers," above), and the parties can form a contract only by starting afresh. If the fact amounts to a refusal, there is no manifest reason for calling it failure to fulfil a condition precedent. The term is not used in this connection in English books. Everything required on the acceptor's part to complete an acceptance would rather seem to be part of the acceptance itself. This subsection does not appear to have been judicially interpreted of indeed to have any very material effect.

Death or insanity of proposer.—The provision made by sub-s. 4 is quite clear. It is a variation from English law, where on the one hand it is understood that "the death of either party before acceptance causes an offer to lapse," without any qualification as to notice, and on the other hand it does not seem that supervening insanity of the proposer operates as a revocation at all, since the contract of a lunatic is only voidable and not void. If an offer is addressed to a man who dies without having accepted or refused it, his executors have no power to accept it either in England or in India. For the proposer cannot be presumed to have intended to contract with a deceased person's estate. This is very different from the case of one who accepts a proposal without knowing that the proposer is dead.

An offer cannot be accepted by the offeree after the death of the offeror, the offeree having notice of the death and the offer merely remains an offer until the offeree signs the agreement. On the basis of an agreement of sale by the plaintiff's husband of land to two brothers only one of whom had signed in the lifetime of the husband and there was a claim by the offerees of breach of contract by the husband the claim failed.[60]

Death of an offeror.—The effect of death varies according to the nature of the particular contract. The offeree cannot accept after notice of offeror's death. If the offer is of a promise independent of the offeror's personality, e.g. guarantee, which can be satisfied out of estate of the deceased, death does not, unless notified, prevent acceptance.[61]

If, as in the case of agency, or in an offer to write a book or to perform at a concert, some element personal to the offeror is involved, death automatically terminates the negotiations.[62]

Death of offeree.—According Warrington L.J. in *Reynolds* v. *Atherton,* an offer ceases by operation of law on the death of the offeree because after death there is no longer an offer at all. The offer is not meant to be made to a dead person or his executors. But this point was expressly reserved when the case went to the House of Lords.[63]

Refusal—The rejection of a proposal by the person to whom it is made is wholly distinct from revocation, and is not within this section. A counter-offer proposing different terms has the same effect as a merely negative refusal; it is no less a rejection of the original offer, and a party who, having made it, changes his mind, cannot treat the first offer as still open.[64]

7. In order to convert a proposal into a promise, the acceptance must—

Acceptance must be absolute.

(1) be absolute unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal

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60 *Fong* v. *Cilli* 11 F.L.R. 495; *Dickinson* v. *Dodds* (1876) 2 Ch.D. 463, 475. See also *Re Whelan* (1897) 1 I.R. 575; *Coulthart* v. *Clementson* (1879) 5 Q.B.D. 42.

61 *Bradbury* v. *Morgan* (1862) 1 H. & C. 249; Cheshire & Fifoot: Law of Contract (6th Ed.), p. 51; Contra per Mellish L.J. (obiter) in *Dickinson* v. *Dodds* (1876) 2 Ch.D. 463, 475. See also Pollock on Contract (13th Ed.) p. 30.

62 Cheshire & Fifoot: Law of Contract (6th Ed.) p. 51.

63 (1921) 125 L.T. 690, 695-6 (C.A.); (1922) 127 L.T. 189, 191 (H.L.); Cheshire & Fifoot: Law of Contract (6th Ed.) pp. 51-52.

64 *Hyde* v. *Wrench* (1840) 3 Beav. 334; not otherwise in India; *Nihal Chand* v. *Amar Nath,* 1926 A.L. 645; 98 I.C. 272; 8 Lah.L.J. 434. Cf. *Stevenson* v. *McLean* (1880) 5 Q.B.D. 346—a mere enquiry by the offeree cannot be treated as a rejection of the offer.

prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer, may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.[65]

Certainty of acceptance.—Under section 7(1) of the Indian Contract Act, proposal to get converted into a promise the acceptance has to be absolute and unqualified.[66] The rule of the first sub-section is in itself obviously necessary, for words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything, and, therefore, can amount to nothing more than a new proposal, or, as it is frequently called, a counter-offer. The difficulties which occur under this head are difficulties not of principle but of construction, the question being in every case whether a particular communication is to be understood as a real and absolute acceptance, or as introducing a condition or qualification which makes it only a stage in a course of negotiation capable of leading, but not necessarily leading, to a concluded contract. Sometimes additional words that seem at first sight to make the acceptance conditional are no more than the expression of what the law implies, as where in England an offer to sell land is accepted "subject to the title being approved by our solicitors." The reasonable meaning of this appears to be not to make a certain or uncertain solicitor's opinion (which might by arbitrary) final, but only to claim the purchaser's common right of investigating the title with professional assistance and refusing to complete if the title proves bad.[67]

The words are a guard against its being supposed that the title was to be accepted without investigation, i.e. the title must be investigated and approved in the usual way, which would be by the solicitor of the purchaser.[67] The learned editors of Halsbury's Laws of England have put the matter thus in Vol. 8, pp. 76-77:

"However, the expression of what is necessarily a condition, not of acceptance, but of the contract itself does not prevent the agreement being enforceable"

e.g. the approval of vendor's title[68] But a condition "subject to the purchaser's solicitor's approval of the title" imports an addition to the obligation to make good title implied by law.[69] Similarly where an agreement of sale of a lease is "subject to the purchaser's solicitor approving the lease" the contract is conditional.[70] An agreement for the sale of land "subject to contract" is not binding until the entering into the contract is completed.[71] An agreement to grant a lease on approval by a party's solicitor may be construed as being merely a safeguard to ensure that the lease embodies the terms of the agreement and does not contain unusual stipula-

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65 "These sections (7, 8 and 9) must be read without reference to the English law on the subject": Ashworth J., *Gaddar Mal* v. *Tata Industrial Bank* (1927) 49 All. 674, at p. 677; 100 I.C. 1023; 1927 A.A. 407; *qu.* whether provoked by irrelevant citations (argument not reported), but the language is clearly too wide; the real meaning must be that English decisions cannot prevail against the clear words of the Act.

66 *U.P. State Electricity Board* v. *Goel Electric Stores* (1977) A.A. 494.

67 *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311, 322; (1874-80) All E.R. Rep. 716, 721, per Lord Cairns (followed in *Treacher & Co.* v. *Mahomedally* (1911) 35 Bom. 110). In such a case the seller should show good title or satisfaction of the solicitor. The decision of the C.A. which had taken a different view on this point, was affirmed on other grounds.

68 See *Gordon* v. *Mahony* (1850) 13 Ir. Eq.R. 383, 404; *Chatterley* v. *Nicholls* (1884) 1 T.L.R. 14 C.A.

69 *Hussey* v. *Horne Payne* (1878) 8 Ch.D. 670 (C.A.) at p. 678; affd. on app. (1879) 4 App. Cas. 311 (H.L.) at p. 322; (1874-80) All E.R. Rep. 716 (Lord Cairns held this does not affect a contract otherwise complete); *Curtis Moffat Ltd.* v. *Wheeler* (1929) 2 Ch. 224 (Maugham J. preferred this view of the C.A. to the contrary opinion of Lord Cairns L.C. in the H.L. and treated it as *obiter); Sreegopal* v. *Ram Churn,* 8 Cal. 856, 863 (observations are *obiter*); Halsbury's Laws of England, Vol. 8, p. 77.

70 *Caney* v. *Leith* (1937) 2 All E.R. 532 applying *Hudson* v. *Buck* (1877) 7 Ch.D. 683; *Clark* v. *Wood* (1882) 9 Q.B.D. 276; *Curtis Moffat Ltd.* v. *Wheeler* (1929) 2 Ch. 224; Halsbury's Laws of England, Vol. 8, p. 77.

71 *Eccles* v. *Bryant* (1948) Ch. 93 (C.A.); (1947) 2 All E.R. 587 (In England the customary way is by exchange of signed copies).

tions.[72] In *Baij Nath's case*[71] it was held that a lessor is bound to give the lessee a good title free from reasonable doubt and where a prospective lessee demands title deeds from the prospective lessor for investigation and approval it cannot be said that there is a final and concluded agreement. In that case the court found that the plaintiff did not intend any final lease being made until a good title had been made and until it had been approved by the plaintiff's solicitors after investigation. This it is submitted was a case on its own facts.[73] It is submitted that a term such as "subject to approval of title by the purchasers' solicitors" imports an addition to the obligation to make good title and is satisfied if the vendor proves that the solicitors did approve of it or the title tendered was such as it made it unreasonable not to approve of it.[74] Again, the offer of a new contract may be annexed to an absolute acceptance so that there is a concluded contract whether the new offer is accepted or not.[75] On the other hand, reference to special conditions not known to the other party,[76] as distinguished from terms already made part of the proposal,[77] will prevent an acceptance from being final. So will a reference to future unspecified terms "to be arranged," or the like, between the parties or their agents.[78] But an acceptance on condition, coupled with an admission that the condition has been satisfied, may be in effect unconditional.[79]

An acceptance which is in form conditional may also be considered in fact absolute, on the ground that the parties did not really envisage the incorporation in the contract of any terms other than those already agreed. In *Nicolene* v. *Simmonds,*[80] an offer was accepted "subject to the usual conditions of acceptance." It was held that there was a binding contract, as these words were on the facts quite meaningless: the offeree had not in mind that any further terms were to be agreed, but was using a high-sounding phrase to which he attached no particular meaning. In another case, also before the Court of Appeal, *Branca* v. *Cabarro*[81] *D* entered into a written agreement to buy *P's* mushroom farm. The agreement concluded with these words: "This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed." No "fully legalised agreement" was ever prepared, but the Court held the parties bound, one of the points being that no other condition was to be incorporated in the agreement to be drawn up by the solicitor.

It is the essence of a contract that there should be *aggregatio mentium* the meeting of minds of the contracting parties. Therefore where there was no *consensus ad idem* as to mak-

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72 *Chipperfield* v. *Carter* (1895) 72 L.T. 487 explained in *Caney* v. *Leith* (1937) 156 L.T. 483, p. 535. See also *Endie* v. *Addison* (1882) 52 L.J.Ch. 80; Halsbury's Laws of England, Vol. 8, p. 77.

73 *Baij Nath* v. *Kshetrahari Sarkar* (1955) A.Cal 210, 215-216.

74 *Treacher & Co. Ltd.* v. *Mahomedally Peerbhoy* (1911) 35 Bom. 110; *Sreegopal* v. *Ram Churn,* 8 Cal. 856. See *supra.*

75 *Sir Mahomed Yusuf* v. *Secretary of State* (1920) 22 Bom.L.R. 872; 45 Bom. 8; 57 I.C. 971: 1921 A.B. 200. The term "counter-offer" is clearly not the right one to use in this view of the facts.

76 *Jones* v. *Daniel* (1894) 2 Ch. 332.

77 *Filby* v. *Hounsell* (1896) 2 Ch. 737.

78 *Honeyman* v. *Marryatt* (1857) 6 H.L.C. 112; *Stanley* v. *Dowdeswell* (1874) L.R. 10 C.P. 102; *Lockett* v. *Norman-Wright* (1925) 1 Ch. 56. But an agreement to supply goods described in general terms at a price "to be agreed" is not necessarily void for uncertainty; for a term may be implied that the goods are intended to be of reasonable quality to be sold at a reasonable price: *Hilla* v. *Arcos* (1932) 147 L.T. 503; *Foley* v. *Classique Coaches* (1934) 2 K.B. 1. The question is one of construction in each case, and the inclusion of an arbitration clause in the contract is in such cases an important element: see also *May and Butcher* v. *The King* (1934) 2 K.B. 17. The Court takes into consideration the fact that the parties believed they had made a contract; *ibid.,* followed on this point in *Rajkishor Mohanty* v. *Banabehari,* 1951 A.Or. 291. The implication of a reasonable sum is assisted if the agreement has been executed on one side: *British Bank for Foreign Trade* v. *Novinex* (1949) 1 K.B. 623, 630.

79 *Roberts* v. *Security Co.* (1897) 1 Q.B. 111, C.A. The principle is sound but its application in the particular case doubtful; see *The Equitable Fire and Accident Office* v. *The Ching Wo Hong* (1907) A.C. 96, 101.

80 (1953) 1 Q.B. 543, C.A. Distinguishing *British Electrical* v. *Patley Pressings* (1953) 1 W.L.R. 280 ("subject to *force majeure* conditions"—held too vague). and *Scammell* v. *Ouston* (1941) A.C. 251 ("the balance of purchase price can be had on hire-purchase terms over a period of 2 years"—too vague). The latter case was followed in *Jai Gobind Singh* v. *Bagal Lal Singh,* 1950 A.A.P. 445. See also *Baijnath* v. *Kshetrahari Sarkar,* 1955 A.Cal. 210 (lease subject to "all other usual clauses" held too vague).

81 (1947) K.B.854.

ing charges of windows of altered design there cannot be said to be a concluded contract.[82] A contract is created by the common intention of the parties to enter into legal obligation and the intention is inferred when the parties enter into an agreement conforming to the rules of law for formation of contracts. But this intention may be negatived.[83] Atkin L.J. in *Rose & Frank Co.* v. *J.R. Crompton & Bros. said:*[83]

> "It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour* v. *Balfour.*[84] If the intention may be negatived impliedly it may be negatived expressly."[85]

Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed,[86] or some other act is done. An absolute acceptance of an offer does not make a binding contract if it does not extend to all the terms under negotiation or it is merely a provisional arrangement subject to a further agreement to be executed between the parties.[87] This is really a case of acceptance with an added condition, but of such special importance as to call for separate mention. There may be an express reservation in such words as these: "This agreement is made subject to the preparation and execution of a formal contract."[88]

In deciding whether a contract is a concluded contract or not the essential question is to find out whether the formal document is of such a nature that it was the very condition of the contract or whether it was commemorative of the evidence on the point.[89] In order to decide this matter the entire negotiations and the correspondence on which the contract depends must be considered.[90] It is a matter of construction whether the execution of a further contract is a condition of the contract or a mere expression of a desire of the parties as to the manner in which the transaction already agreed to will go through.[91] The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. But there may be cases where the signing of a further formal agreement is made a condition or term of the bargain and if the formal agreement is not approved and signed there is no concluded contract.[92]

In *Sriramulu's case*[93] the drawing up of a written agreement was not shown as a prerequisite to the coming into operation of the oral agreement to sell.

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82 *State of Punjab* v. *Hindustan Development Board Ltd.* (1960) 2 Punj. 676; 1960 A.Punj. 585; *Bhagwandas* v. *Girdhari Lal & Co.* (1966) A.SC. 543. See also *Rose & Frank Co.* v. *J.R. Crompton & Bros.* (1923) 2 K.B. 261; (1925) A.C. 445; (1924) All E.R. Rep. 245. See sec. 7.

83 *Rose & Frank Co.* v. *J.R. Crompton & Bros.;* n.18 *supra.*

84 (1919) 2 K.B. 571. See *Lala Muddun Gopal Lal* v. *Mt. Khikhinda Kuer,* 18 I.A. 9 (case of Hindu Law).

85 *Edwards* v. *Skyways Ltd.* (1964) 1 W.L.R. 349, 355.

86 "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation": *Chinnock* v. *Marchioness of Ely* (1865) 4 D.J.S. 638, at p. 646. But see *Branca* v. *Cobarro* (*supra*).

87 *Namayya* v. *Union of India* (1958) A.A.P. 533. *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311; (1874-80) All E.R. Rep. 716; *Winn* v. *Bull* (1877) 7 Ch.D. 29. See under s. 13.

88 *Winn* v. *Bull* (1877) 7 Ch.D. 29; Finch. Sel. Ca. 81, followed in *Hatzfeldt-Wildenbury* v. *Alexander* (1912) 1 Ch. 284; *Rossdale* v. *Denny* (1921) 1 Ch. 57, C.A.; *Raingold* v. *Bromley* (1931) 2 Ch. 307; *cp,* the cases cited in note 14, *supra.*

89 *Goshto Bihari* v. *Surs Estate Ltd.* (1960) A.Cal. 752; *Harichand Mancharan* v. *Govind Luxman,* 50 I.A. 25; 1923 P.C. 47; *Currimbhoy Co.* v. *Creet,* 60 I.A. 297, (1933) A.P.C. 29; *Shankarlal* v. *New Muffasil Co. Ltd.,* 73 I.A. 98, (1946) A.P.C. 97; *Von Hatzfeldt Wildenburg* v. *Alexander* (1912) 1 Ch. 284; *Hukamchand* v. *Ram Bahadur Singh,* 51 I.A. 208; (1924) A.P.C. 156.

90 *Namayya* v. *Union of India,* 1958 A.A.P. 533; *Damodar Shah* v. *Union of India* (1959) A.Cal. 526; *Ka Ron Lamong* v. *State of Assam* (1959) A.Assam 75, 90.

91 *Namayya* v. *Union of India* (1958) A.A.P. 533; *Currimbhoy & Co.* v. *Creet,* 60 I.A. 297; 1933 A.P.C. 29.

92 *Kollipara Sriramulu* v. *Aswatha Narayana* (1968) A.SC. 1028; *Von Hatzfeldt-Wildenburg* v. *Alexander* (1912) 1 Ch. 284, 288; *Rossiter* v. *Miller,* 3 A.C. 1124; *Currimbhoy & Co.* v. *Creet,* 60 I.A. 297 reld. upon.

93 *Kollipara Sriramulu* v. *Aswatha Narayana,* n. 28 supra.

But this rule has no application to a contract required to be evidenced by a formal document under Art. 299 of the Constitution.[94]

In the case[95] of contracts governed by Article 299 of the Constitution there can be a contract by correspondence and the execution of a formal document is not absolutely essential provided the other conditions of the Article are satisfied.

A contract to enter into a contract is not a valid contract and therefore a clause in an arbitration agreement that in the event of a dispute arising the same "can" be referred to arbitration is not a valid agreement to refer to arbitration. The word "can" cannot be construed as an option given to either party.[96]

An agreement[97] whereby the vendor agrees to sell and the purchaser agrees to purchase certain premises and whereby the vendor was required to sell within a certain period of time will constitute a concluded contract and will be enforceable by specific performance.

Acceptance of tender.—The effect of acceptance of a tender with a minimum guarantee for the purchase of articles tendered for constitutes a contract.[98]

Waiver of right by a party.—A suit was compromised whereby the defendant was to be given the first offer to purchase in case of sale. That was a concluded contract and the mere fact that the defendant could waive his right could not be taken as a criterion to determine whether there was or was not a binding contract.[99]

The municipality passed a resolution agreeing to renew the lease in favour of the lessee on his paying the upset price and annual rent within specified time. The lessee appealed to the Minister but failed and then seven years later he paid part of the money and agreed to the rest being paid in instalments which was accepted by the Municipal Commissioner. But the Supreme Court held that the Commissioner had no authority to do so in view of the municipality's resolution. Thus there was fresh offer and no contract came into existence.[1]

The plaintiff tendered to buy from the defendant 3,500 tonnes of coke at Rs.31/- per tonne and also deposited Rs.5000/- as security. The acceptance of the tender and the deposit of security money constituted a concluded contract. Further the plaintiff had accepted all the terms of the sale.[2]

The English authorities have also been followed on the point that parties are free to provide that the agreement shall not be complete and operative until its terms are reduced into writing, or are embodied in a formal document, and that it is a question of interpretation whether they have done so or not. Where, however, there is no such stipulation express or implied, the mere circumstance that the parties intend to put the agreement into writing or in a formal instrument will not prevent the agreement from being enforced, assuming, of course, that an agreement otherwise complete and enforceable is proved.[3]

Seeking Clarification.—Seeking clarification of an offer neither amounts to the acceptance of the offer nor to the making of a counter offer.[4]

Therefore where an offeree wrote to the offeror that defects in the tender submitted may

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94 *Damodar Shah* v. *Union of India,* (1959) A.Cal. 526; *K.P. Chawdhary* v. *State of M.P.* (1967) A.SC. 203, 206.
95 *Manikam Chettiar* v. *State of Madras* (1971) 1 Mad. 345; (1971) A.M. 221.
96 *Jyoti Bros.* v. *Shree Durga Mining Co.* (1956) A.Cal. 280. See *Namayya* v. *Union of India* (1958) A.AP. 533.
97 *Dr. Jiwan Lal* v. *Brij Mohan Lal* (1973) A.SC. 559, 560. (1973) 2 S.C.R. 230.
98 *Cummins Diesel Sales and Supply Ltd.* v. *D.G. Supplies and Disposal* (1981) A.D. 61, 64.
99 *Smt. Nirmalabala* v. *Sudarshan Jana* (1980) A.Cal. 258; *Baijnath* v. *Kshetra Hari* (1955) A.Cal. 210; *Century Spg. & Mfg. Co. Ltd.* v. *Ulhas Nagar Municipality* (1971) A.SC. 1071 folld.
1 *Badri Lal* v. *Municipal Corporation of Indore* (1973) A.SC. 508, 510: (1973) 3 S.C.R. 15.
2 *Jagdish Prashad Keshwani* v. *Fertilizers Corporation of India* (1981) A.P. 58, 60; *Union of India* v. *Madan Lal* (1966) A.SC. 1724 disting.
3 *Whymper* v. *Buckle* (1879) 3 All. 469, citing *Brogden* v. *Metropolitan Railway Co.* (1887) 2 App. Ca. 666; *Lewis* v. *Brass* (1877) L.R. 3 Q.B.D. 667; *Bonnewell* v. *Jenkins* (1878) L.R. 8 Ch.D. 70; and see note 22, *supra*.
4 *U.P. State Electricity Board* v. *Goel Electric Stores,* (1977) A.A. 494.

be rectified so as to make it fit for consideration it was only an opportunity given to the offeror and not a counter offer.[5]

Insurance Contract, formation of.—A policy of insurance becomes effective where all other formalities had been completed except that "the personal statement duly completed by the doctor had not been done" as this was held to be a mere formality.[6] The acceptance of a proposal of life insurance does not necessarily result in a binding insurance contract. It may merely amount to an intimation of willingness of the insurer to insure on payment of the necessary premium.[7] An acceptance of a proposal by an insurer on the condition that the first premium will be paid within 30 days from the date of acceptance is in law a counter offer, the fulfilment of which would result in a contract.[8] A contract of insurance, like any other contract, is concluded by offer and acceptance. A stipulation of attachment of liability on the payment of premium is a condition precedent to the policy taking effect. But that is a condition for the benefit of the insurer and can be waived by the insurer.[9]

Or a proposal for insurance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here again there is no contract, but only a counter-offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against.[10] Where there is no precise clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form,[11] or whether they should be subject to a new agreement the terms of which are not expressed in detail,[12] and this must be determined by examination of the whole of a continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract.[13] But where it appears that a complete contract was formed by unqualified acceptance of an offer at a certain date, subsequent negotiations will have no effect unless they amount to a new agreement.[14] Similarly an unconditional acceptance of the original offer and the formation of the contract thereupon is not affected by a collateral term annexed to that acceptance.[15]

Revival of lapsed insurance.—A lapsed insurance policy on life does not become an enforceable contract until revived and if death takes place before revival, no rights in favour of the person applying for revival arise. Revival is not automatic nor a right. Revival gives rise to a new contract and there is no revival after death.[16]

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5 Cheshire & Fifoot Law of Contracts, 9th Ed. p. 34.

6 *Ramdev Moolchand* v. *Lakshmi Insurance Co.* (1962) A.Punj. 125; Macgillivary on Insurance (4th Ed.) section 649. For cases of misrepresentation & fraud see *infra*.

7 *Life Insurance Corp.* v. *Tirupathayya* (1963) A.A.P. 353.

8 *Benarsi Debi* v. *New India Assurance Co.*, 1959 A.P. 540.

9 *Abdul Azeez & Co.* v. *New India Assurance Co.* (1954) A.M. 520; (1953) 2 M.L.J. 714; *Ocean Accident & Guarantee Corp. Co.* v. *Patkar*, 1935 A.B. 236 folld.; *South British Insurance Co.* v. *Stenson*, 52 Bom. 532; (1928) A.B. 260 dist. See also *Equitable Fire & Accident Office* v. *Ching Wo Hong*, 1907 A.C. 96.

10 *Canning* v. *Farquhar* (1886) 16 Q.B.D. 727; see especially per Lindley L.J. at p.733.

11 *Harichand Mancharam* v. *Govind Luxman Gokhale* (1922) 50 I.A. 25; 47 Bom. 335; 71 I.C. 763; *Currimbhoy & Co.* v. *Creet* (1933) 60 I.A. 297; 60 Cal. 980; 141 I.C. 209; 1933 A.P.C. 29; *Subimalchandra* v. *Radhanath* (1933) 60 Cal. 1372; 149 I.C. 1000; 1934 A.Cal. 235; *Gujjar Mal* v. *Governor-General of India*, 1942 A.Pesh. 33; *Shankarlal Narayandas* v. *The New Mofussil Co. Ltd.* (1946) 73 I.A. 98, 48 Bom.L.R. 456, 224 I.C. 598, 1946 A.P.C. 97, reversing (1941) Bom. 361; *Sitlani* v. *Viroosing* (1947) 225 I.C. 264, 1947 A.S. 6; *Amritlal* v. *Harkisandas* (1945) 47 Bom.L.R. 878, 1946 A.B. 149. See *Deep Chandra* v. *Sajjad Ali Khan*, 1951 A.A. 93 (F.B.): *Rahiman* v. *Sadashiv Tripathy* (1968) A.Or. 84.

12 Jessel M.R. in *Winn* v. *Bull*, note 24 above; *Akoojee Jadwet & Co.* v. *A.V. & Son*, 1939 A.R. 423, 185 I.C. 705; *Shamjibhai* v. *Jagoo Hemchand*, 1952 A.N. 220.

13 *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311; *Aryodaya S. & W. Co.* v. *Javalprasad* (1903) 5 Bom.L.R. 909.

14 *Perry* v. *Suffields Ltd.* (1916) 2 Ch. 187, C.A.; *Elliott* v. *Pearson* (1948) Ch. 452; *Jainarain* v. *Surajmull* (1949) F.C.R. 379, 51 Bom.L.R. 979, (1949) A.F.C. 211; *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254, 260; *Namayya* v. *Union of India* (1958) A.AP. 533.

15 *Namayya* v. *Union of India*, 1958 A.AP. 533; *Jainarain* v. *Surajmal*, 1949 A.F.C. 211, 216 reld. upon.

16 *Ahmedunnissa Begum* v. *Life Insurance Corp.* (1981) A.AP. 50, 54. *McCanna* v. *City Life Assurance*

Material fact in Insurance.—Any fact the knowledge or ignorance of which would materially influence an insurer in making the contract or in estimating the degree and character of risks in fixing the rate of premium is a material fact, but the withdrawal of a proposal of insurance with another insurer is not such a material fact.[8]

In a contract of insurance utmost good faith is essential, i.e., the insured is expected to answer various questions and give true and faithful information. If the insured has knowledge of a fact which others cannot ordinarily have, then he should not indulge himself in *suppressio veri suggestio falsi* by making a suggestion which is false. A proposal of insurance for a woman could not be accepted if she had last delivered a child within six months prior to the date of proposal. The primary information of the birth was within the exclusive knowledge of the parents and when that is not correctly given there is a deliberate omission and a conscious avoidance of duty on the part of the insured.[17]

Temporary covering note in Insurance.—A temporary covering note after the expiration of a policy is an offer to insure for the future, which is capable of acceptance by conduct and without communication with the insurance company; and the contract so created would contain an implied promise by the insured to pay either in the renewal premium or for the period for which the temporary cover note had been accepted, and without a valid acceptance there is no insurance.[18]

Subsequent demands.—A concluded contract for the sale of a tank of oil is not affected by a subsequent demand of *Dharmada* or a further term about time of dispatch of the wagon sought to be imposed by the buyers.[19]

Absolute acceptance.—Section 7 of the Contract Act requires that the acceptance of the offer must be absolute and unqualified. It cannot be conditional.[20] When there is a variation between the offer and acceptance even in respect of a material term, acceptance cannot be said to be absolute and it does not result in the formation of a legal contract.[21] A contract unlike a tort is not unilateral. If there be no meeting of minds, no contract may result. There should therefore be an offer by one party express or implied an acceptance of that offer by the other in the same sense in which it was made by the other. There must be intent to accept and some external manifestation of that intent by speech, writing or other act. Acceptance must be communicated to the offeror unless he has waived such intimation or the course of negotiations implies an agreement to the contrary.[22] A letter by a vendor "for a quick sale, I would accept £26,000" and a reply by buyer "I accept your offer" constitute a specifically enforceable contract. (*Bigg* v. *Boyd Gibbins Ltd.*, (1971) 2 All E.R.183). In the case of a contract, an offer must be certain and such that, in law, is capable of being accepted. If its terms are unsettled or indefinite, it cannot create a contractual relationship. Parties must make their own contracts, the court will not make a contract for them.[23] In a tender form containing the conditions of a contract governing the Department of Supply Contracts, two of the relevant conditions were:

Co. (1919) 2 K.B. 491 reld on *P. Sankunni Menon* v. *Empire of India Life Assurance Co. Ltd.* (1932) A.M. 241 folld.

17 *V. Srinivasa Pillai* v. *Agent of Life Insurance Corporation of India, Madras* (1977) A.M. 381; *Mithoo Lal* v. *L.I.C. of India* (1962) A.SC. 814; *Balkrishna* v. *New India Assurance Co.* (1959) A.P. 102; *A.I.G. Insurance Co.* v. *S.P. Maheshwari* (1960) A.M. 484 and *L.I.C. of India* v. *Parvathavardhini Ammal* (1965) A.M. 357 followed.

18 *Taylor* v. *Allon* (1965) 2 W.L.R. 598.

19 *Lakshmi Ginning & Oil Mills* v. *Amrit Banaspati* (1962) A.Punj. 56.

20 *Jawahar Lal Burman* v. *Union of India* (1962) 3 S.C.R. 769, 785; (1962) A.SC. 278; *Trollope and Colls Ltd.* v. *Atomic Power Construction Ltd.* (1963) 1 W.L.R. 333; (1962) 3 All E.R. 1035 (corresponding English Law); *Union of India* v. *Babulal Uttam Chand* (1968) A.B. 294; *Big* v. *Boyd Gibbins Ltd.* (1971) 2 All E.R. 183 (What offer and acceptance constitute contract); *Brown* v. *Gould,* (1971) All E.R. 1505 (option to renew lease in future having regard to the then market value) and *Union of India* v. *Uttam Singh Duggal* (1972) A.D. 110.

21 *Union of India* v. *Uttam Singh Duggal & Co.* (1972) A.D. 110, 115, 116.

22 *Bhagwandas* v. *Girdharilal & Co.,* 1966 A.SC. 543; *Haridwar Singh* v. *Begum Sumbrui* (1972) A.S.C 1242-1245 (No concluded contract where the acceptance is not conveyed to offeror).

23 *Coffee Board, Bangalore* v. *Haji Ibrahim* (1966) A.My. 118; *Scammell and Nephew* v. *Ouston* (1941) A.C. 251, 255, 269; (1941) 1 All E.R. 14; *May & Butcher* v. *The King* (1934) 2 K.B. 17n.

(a) that on acceptance of the tender the contractor shall at the option of the Secretary, Department of Supply, and within the period specified by him, deposit with him the security deposit therein-specified; and

(b) if the contractor is called upon to deposit security and the contractor fails to provide the security within the period, such failure will constitute a breach of the contract or/and the Secretary shall be entitled to make other arrangements at the risk and acceptance of the contractor.

The Secretary, Supply Department, entering into contract on the above terms, informed the contractor that his tender had been accepted "subject to your depositing 10% as security".... "The contract is concluded by this acceptance and formal acceptance of tender will follow immediately on receipt of Treasury Receipt"

The definition of the word "Contract" lays down that only those general and special conditions thay may be added to the contract shall apply to the contract between the parties. No special conditions were added to or incorporated in the contract between the parties, but by express words general conditions were added to and incorporated in the letter of acceptance of tender. The acceptance of the tender having been made only on terms and conditions contained in the letter of acceptance the said letter was a counter offer and the respondent having acted upon the letter of acceptance on the terms and conditions contained therein accepted the said counter offer. Even if the tender was submitted subject to the special conditions the said special conditions did not become part of the contract between the parties.[24]

The conditions of the contract read with the letter of acceptance were construed by the Supreme Court in *Jawahar Lal Burman* v. *Union of India*[25] that according to the tender, security deposit was a condition subsequent and the letter of acceptance did not make it a condition precedent. The agreement of parties as to the terms of a contract can be proved not only by their words but also by their conduct in accordance with the maxim *non refert an quis assensum suum praefert verbis, aut rebus ipsis et factis.*[26]

In a contract for supply of "screened *zira*" F.O.R. Jamalpur Railway Station. it was provided that the Railway Administration would not be liable for "anything that may happen to the suppliers' commodities until the same passed into the physical possession of the buyer (and not as a carrier) at a place of delivery noted in the Purchase Order." This condition was held to be a clear indication of keeping the liability of the Railway carrier and purchaser separate and distinct.

In such a case, in the absence of a contract, express or implied, the supply of wagons by the Railway Administration would not be a condition precedent to the supply of the commodities within the time specified by the contract.[27] A tender issued by Government for sale of 244 tons of iron scrap approximately was filled by a purchaser and accepted by Government. This was held to be a valid unconditional contract, implying that purchaser will pay more if the weight exceeded the quality tendered for and get a refund if the quality is less.[28]

In India it has been laid down, in accordance with English law as well as with the terms of the Act, that an acceptance with a variation is not acceptance; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made.[29] Thus where an offer was made for the purchase of certain goods which were to be ordered out from Europe, an acceptance "free Bombay Harbour and interest," being a term not contained in the offer, was held to be no acceptance within the meaning of this section. Where a buyer signed a bought note after inserting therein in Chinese certain terms which were not in the sold note previously signed by the seller, it was held that there was no contract unless the seller accepted the additional terms in Chinese.[30] In such a case the acceptance with a qualification is in its nature a counter-proposal which, if accepted by the proposer, would constitute an

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24 *Heavy Engineering Corporation Ltd.* v. *Crompton Greaves Ltd.* (1972) A.Cal. 217, 220.
25 (1962) 3 S.C.R. 769.
26 *Laxmi Ginning & Oil Mills* v. *Amrit Banaspati,* 1962 A.Punj. 56, 61.
27 *Union of India* v. *Vasudeva Aggarwal,* 1960 A.P. 87, 96.
28 *Debi Prasad* v. *Union of India* (1969) A.B. 163.
29 *Kundan Lal* v. *Secretary of State* (1939) 14 Luck. 710; 183 I.C. 597; 1939 A.O. 249; *Haji Mahomed* v. *Spinner* (1900) 24 Bom. 510, 523. In the latter case the plaintiffs maintained that the additional term was already implied in the offer by a previous course of dealing or otherwise. The defendant maintained that there was a contract without that term. The Court held that there was no contract at all.
30 *Ah Shain Shoke* v. *Moothia Chetty* (1899) 4 C.W.N. 453.

agreement.[31] A contract relating to grant of license of sale of liquor is not complete till the bid is confirmed. Therefore, where the highest bidder did not deposit 1/6th of the purchase price during seven days whereupon resale was ordered without the bid having been confirmed by the Chief Commissioner, the essential pre-requisite of a completed sale was missing and no liability could be imposed on the auction-purchaser for the shortfall on the resale.[32]

According to the rules of a sale of forest products a man making a tender for the purchase of those products had also to make a deposit of 25% of the tendered price. The respondent firm's tender was the highest and the tender was accepted by forest authorities on behalf of the Chief Conservator of Forests. But the firm failed to make a deposit of 25% of the tendered price which was a condition precedent for the acceptance of the tender which even the Chief Conservator of Forests could not waive and hence the purported acceptance was not valid and there was no concluded contract.[33]

Offer, acceptance, counter offer—effect of.—In English law to make a contract, there must be an offer and unreserved acceptance of the offer. If the offer is rejected there may be a counter offer but that kills the original offer. The offeree cannot revert to the original offer and purport to accept it.[34] Similarly if the offer is accepted but another term, e.g. of price is introduced, the original offer is destroyed and cannot be accepted unless renewed.[35] When a party makes a composite offer each part being dependent upon the other, another party cannot by accepting a part of the offer compel the other to confine its dispute to the accepted part.[36]

The circumstance that the parties do intend a subsequent agreement to be made is evidence to show that they did not intend the previous negotiations to amount to an agreement, though not conclusive; they will be bound by a previous agreement "if it is clear that such an agreement has been made".[37] The terms of a contract have retrospective application if the parties during negotiations act on that understanding and in the anticipation that on the contract being made it would govern what was being done.[38] Where, however, the formalities are not of the parties' selection, so that nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of these formalities. Thus, while a suit was pending the parties entered into a written agreement whereby the plaintiff agreed to accept the property of the defendant in adjustment of the suit. The agreement was not recorded as required under s. 98 of the Code of Civil Procedure then in force, being Act VIII of 1859 (now Code of Civil Procedure, 1908, O. 21, r. 2). It was not, therefore, such a final adjustment of the suit as precluded the case from being proceeded with. The plaintiff, taking advantage of that fact, proceeded with the suit, and obtained a decree against the defendant. The defendant subsequently brought a suit against the plaintiff for damages for breach of the agreement; and it was held that he was entitled to damages, there having been a binding agreement between the parties, though the formality of recording the agreement was not completed.[39] Such cases, however, must be distinguished from those where the negotiations have not led to a concluded agreement. Thus in *Koylash Chunder* v. *Tariney Churn*[40] the defendant wrote to the plaintiff: "The value of your house has been fixed through the broker at Rs. 13,125. Agreeing to that value, I write this letter. Please come over to the of-

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31 *Bhagwandas* v. *Shiv Dial* (1913) Punj. Rec. No. 92, where the counter-proposal was accepted; *Muralidhar* v. *Paresh*, 1947 A.Cal. 14, 228 I.C. 260.
32 *Union of India* v. *Bhimsen Walaiti Ram*, (1971) A.SC. 2295 (1964) 1 Punj. 548 affirmed.
33 *State of Madhya Pradesh* v. *Gordhandas Kailash Nath* (1973) A.SC. 1164, 1166.
34 *Trollope & Colls Ltd.* v. *Atomic Power Constructions Ltd.* (1963) 1 W.L.R. 333, 339; (1962) 3All E.R. 1035 (Megaw J.).
35 *Moolji Jaitha & Co.* v. *Setho Kishorilal* (1961) A.Ker. 21.
36 *General Assurance Society* v. *L.I.C.* (1964) A.SC. 892; (1964) 5 S.C.R. 125.
37 *Ridgway* v. *Wharton* (1856-57) 6 H.L.C. 238, at p. 264.
38 *Trollope & Colls Ltd.* v. *Atomic Power Constructions Ltd.* (1963) 1 W.L.R. 333; (1962) 3 All E.R. 1035.
39 *Thota Venkatachellasami* v. *Krishnaswamy* (1874) 8 M.H.C. 1. See Mulla's Code of Civil Procedure, 13th ed., pp. 957, *sqq*.
40 (1884) 10 Cal. 588; *Baijnath* v. *Kshetrahari Sarkar*, 1955 A.Cal. 210.

fice of my attorney between three and four this day,with the title deeds of the house and receive the earnest." In reply, the plaintiff wrote: "You having agreed to purchase our house for Rs. 13,125, have sent a letter through the broker, and we are agreeable to it, and we will be present between three and four this day at your attorney's, and receive the earnest." The plaintiff and the defendant met at the attorney's office, but the attorney was absent, and accordingly no inspection of title deeds or payment of the earnest money took place. The plaintiff sued the defendant for specific performance, but it was held that there was no binding contract, as two important matters—namely, inspection of the deeds[41] and the amount and payment of the earnest money—were left to be arranged at the attorney's office. Garth C.J. said: "As regards the earnest money, it must be observed that both parties treat that as an element in the bargain.... Suppose the meeting had taken place, and the parties had been unable to agree as to the amount of the earnest money, how could it possibily have been said that they have arrived at any binding agreement?"[42] A provision in an agreement for the sale of a house that "on approval of the title by the purchaser's solicitor the purchase money should be paid" has not the effect of rendering the completeness of the agreement conditional upon the approval of the title by the solicitor, but of simply fixing the time for the payment of the purchase money without waiting for a conveyance.[43]

Counter offer.—The seller offered to sell certain goods on certain terms of payment which shall prevail over buyers conditions in his order. The buyer placed an order with conditions and terms materially different from seller's terms. When the seller came to supply the goods he demanded a higher price which the buyer refused to pay. The sellers brought an action. The Court of Appeal held the buyer's offer to be a counter offer which destroyed the offer of the sellers and the seller by accepting the order was not entitled to bring his action for increased price (Case on construction of documents).[44]

Introducing new terms.—By introducing new terms in a letter of acceptance of an offer, a party makes a counter offer and the offer is not thereby accepted.[45]

Formation of a contract.—A rule of a society provided that "the secretary shall be responsible for the executive administration of the society subject to the control of the President". Any communication on behalf of the society has to be by the secretary as such and any communication by the President in a casual way will not be binding on the society nor would any such communication conclude a contract between the society and another person.[46]

McGregor's Case.—A stranger was a lodger with a family but was treated as a member of the family. The family and the stranger had devised separate answers for a fashion competition sharing the expenses and agreed to share the winnings and one of them won the prize. It was held that the stranger was entitled to share the prize as there was mutuality in the arrangement and that it could not be said that it did not give rise to a legal right because it was similar to a family matter.[47]

Contract—what is within s.7 (d) of People's Representation Act.—In his mining lease, the lessee undertook to sell to the Government out of the ore brought to the surface such quantities as are required by the Government after the Government had notified to the lessee. This was held to be an offer by the lessee and till it was accepted by the Government by exer-

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41 It looks as if there had been some misapprehension here. In English practice, at any rate, a contract for purchase of land is not suspended until the title has been shown; there is a complete contract as soon as all the terms—including special conditions, if any, as to title—have been agreed upon, subject to the purchaser's right to rescind, or to compensation if a title is not shown according to the contract, and often, by agreement, to the vendor's right to rescind if he cannot remove any objection.

42 It looks very much as if some well-known customary proportion of earnest money was really intended by the parties, but apparently there was no proof of this.

43 *Cohen* v. *Sutherland* (1890) 17 Cal. 919.

44 *Butler Machine Tools Co. Ltd.* v. *Ex Cell O' Corporation* (1979) 1 All E.R. 965; *Hyde* v. *Wrench* (1840) 3 Beav. 334 appld.; *High Trees Case* (1956) 1 All E.R. 256 appld. in *Brikom Investments Ltd.* v. *Carr* (1979) 2 All E.R. 753, 756.

45 *Northland Airlines Ltd.* v. *Dennis Feranti Meters Ltd.* (1970) 114 S.J. 845.

46 *Subramania* v. *Ammapet Co-operative Weavers Society,* 1961 A.AP. 289; *Powell* v. *Lee,* 99 L.T. 284; 24 T.L.R. 606.

47 *Simpkins* v. *Pays* (1955) 1 W.L.R. 975.

cise of its option as a preferential purchaser, it would not amount to a subsisting contract within s. 7(d) of the People's Representation Act.[48]

Formation of contracts.—In commercial transactions, the mere acts of indulgence are not apt to create rights. (Per Viscount Simonds in *Tool Metal Mfg. Co.* v. *Tungsten Electric Co.*[49] disapproving of the principle in *Combe* v. *Combe.*[50] A sugar mill supplying sugar to a State under the orders of the Sugar Controller cannot be said to have entered into a transaction of sale and is not a contract within the provisions of s. 2 of the Contract Act.[51] A letter attached to a tender of a contractor that the tender was subject to adequate supply of labour being available as and when required was held not to have been incorporated in the contract in *Davis Contractors Ltd.* v. *Farenham Urban Distt. Council,*[52] as it was not listed in a clause of the formal contract although the tender was.

A hire-purchase agreement form was signed by a hirer and left with a dealer, who was not an agent of the finance company, to fill in and the dealer whether by mistake or fraud filled in sums different from those agreed between the parties,

the hirer was held not to be estopped from denying the truth of the written document and it was held that there was no and never had been any agreement between the hirer and the finance company on which the latter could sue for instalments which were outstanding nor could the hirer recover the amounts paid as deposits to the dealer since it was not referable to any contract with the owner.[53] An arrangement whereby the owner of a vehicle agrees to carry a co-worker to the place of their work and back for a weekly sum paid does not show that either party intended to enter into a legal contract.[54]

The parties were two companies engaged in hiring out heavy cement moving machinery and had equal bargaining power. The defendants urgently needed a dragnet crane which the plaintiffs agreed to supply. The agreement was made on telephone and only hiring and transport charges were agreed upon and nothing was said about other conditions of hire. The plaintiffs sent a printed form to the defendants containing the conditions of hire for signature; but before it could be signed the crane sank into the marshy land. The plaintiffs conditions provided indemnifying for all expenses of use. Their conditions were common to all firms doing similar business even the defendants. The plaintiffs claimed charges for recovery and the defendants pleaded that they were not liable since the conditions were not incorporated in the oral agreement. It was held that the terms in the printed form were incorporated in the contract since the defendants know the conditions were the same as their own.[55]

Essentials of a lease.—In order that there be a valid agreement for a lease, the essentials are: the parties to be determined, the property to be determined, the length of the term and the rent; and also the date of its commencement.[56] The parties must themselves define the subject-matter of their bargain and a term of years can only be defined by indicating the commencement and the termination. Where an agreement for a lease starts at some future time and that time is not specified or agreed, there is no concluded contract.[57]

Ex Gratia.—*"Ex gratia"* is synonymous with "without admission of liability".[58] The use of the words *"ex gratia"* signifies that a pre-existing liability is not admitted but it does not preclude the legal enforceability of the settlement itself.[59]

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48 *Dantu Bhaskarrao* v. *C.V.K. Rao* (1964) A.AP. 77; *Satyanathan* v. *Subramanyan* (1955) 2 S.C.R. 83; 1955 A.SC. 459 (dist).
49 (1955) 2 All E.R. 657, 660.
50 (1951) 1 All E.R. 767; (1951) 2 K.B. 215.
51 *New India Sugar Mills* v. *Commissioner of Sales Tax* (1963) 2 S.C.R. 459, 499; 1963 A.SC. 1207 distinguished in *Andhra Sugars Ltd.* v. *State of Andhra* (1968) A.SC. 599.
52 *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council* (1956) 3 W.L.R. 37, 60; (1956) A.C. 696; (1956) 2 All E.R. 145.
53 *Campbell Discount Co.* v. *Gall* (1961) 2 W.L.R. 514, 522 (C.A.); (1961) 1 Q.B. 431; (1961) 2 All E.R. 104.
54 *Coward* v. *Motor Insurers Bureau* (1962) 2 W.L.R. 663, 672.
55 *British Crane Hire Corp. Ltd.* v. *Ipswich Plant Hire Ltd.* (1974) 1 All E.R., 1059 (C.A.); *McCutcheon* v. *David MacBrayne Ltd.* (1964) 1 All E.R. 430, 433 applied.
56 *Harvey* v. *Pratt* (1965) 1 W.L.R. 1025, 1027 (C.A.); *Marshall* v. *Berridge* (1881) 19 Ch.D. 223, 245 (C.A.). There must be a certain beginning and a certain ending, otherwise it is not a perfect lease.
57 *Harvey* v. *Pratt* (1965) 1 W.L.R. 1025, 1027.
58 *Edwards* v. *Skyways Ltd.* (1964) 1 W.L.R. 349, 356.
59 *Ibid.*

questing "parties negotiating bills under it to endorse particulars," has been held to amount to a general invitation or request to advance money on the faith of such bills being accepted, and to constitute a contract with any one so advancing money while the credit remained open.[70] This is undoubted law, but the same cannot be said of the judgments which have held (in the circumstances, not quite decisively) that when a sale by auction is advertised as without reserve the auctioneer makes a general offer to bidders, which becomes a binding promise to the highest *bona fide* bidder, and gives him a right of action "as upon a contract that the sale shall be without reserve",[71] and that a railway company's timetable is a general proposal to run trains according to the table, which is accepted by an intending passenger tendering the price of a ticket.[72] These last-mentioned cases, at any rate, mark the extreme limit of effective proposals of a contract as distinguished from the invitation of proposals by a general statement of the terms on which one is minded to do business. It has been held, on the other hand, that when particular goods are advertised for sale by auction the auctioneer does not contract with any one who attends the sale, intending to purchase those goods, that they shall be actually put up for sale;[73] and that an advertisement for tenders for goods to be sold is not a proposal capable of being a contract to sell to the highest bidder, but "a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt".[74] An advertisement for tenders is only an invitation for offers which the offeree may or may not accept. He is not bound to accept the highest or the lowest tender[75] as the case may be. Similarly an advertisement for the award of a scholarship after holding an examination is no promise to give it to the best student.[76] In some cases the difficulty of ascertaining the acceptor, if the announcement is treated as a proposal, is enough to dispose of the question. A second-hand bookseller's catalogue is not a series of offers, but only invitation of offers; for if the catalogue had the effect of proposing a sale of every book to the first person who paid or undertook to pay the marked price, the bookseller would be bound to decide at his peril, as between practically simultaneous applicants, whose acceptance was first in order of time, and this might involve obscure matters of both fact and law.[77] Clearly the bookseller does not mean to tie his hands in this way, nor can any reasonable customer suppose that he does. In fact, interpretation must be largely guided, in this class of transactions, by business usage and common sense. So where brokers in Bombay wrote to merchants in Ghaziabad stating their terms of business and the merchants afterwards placed orders with the brokers which were executed by them, it was held that the first letter was only an invitation to do business; no contract was made until the orders given by the brokers were accepted by the merchants and hence the cause of action arose wholly in Bombay.[78] A bank's letter with quotations as to particulars of interest on deposits in answer to an enquiry is not an offer but only a quotation of business terms.[79] Where the owner of a property says that he will not accept less than Rs. 6,000, he does not make an offer, but merely invites offers.[80]

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70 *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867) L.R. 2 Ch. 391; Finch, Sel. Ca. 40.

71 *Warlow* v. *Harrison* (1859) 1 E. & E. 309, Ex.Ch. Two members of the Court preferred to say that the auctioneer was liable as on a warranty that he had authority to sell without reserve. Probably courts of first instance in England are bound to follow this case: see *Johnston* v. *Boyes* (1899) 2 Ch. 73, 77. Professor Gower supports the case on the basis that an act done at the request of another, express or implied, is sufficient consideration to support a promise: 68 L.Q.R. 457. (See s. 2(d) of the Act.) This is unilateral consideration and the tendency to imply a request in such cases as *Crears* v. *Hunter* has been noted (*supra*). *Contra* Slade in 68 L.Q.R. 238, 69 L.Q.R. 21. The case was approved *obiter* by Innes C.J. in the South African Court of Appeal in *Neugebauer* v. *Hermann* (1923) A.D. 564, 571.

72 *Denton* v. *G.N.R. Co.* (1856) 5 E. & B. 860. It was also held that an action for deceit would lie on the facts. This opinion is not easy to reconcile with later authorities. See Pollock on Torts, 15th ed., pp. 221-2.

73 *Harris* v. *Nickerson* (1873) L.R. 8 Q.B. 286.

74 *Spencer* v. *Harding* (1870) L.R. 5 C.P. 561.

75 *Spencer* v. *Harding* (1870) 5 G.P. 561.

76 *Rooke* v. *Dawson* (1895) 1 Ch. 480.

77 In *Grainger* v. *Gough* (1896) A.C. 325, the House of Lords held that a wine merchant's catalogue was not an offer, for the reason stated in the text.

78 *Devidatt* v. *Shiram* (1932) 56 Bom. 324; 34 Bom. L.R. 236; 137 I.C. 381; 1932 A.B. 291.

79 *State Aided Bank of Travancore Ltd.* v. *Dhirt Ram*, 1942 A.P.C. 6; 198 I.C. 753.

80 *MacPherson* v. *Appanna*, 1951 A.S.C. 184, relying on the Privy Council in *Harvey* v. *Facey* (1893) A.C. 552.

Invitation for offer.—One 'G' wrote to a broker 'B' saying that he will sell his house at not less than a certain price and also that he will give commission at a certain rate if he (the broker) can arrange a sale and also that "offer" shall be valid for 3 weeks. One 'S' wrote through his Solicitors that he was willing to purchase the property at the price mentioned and asked for particulars. 'G' did not agree and 'S' brought a suit and asked for an injunction. It was held that the letter of 'G' was not an offer to the public at large, but only an invitation to treat. The word 'offer' in the letter to the broker related to him alone.[81] Where the acceptance of a proposal consists of the performance of the condition of the proposal, the contract is made at the place where the condition is performed.[82] A representation by a municipal committee that something will be done in future may result in a contract if another person acts upon it. *Century Spg. & Mfg. Co.* v. *Ulhasnagar Municipal Committee,* (1971) A.SC. 1021.

Where the chemist-operated a self serving super market displayed drugs which fall within the Prohibition of Drugs Statute, the Court of Appeal held that the display was only an invitation. The customer by presenting the goods at the cash desk only offered to buy which the cashier could accept or reject.[83]

The auctioneer in an auction to sell a motor car in an unroadworthy condition against a British Statute was held not guilty as an auctioneer on the rostrum does not make an offer to sell but only makes an invitation to treat. An offer by a bidder is only accepted by the auctioneer signified by a nod of the head.[84]

An advertisement for an auction is merely a statement of intention to hold the auction not an offer to hold it. Therefore any goods advertised to be sold at the auction can be withdrawn without notice and no action will lie for loss of time and expenses by a man who goes to the auction hoping to buy a particular article if it is withdrawn.[85]

According to English law, the proposal may emanate from a third person, who suggests to the prospective parties the terms of an agreement. In such a case, a contract is formed as soon as both parties have acted on the agreement, even though there has until that moment been no direct communication between them: *Clarke* v. *Dunraven.*[86] There a yacht club committee invited non-members to enter for a race on the terms, *inter alia,* that a yacht that fouled another should pay damages. *A* and *B* both entered yachts, but as they were jockeying for position preparatory to crossing the starting line,[87] *A*'s yacht fouled *B*'s and *A* was held liable in damages to *B.*[88]

Acting on offer—when sufficient acceptance.—The nature of the acceptance required in these cases was considered by the English Court of Appeal in *Carlill* v. *Carbolic Smoke Ball Co.*[89] The defendant company, being the proprietor of the "carbolic smoke ball," a device for treating the nostrils and air passages with a kind of carbolic acid snuff, issued an advertisement offering £100 reward to any person who should contract influenza (or similar ailments as mentioned) after having used the ball as directed. It was also stated that £1,000 was deposited with a named bank, "showing our sincerity in the matter." The plaintiff bought one of the

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81 *Sanwarmal Goenka* v. *Soumyendra Chandra Gooptu* (1981) A.Cal. 37, 41; *Harvey* v. *Facey* (1893) A.C. 552 referred to in *D.L. MacPherson* v. *M.N. Appanna* (1951) A.SC. 184 disting *Abdulla Ahmad* v. *Animendra Narayan Sinha* (1950) S.C.R. 30, (1950) A.SC. 15 refd. to.

82 *Sitaram Marwari* v. *Thompson* (1905) 32 Cal. 884; *Heavy Engineering Corporation* v. *Crompton Greaves Ltd.,* (1972) A.Cal. 217 (Tender containing special and general conditions. The latter were accepted).

83 *Pharmaceutical Society* v. *Boots Cash Chemists Ltd.* (1953) 1 Q.B. 401, (1953) 1 All E.R. 482; *Fisher* v. *Bell* (1961) 1 Q.B. 394; (1960) 3 All E.R. 751 (display of flick knife with price ticket).

84 *British Car Auctions* v. *Wright* (1972) 1 W.L.R. 1519; *Fisher* v. *Bell* (1861) 1 Q.B. 394 folld.

85 *Harris* v. *Nickerson* (1873) 8 Q.B. 286.

86 (1897) A.C. 59, H.L. Distinguished in *Dharam Das* v. *Manik Lal,* 1955 A.V.P. 33; *Shanklin Pier Ltd.* v. *Metal Products Ltd.* (1951) 2 All E.R. 471. (The parties to a collateral contract need not be same as those to the "main" contract).

87 A warning gun had already been fired to indicate that five minutes later the starting gun would sound: in the meantime no competitor could cross the starting line.

88 The judgments are not clear whether the contract between A and B was complete as soon as both had sent in the prescribed entry to the club secretary, or only when they actually sailed against one another.

89 (1893) 1 Q.B. 256; (1891-4) All E.R. Rep. 127.

smoke balls by retail, did use it as directed, and caught influenza while she was still using it. Hawkins J.[90] held in a considered judgment that she was entitled to recover £100 as on a contract by the company. The Court of Appeal held that the defendant company could not be heard to say the offer was not meant seriously; that the terms, though rather vague, were capable of a certain meaning, and at least included the event, which had happened, of the plaintiff taking influenza while still using the remedy; and that, if the offer was unguarded and improvident, that was the defendant's own folly and no answer to the plaintiff's claim. There was an offer to any one who performed the condition (namely, of using the smoke ball as directed) on the faith of the advertisement; and by such performance it became a contract, not absolute, but subject to the further independent condition of the user contracting influenza or the like while using the remedy, and perhaps during some reasonable time afterwards. (As to conditional, or, as the Act calls them, contingent contracts in general, see Chap. III. below, ss. 31 *seq.)* As to the objection that to complete the plaintiff's acceptance of the offer there must either be communication to the defendant or some act of a public nature, Bowen L.J. said[91]: "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. ...But there is this clear gloss to be made upon that doctrine, that, as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose that there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." Carlill's case shows that the principle is that an offer, to be capable of acceptance, must involve promise by the offeror that he will bind himself if the exact terms specified by him are accepted.

An offer may be made either to a particular person or to the public at large.

If an offer takes the form of a promise in return for an act, the performance of that act is in itself an adequate indication of assent.[92] *Cp.* s. 7(2), above. This principle was followed in *Hindusthan Co-operative Insurance Society* v. *Shyam Sunder.*[93] There *A* signed a proposal form of insurance on his life and handed it to *N*, an organiser of the defendant insurance company, with a cheque for the premium. *N* had no authority to receive the cheque as premium, but after *A* had been twice medically examined the company cashed the cheque. Two weeks later the company wrote to *N*, asking him to make further enquiries regarding *A*'s proposal, but the next day *A* died of pneumonia. The company denied liability, but the Court held that the contract was complete from the moment the cheque was cashed, as *A* had dispensed with express communication of acceptance.

In an Australian Case it was held that to establish a contract it should be made to appear that an announcement or a statement relied on as a promise was offered as a consideration for the doing of the act and that act was done in consideration of a potential promise inherent in the statement or announcement and there must exist between the two a relation of *quid pro quo.*[94] In *Australian Woollen Mills case*

an announcement was made by the Australian Commonwealth Government that it would pay subsidy to manufacturers of wool purchased and used for local manufacture after 30th June 1946. The plaintiff purchased large quantities of wool for local manufacture and received large sums by way of subsidy.

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90 The facts were not disputed. See the report in the Court below, (1892) 2 Q.B. 484.

91 (1893) 1 Q.B. 256, at p. 269. Cited with approval in *State of Bihar* v. *Bengal C. & P. Works,* 1954 A.P. 14.

92 *Carlill* v. *Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256, (1891-4) All E.R. Rep. 127 C.A. See Cheshire & Fifoot; Cases on the Law of Contracts, p.1.

93 1952 A.Cal. 691.

94 *Australian Woollen Mills Pty. Ltd.* v. *The Commonwealth* (1954) 92 C.L.R. 424; *Edwards* v. *Skyways Ltd.* (1964) 1 W.L.R. 349, 355.

But this was held not to be a contract enforceable against the Commonwealth because the offer was not intended to give rise, on the doing of the act, to an obligation.[95]

It was said without hesitation, several years earlier, by a very learned American writer, that "in a unilateral contract"—i.e., where a performance is given for a promise—"an acceptance in terms may be, and commonly is, dispensed with.[96] Earlier still the question had been judicially thrown out: "If a man writes, 'Send me such and such goods, and I will pay for them,' is not the sending of the goods without more, an acceptance of the offer?"[97] Perhaps it would now be a safe and more elegant way of stating the law to say that a proposal is in every case accepted by performance of its conditions (or perhaps, more accurately, by compliance with its terms); that communication by the acceptor to the proposer or his authorised agent is necessary when the terms consist of or include a counter-promise (for there is no promise at all without communication),[98] but that when only acts are required the communication of their performance may or may not be added as a term of the offer at the will of the proposer, which may be either express or inferred from the nature and circumstances of the proposal.[99] From this point of view, the present section of the Act would be logically prior to s. 7.

Does an act done by a person in ignorance of the proposal amount to "performance of the conditions of the proposal" within the meaning of this section.? According to the High Court of Allahabad it does not. The plaintiff in that case was in the defendant's service as a *munib*. The defendant's nephew absconded, and the plaintiff volunteered his services to search for the missing boy. In his absence the defendant issued hand-bills offering a reward of Rs. 501 to any one who might find out the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the hand-bills when he found out the boy. Held that the plaintiff was not entitled to the reward.[1] The Court declined to follow the English case of *Williams* v. *Carwardine*[2] as an authority that if *A* offers a promise for an act, and *B* does the act in ignorance of the offer, *B* is nevertheless entitled to claim performance of the promise from *A*. The Australian High Court has held that Contractual obligations do not arise if services are rendered which in fact fulfil the terms of an offer but are performed in ignorance that the offer exists. There cannot be assent without knowledge of the offer and reliance upon it.[3] There has been another somewhat peculiar case before the Privy Council.[4] The plaintiff was a grandniece of Papamma, a wealthy Hindu widow, and was brought up by her from early age. At the age of fourteen the plaintiff was married to an ex-*zamindar* who owned property of considerable value. Papamma was anxious that the plaintiff, although married, should continue to live with her, and she promised that if the plaintiff and her husband would reside with

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95 *Australian Woollen Mills Pty. Ltd.* v. *Commonwealth* (1954) 92 C.L.R. 424. J.C. Smith: 69 L.Q.R. 99; Sir A. Goodhart: 67 L.Q.R. at p. 456 and 69 L.Q.R. 106 refd. to.

96 Langdell: Summary of the Law of Contracts, s. 12.

97 Cresswell J. in *Harvey* v. *Johnston* (1848) 6 C.B. 295, at p. 304; 77 R.R. 328, at p 332. The suggestion appears to have escaped the notice of text-writers for many years.

98 Even the English doctrine (unknown in India) that a covenant by deed is binding without communication to the covenantee is no real exception. The maker of the deed is bound, not because a promise not communicated can of itself be binding, but because he has solemnly acknowledged himself to be bound.

99 Definite proposals (e.g., to guarantee a particular ascertained or ascertainable debt) must be distinguished from expression of undefined willingness which only invite a proposal: see *Ranga Ram Thakar Das* v. *Raghbir Singh,* 1928 A.L. 938; 113 I.C. 780, and commentary on s. 5 above.

1 *Lalman Shukla* v. *Gauri Dutt* (1913) 11 All.L.J. 489; *Crown* v. *Clarke* (1927) 40 C.L.R. 227.

2 (1833) 4 B. & A. 621, 5 C. & P. 574, 38 R.R. 328. This is not a decision that an act done in ignorance of an offer can conclude a contract. It is clear from the report in 5 C. & P. 574 that the plaintiff Williams knew of the reward before she gave information to the police. However in *Gibbons* v. *Proctor* (1892) 64 L.T. 594, the Court misunderstood the 1833 case, because 5 C. & P. 574, the full report, was not cited, and decided that a person can claim a reward though ignorant of it when the information was supplied, purporting to follow the 1833 case. Thus the only English decision is contrary to the Indian case, but has not been followed by the High Court of Australia: *R.* v. *Clarke* (1927) 40 C.L.R. 227, or by the Court of Appeal in South Africa: *Bloom* v. *American Swiss Watch Co.* (1915) App. D. 100. *Gibbons* v. *Proctor,* might well not be followed in England, as a decision *per incuriam*. In the United States, a conclusion similar to the Indian case had already been reached: *Fitch* v. *Snedaker* (1868) 38 N.Y. 248.

3 *Crown (R)* v. *Clarke* (1927) 40 C.L.R. 227.

4 *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao* (1916) 43 I.A. 138; 39 Mad. 509; 34 I.C. 921.

her, she would make provision for her on a fairly ample scale by the purchase of immovable property for her. The plaintiff and her husband accordingly lived with Papamma. In 1893 Papamma bought a village in her own name, but, as she stated, for the appellant. Dissatisfaction arose because it was not transferred to the plaintiff, and the husband consequently ceased to reside with Papamma. Papamma sent messages to the husband asking him to return, but he did not return, In October, 1893, Papamma wrote a letter in her own hand to the plaintiff herself stating that the village had been purchased for the appellant and would be transferred to her upon the writer's death. The plaintiff and her husband thereafter resided with Papamma until Papamma's death in 1899. After Papamma's death the plaintiff instituted a suit for a declaration that she was entitled to the village and for possession thereof. Their Lordships held that the letter of October, 1893, constituted a promise which was accepted by the plaintiff, and that there was a completed contract which entitled the plaintiff to possession of the village: "The Board is of the opinion accordingly that there has been a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words (*sic*) of Lord St. Leonards in *Maunsell* v. *Hedges*[5] might be asked here: 'Was it not a proposal, with a condition, which being accepted, was equivalent to a contract?' Their Lordships do not doubt that it was".[6]

A promised to leave a house to a relation with the arrangement that during the lifetime of the promisor the relation will come and live with him and share expenses. On the basis of the promise the relation sold his cottage and came to live with the promisor who terminated the arrangement and asked the relation to quit. This arrangement was held to be a binding contract and not merely an unenforceable family arrangement.

The promisee was held entitled to damages for the loss of the benefits of living in a big house during the lifetime of the promisor and damages for the loss of prospect of inheriting the house under the promisor's will.[7]

A husband's letter to the wife mentioning the conditions *inter alia* as to residence and alimony on which he was prepared to allow his wife to divorce him was acted upon by the wife although the acceptance was not communicated to the husband.

This was held a concluded contract supported by consideration because the wife acted upon it and invited the Divorce Court to act upon it.[8] But in *Balfour* v. *Balfour* where a husband promised to pay £30 a month to his wife but did not do so, the promise was not enforced as there was no consideration and it was merely a friendly arrangement between the husband and wife who were living together on friendly terms.[9]

A document, purporting to be an agreement, required to be signed by both plaintiff and defendant to operate as binding agreement, was signed by the defendant and the plaintiff acting upon that signature presented for signature some further documents necessary for effectuating the agreement to the defendant, which he signed. This could only have been done on the footing of the plaintiff having accepted the proposed agreement.

This was held to make the contract complete. Any repudiation afterwards was not sufficient to revoke the agreement.[10] Whether or not there is a contractual animus must depend largely on the true construction of the documents from which that animus is to be inferred.[11]

A cheque for a smaller amount in full and final payment of a bigger amount was cashed by the creditor without informing the debtor of his not agreeing to the condition; the creditor must be taken to have thereby agreed to the proposal. His subsequent demand does not make any difference to the position.[12]

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5 (1854) 4 H.L.C. 1039.
6 (1916) 43 I.A. 138, at p. 146; 39 Mad. 509, at p. 522.
7 *Parker* v. *Clark* (1960) 1 W.L.R. 286; *Todd* v. *Nicol* (1957) S.A. S.R. 72.
8 *Nalini* v. *Somasundaram*, 1964 A.M. 52.
9 (1919) 2 K.B. 571; (1918-19) All E.R. Rep. 860.
10 *Robophone Facilities Ltd.* v. *Blank* (1966) 3 A.E.R. 110, 136. Lord Denning M.R. *contra*—No agreement without signature of plaintiff and communication of acceptance.
11 *Gore* v. *Van der Lann* (1967) 1 All E.R. 360; *Wilkie* v. *London Passenger Transport Board* (1947) 1 All E.R. 258 dist.
12 *Union of India* v. *Rameshwar Lal Bhagchand* (1973) A.Gau. 111, 113, 114; *Amrit Banaspati Co. Ltd.* v. *Union of India* (1966) A.A. 104. folld.; *Kapurchand* v. *Himayatali Khan* (1963) 2 S.C.R. 168;

Agreement to pay Compound interest.—Where for several years a constituent availed of an overdraft at a bank and periodical statements of account were sent to him showing the charging of a compound interest and no objection was taken by him, he must be taken to have agreed to the rate of interest.[13]

Compound interest, charging of, when binding.—A firm had a cash credit account with a Bank and every month interest was calculated on daily balances which was added on the last day of the month to the account. This amounted to charging compound interest which was held to be contemplated by the agreement—the expression being "shall be charged to such account or accounts".[14]

Conditional offer and acceptance.—When an offer of payment is made with a condition, the payment has to be accepted with the condition or not at all.[15] A conditional offer to pay a specified sum within a specified period in full discharge of the debt is not binding if not accepted as it is not a promise within s. 2(b).[16] The acceptance of a conditional offer is an acceptance of the offer and the condition attached thereto. The acceptance of the offer of a named sum in full payment of his claim by a person operates as a discharge of the claim. The claimant cannot accept the amount and repudiate its being payment in full discharge or claim it as payment of another claim.[17] Therefore acceptance of a cheque by the Railway in full and final discharge of liability cannot be accepted and cashed without the liability standing discharged.[18]

A conditional offer by a hirer under a hire-purchase agreement will not result in a contract if the condition is not or cannot be fulfilled, e.g. inability of the finance company to fulfil the condition of the car remaining substantially in the same condition until acceptance.[19] An application for a free pass, wherein a plaintiff specifically agrees that the use of the pass should be subject to the conditions specified therein, has all the elements of a contract because by submitting the application the plaintiff was accepting the offer of a free pass subject to conditions specified. Each party gave good consideration by accepting a deteriment in return for the advantages gained.[20] An acceptance of a proposal by a company subject to ratification by its Managing Director who was away at the time, becomes a concluded contract on the company writing that the Managing Director would be arriving to sign the agreement, the requirement of a formal document was held not to apply.[21]

In Goshto *Bihari* v. *Surs Estates Ltd.*,[22]

P, a proprietor, authorised a broker to sell his premises for a specified sum. The broker approached a well-known firm of solicitors who on behalf of their client offered to buy the premises free from incumbrances and the title being "found good and marketable" provided the client was satisfied with the area of the land and rent of the premises. *P*'s solicitors in reply supplied the required information thus complying with the other party's request as to area and rent and also asked for a draft agreement by a specified date and time otherwise "negotiations... will be treated at an end". When the draft was sent, *P* refused to sell.

After quoting the following passage from Fry on Specific Performance[23]—

(1963) A.SC. 250 refd.; *Dip Chand* v. *Abhechand* (1962) A.Cal. 166; *Shyamnagar Tin Factory (Pvt.) Ltd.* v. *Snow White Food Products Co.* (1965) A.Cal. 541 disting.

13 *K.V. Satyanarayana* v. *State Bank of India* (1975) A.AP. 113, 119; *Balakrishna* v. *Bhawanipur Banking Corp.* (1932) A.Cal. 521; 59 Cal. 662; *Haridas* v. *Mercantile Bank, India,* 47 I.A. 17; (1920) A.PC. 61; Hulas Kunwar v. *Allahabad Bank* (1958) A.Cal. 644 reld. on.

14 *Ibid. K.V. Satyanarayana* v. *State Bank of India* (1975) A.A. 113, 117.

15 *Union of India* v. *Gangadhar Mimraj* (1962) A.P. 372; *Amrit Banaspati* v. *Union of India* (1966) A.A. 104.

16 *Papraich Sugar Mills Ltd.* v. *Papraich Sugar Mills Mazdoor Union* (1957) S.C.R. 872; (1957) A.S.C. 95; *Shyam Sundar* v. *Parlakimedi Municipality* (1964) A.Or. 111.

17 *State of Bihar* v. *Charanjit Lal,* 1960 A.P. 139; *Faithful Croft* v. *Benjamin Lumley,* 10 E.R. 1459, 1468; *Sheikh Mohammad Jan* v. *Munshi Ganga Bishan,* 38 I.A. 80; *Ishaq Abdul Karim* v. *Madanlal* (1965) A.A. 34. See also *infra* s. 63.

18 *Amrit Banaspati* v. *Union of India,* 1966 A.A. 104. See also cases under s. 63.

19 *Financings Ltd* v. *Stimson* (1962) 1 W.L.R. 1184; (1962) 3 All E.R. 386.

20 *Gore* v. *Van der Lann* (1967) 1 All E.R. 360, 366; *Wilkie* v. *London Passenger Board* (1947) 1 All E.R. 258 dist.

21 *Municipal Committee Harda* v. *Harda Electric Supply Co.,* 1964 A.MP. 101.

22 (1960) A.Cal. 752.

23 Fry on Specific Performance, p. 162 (6th Ed.).

"The contracting parties may be indicated by description instead of by name provided the description is sufficient to preclude any fair dispute as to the identity."

the Calcutta High Court held that when a reputed firm of solicitors writes to say that one of their clients is willing to purchase the property there is no scope for dispute about the identity of the purchaser and there is no difficulty in ascertaining who the purchaser is "so as to either make the contract uncertain on that ground or unenforceable by specific performance.[24] If there is a prior agreement that contract forms if not returned unsigned with a letter shall amount to acceptance, then the non-return of the contract is acceptance but that is not so if there is no prior agreement.[25] This will apply to arbitration agreements also.[26]

Contract vague.—A condition in a letter of acceptance that it was subject to agreement for a satisfactory mortgage is vague and unenforceable.[27] But the words "22,000 standards of soft wood of fair specifications over the season 1930" are not vague to make a contract.[28]

Course of dealing—implied when.—The Court of Appeal has held that three or four transactions in the course of five years are not enough to establish a course of dealing.[29]

Acceptance by receiving consideration.—The second branch of the section as to "acceptance of any consideration," etc. is rather obscure. It is hard to say with any certainty what particular class or classes of transactions it covers, and the words seem more appropriate to gifts or transfers of property than to contracts. It is generally sound principle, no doubt, that what is offered on conditions must be taken as it is offered. The use of the word "reciprocal" is curious, for it hardly fits the most obvious class of cases, as where goods are sent on approval, and the receiver keeps them with the intention of buying them. Here the seller need not and commonly does not offer any promise, and there is therefore no question of a reciprocal promise as defined in the Act (s. 2(f)). No doubt the acceptance of an offered consideration, *as such,* amounts to giving the promise (whether reciprocal or not) for which it was offered, or else raises an equivalent obligation. But a thing which is offered in one right and for one purpose may be taken under a different claim of right and with a different intent; and in that case (which is exceptional but of some importance) the legal result will not be a contract between the parties, whatever else it is capable of being, unless indeed the party receiving the thing so conducts himself as to lead the proposer reasonably to conclude that there is an acceptance according to the offer; and then the proposer can hold him liable on the universal principle that a man's reasonably apparent intent is taken in law to be his real intent. We cannot suppose that the present section is intended to preclude all inquires of this kind by making every receipt in fact of a thing offered by way of consideration a conclusive acceptance of the proposal. It has been applied however to the case of a bank's customer receiving notice, which he did not answer, of an increase in the rate of interest on overdrafts, and afterwards obtaining a further advance; held that he accepted a consideration offered by the bank within the terms of this section[30] and as a consideration for that "reciprocal promise" the bank offers to desist from discontinuing the overdraft or from immediate recall of its debt.[31]

If 'A' is under a contractual obligation to 'B' and performs or promises to perform part of that obligation in return for 'B's' promise to forego the balance such performance or pro-

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24 *Goshto Bihari* v. *Surs Estate Ltd.* (1960) A.Cal. 752.

25 *Gaddarmal* v. *Chandrabhan* (1968) A.A. 292; disting. *Gaddarmal* v. *Tata Industrial Bank,* 49 All. 674; and *Alfred Domingo* v. *D'Souza,* 50 All. 695; and *Haji Mohammad* v. *E. Spinner & Co.,* 24 Bom. 510; and *Paul Felthouse* v. *Bindley,* 142 E.R. 1087.

26 *Gaddarmal* v. *Chandrabhan* (1968) A.A. 292; *Jugal Kishore* v. *Goolbai* (1955) 2 S.C.R. 857; (1955) A.SC. 812.

27 *Lee Parker* v. *Izzet* (1972) 1 W.L.R. 775.

28 *Hillas & Co.* v. *Arcos Ltd.* (1932) All E.R. Rep. 494.

29 *Hollier* v. *Rambler Motors Ltd.* (1972) 2 Q.B. 71; (1972) 1 All E.R. 399; (1972) 2 W.L.R. 401.

30 *Gaddar Mal* v. *Tata Industrial Bank* (1927) 49 All. 674; 100 I.C. 1023; 1927 A.A. 407. Followed in *Behari Lal* v. *Radhyi Shyam,* 1953 A.A. 745; *Hulas Kanwar* v. *Allahabad Bank Ltd.,* 1958 A.Cal. 644 (overdraft kept alive for 3 years).

31 *Hulas Kanwar* v. *Allahabad Bank Ltd.,* 1958 A.Cal. 644; *Haridas Ranchhordas* v. *Mercantile Bank,* 47 I.A. 17; *Bruce* v. *Hunter* (1813) 3 Camp. 467; *Bata Krishna Pramanie* v. *Bhawanipore Banking Corporation Ltd.,* 59 Cal. 662; 1932 A.Cal. 521; *Gaddarmal* v. *Tata Industrial Bank,* 49 All. 674; 1927 A.A. 407.

mise on 'A's' part is not consideration for 'B's' promise; for 'A' is doing or promising no more than he was already obliged to do.

But if 'B' now sues 'A' on the original contract, 'A' may use 'B's' promise as a defence to the action provided that 'A' can show (1) that he has acted or omitted to act in reliance upon 'B's' promise; (2) that by this act or omission he has altered his position (for the worse); (3) that it is inequitable to allow 'B' to sue on the original obligation.[32]

No offer for Sale.—An invitation to treat is not an offer capable of coversion into a contract by acceptance, but represents a process of negotiation that precedes the making of a definite offer. The display of goods in a shop with price attached is only an invitation to treat.[33]

In an English case the facts were that a man advertised saying "Quality British A.B.-C.R..... Bramblefinch cocks, Bramblefinch hens, 25s. each". It was inserted under the general heading "Classified Advertisements" and there is no use of the words "offer for sale". One 'T' having seen the advertisement wrote for a hen which was sent to him. The advertiser was charged with unlawfully offering for a certain live bird contrary to the Protection of Wild Birds Act, 1954. The Justices were of the opinion that the advertisement was an offer for sale and convicted the adversary. On appeal it was held that the advertisement in the present case constitution in law an invitation to treat, not an offer for sale and the offence charged against the accused was not established.[34]

In another case a shopkeeper displayed in his shop window a knife with a price ticket behind it. There was a charge for offering for sale flick knife which was prohibited. But it was held that the shopkeeper was not guilty because the displaying of the knife in the shop window was merely an invitation to treat and he had not thereby offered the knife for sale.[35]

Promises, express or implied.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Express and tacit promises.—This section assumes rather than lays down that which we have already found it needful to mention in the course of the commentary, namely, that both proposals and acceptances may take place without express words. An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. It must be distinguished from the promises frequently said in English books to be implied by law, which were fictions required by the old system of pleading to bring cases of "relations resembling those created by contract" (ss. 68-72, below) within the recognised forms of action, and sometimes to give the plaintiff the choice of a better form of action. Thus, if the plaintiff desired to sue for a liquidated sum in the general form of *assumpsit* instead of in the less convenient form of *debt*, the law conclusively "implied" a promise to pay the debt, though there might not have been any promise in fact. The actual promise "made otherwise than in words" is a matter of fact which in common law practice would be established by the verdict of a jury; whereas in the case of the fictitious promise a jury might have to find the facts on which the law proceeded, but would not have been allowed to find that there was no real promise.

A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Strictly speaking the word "implied" more appropriately applies to contracts implied by law but it is sometimes used to designate what may be called tacit contracts, i.e. contracts where proposal or the acceptance or both are signified not by words but by acts or conduct. But the acts or conduct must be such that it can only give rise to the inference that there must have been an implied offer and acceptance. If they are not consistent with there being an offer and acceptance they cannot give rise to a tacit or implied contract.[36] An "express con-

32 *Foakes* v. *Beer* (1884) 9 App. Cas. 605; (1881-5) All E.R. Rep. 106.
33 *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.* (1953) 1 Q.B. 401; (1953) 1 All E.R. 482; (1953) 2 W.L.R. 427.
34 *Partridge* v. *Crittenden* (1968) 2 All E.R. 421, 424.
35 *Fisher* v. *Bell* (1960) 3 All E.R. 731.
36 *Umed Singh Hamir Singh* v. *Marsien Mills*, 1959 A.B. 143.

tract" means the reciprocal promises contained in words of the contract or resulting from a true construction of the excluded stipulations which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties.[37] Thus an agreement between partners to vary the terms of the partnership contract may "either be express or be implied from a uniform course of dealing" (s. II(1) of the Indian Partnership Act, 1932, which reproduces well-settled English law). Again when a customer of a bank has not objected to a charge of compound interest in accordance with the usual course of business there is an implied promise to pay the charge.[38] Where parties have acted on the terms of an informal document which has passed between them, but has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound by those terms.[39] Questions may arise whether all the terms of another document are incorporated in a contract, when the contract refers to that document. The terms of a document can be incorporated by reference, when they are not inconsistent with the express terms of the incorporating document, and are not repugnant to the transaction which that document represents.[40] The Madras High Court has held that a contract of sale is a consensual act. The parties are free to settle any terms they please.[41]

The language of the section appears to assume that the terms of a contract may be (as undoubtedly they may, by familiar law and practice) partly express and partly implied. A term which, in the opinion of the Court, results from the true construction of the language used by the parties may be said to be implicit in that language, but in the sense of the present section it is not implied; for it is contained in the words of the agreement,[42] though not apparent on the face of them. But there is a class of cases, of considerable importance in England, where the parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied, as resulting not from the words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances.[43] In India most of the cases of this kind which have been reported in the High Courts appear to be on implied contracts to pay interest. Such a contract may exist by reason of mercantile usage.[44] The ground on which usages of this kind are enforced is not that they have any intrinsic authority, but that the parties are deemed to have contracted with reference to them. They need not, accordingly, be ancient or universal. It is enough that they are in fact generally observed by persons in the circumstances and condition of the parties.

No Implied Contracts under Art. 299.—There can be no implied contract between the Government and another person because that would nullify the provisions of Art. 299 (1)[45] and therefore no contract will be inferable from facts and circumstances and a contract not

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37 *Ramamoorthy* v. *Satyanarayana*, 1958 A.AP. 550, 554.

38 *Haridas Ranchordas* v. *Mercantile Bank of India* (1920) 47 I.A. 17; 44 Bom. 474; 55 I.C. 522 (dist. in *Gaddar Mal* v. *Tata Industrial Bank, supra*, where no usual course of business was proved); *Hulas Kanwar* v. *Allahabad Bank Ltd.*, 1958 A.Cal. 644; *Bruce* v. *Hunter* (1813) 3 Camp. 467; *Bata Krishna* v. *Bhavanipore Banking Corporation Ltd.*, 59 Cal. 662; (1932) A.Cal. 674; *K.V. Suryanarayana* v. *State Bank of India* (1975) A.A.P. 113, 119.

39 *Brogden* v. *Metropolitan Railway Co.* (1877) 2 App. Ca. 666. This might also be regarded as a case of acceptance by acting on the terms of a proposal. *Bajranglal* v. *Anandilal* (1944) Nag. 101, 1944 A.N. 124. The conduct of the parties coupled with a *chitti* found sufficient to prove an agreement to pay.

40 *Dwarkadas & Co.* v. *Daluram*, 1951 A.Cal. 10, 19.

41 *The State of Madras* v. *Ramalingam* (1956) A.M. 695 (case under Sale of Goods Act).

42 We say *agreement*, not necessarily *contract*. It often depends on the true construction of an agreement whether it is a contract or not; and for this purpose there is no difference between express and implied terms, see *Meherulla* v. *Sariatulla* (1929) 57 Cal. 1093, 1095.

43 See *Jiwibai* v. *Ramkumar* (1946) Nag. 824, 838.

44 *Juggomohun Ghose* v. *Manickchund* (1859) 7 M.I.A. 263, a new trial was ordered on the ground that the evidence of mercantile usage had not been sufficiently considered. On the new trial the evidence was found insufficient, and on a fresh appeal the Privy Council refused to disturb the judgment: *Juggomohun Ghose* v. *Kaisreechund* (1862) 9 M.I.A. 260. See also *Ramamoorthy* v. *Satyanarayana* (1958) A.AP. 550, 554; *Devi Prasad* v. *Union of India*, 1969 A.B. 163.

45 *K.P. Chawdhary* v. *State of M.P.* (1967) A.SC. 203, 206. See cases under "s. 175(3) of Govt. of India Act", s. 65, *infra*.

complying with the provisions of Art. 299 (1) is not a contract at all and is not enforceable against or by the Government .[46] The Supreme Court held there was no contract either before or after the auction because of Art. 299 (1) and in the absence of that no moneys were recoverable under the Madhya Pradesh Land Revenue Code.[47]

Terms Implied—when business efficacy.— Under the law, apart from the terms imported by mercantile usage, the court may imply terms, which are necessary in order to repair an intrinsic failure of the expression in the contract, in other words, which will implement the presumed intention and give "business efficacy" to the contract.[48] This principle was laid down in the *Moorcock*[49] and also by the Privy Council.[50] The courts in England have limited the doctrine of *"the Moorcock"*.[51] The current tendency is perhaps summarised in the words of Jenkins L.J.:[52]

"I do not think that the court will read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate, although they did not include it in so many words."[52]

But the Privy Council in an appeal from Australia has held[53] that in the first instance an implied term must be equitable. The other conditions are:

(1) It must be reasonable and equitable
(2) It must be necessary to give business efficacy to the contract and no term can be implied if contract is effective without it.
(3) It must be so obvious that it goes without saying
(4) It must be capable for clear expression
(5) It must not contradict any express term of the contract.

Sellers were held to warrant absolutely that they would obtain an export licence because of the clause "Delivery: prompt as soon as licence granted" which meant that licence would be granted, the only thing was when. In such cases, the warranty is to use reasonable diligence to get the licence.[54] Variation clauses were retrospectively applied because of a stipulation necessary for the business efficacy of the contract.[55] Where the provisions of a lease cannot be carried out and must remain inoperative without implying an easement of necessity into the lease, the court should read the lease in such a way that *res magis valeat quam pereat* and therefore the right course is to imply an easement of necessity.[56]

When a purchaser buys a house from a builder who contracts to build it, there is a threefold implication: that a builder will do his work in a good and workman like manner; that he will supply good and proper materials which will also apply to materials used before the contract; and that it is reasonably fit for human habitation.[57]

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46 *K.P. Chawdhary* v. *State of M.P.* (1967) A.SC. 203, 206, 207; *State of Bihar* v. *Karamchand Thapar* (1962) 1 S.C.R. 827; (1962) A.SC. 110; *Bikhraj Jaipuria* v. *Union of India* (1962) 2 S.C.R. 880; (1962) A.SC. 113; *State of West Bengal* v. *B.K. Mondal* (1962) Supp. 1 S.C.R. 870; (1962) A.SC. 779; *Union of India* v. *A.L. Rallia Ram* (1964) 3 S.C.R. 164; (1963) A.SC. 1685.

47 *K.P. Chawdhary* v. *State of M.P.* (1967) A.SC. 203, 207.

48 *Krishnarao* v. *State of Andhra,* 1962 A.AP. 249, 252; *Re Anglo-Russian Merchant Traders & Butt & Co.* (1917) 2 K.B. 679.

49 *The Moorcock* (1889) 14 P.D. 64; (1886-90) All E.R. Rep. 530. (It was safe for the ship to be at the wharf.)

50 *Kleinert* v. *Abosso Gold Mining Co.* (1913) 58 Sol. Jo. 45; *Delhi Cloth & General Mills Ltd.* v. *K.L. Kapur,* 1958 A.Punj. 93, 101 (If it is so obvious that it goes without saying); *Narayana Rao* v. *Rama Chandra* (1959) A.AP. 370, 374: *U.G.S. Finance* v. *National Mortgage Bank of Greece* (1964) 1 Lloyds Rep. 446, 543 (per Pearson L.J.).

51 (1889) 14 P.D. 64.

52 *Sethia (1944) Ltd.* v. *Partabmull Rameshwar* (1950) 1 All E.R. 51 at p. 59 (C.A.). See also *Compagnie Algerienne de Meuniere* v. *Katana Soc., etc.* (1960) 2 Q.B. 115; (1960) 2 All E.R. 55; *Debi Prasad Khandelwal & Sons* v. *Union of India* (1969) A.B. 163.

53 *B.P. Refinery (Westernport) Pty Ltd.* v. *Shire of Hastings* (1976) 52 A.L.J.R. 20. *The Moorcock* (1889) 14 P.D. 64 (C.A.); (1886-9) All E.R. Rep. 530.

54 *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkauppa* (1957) 1 All E.R. 484.

55 *Trollope and Colls Ltd.* v. *Atomic Power Construction Ltd.* (1963) 1 W.L.R. 333.

56 *Wong* v. *Beaumont Property Trust Ltd.* (1964) 2 W.L.R. 1325, 1333 (C.A.).

57 *Hancock* v. *B.W. Brazier (Anerley) Ltd.* (1966) 2 All E.R. 901, 903; *Lawrence* v. *Cassel* (1930) 2 K.B. 83; (1930) All E.R. Rep. 733; *Millar* v. *Cannon Hill Estates Ltd.* (1931) 2 K.B. 113; (1931) All E.R. Rep. 93.

Where the facts and circumstances lead to the irresistible conclusion that the parties must have agreed to do a particular thing on a particular footing and they may not have expressed it in their written contract the Court should imply an agreement or a term to that effect and in doing so the Court does not make a new contract for the parties but it only gives effect to their presumed intention as if they have expressly said to each other that this is our agreement or a term of the bargain.[58]

An unexpressed term could only be implied if it was necessary to give business efficacy to a contract, but it must be a term which the court finds the parties must have contemplated to be a term of their contract. If, however the terms of the contract are explicit and clear and free from ambiguity, those terms will be applied even if the Court considered that some other term will be more appropriate. Therefore in a building Contract if it was clear that phase III was to be completed by a particular date, no term for extension could be implied because of the delay in completion of a penultimate phase.[59]

But this implication may be excluded by an express provision.[60] An implied term, that when a broker is invited to produce an offer, there is a promise by the invitor that it would be accepted, unless just excuse for refusal existed was not raised in *Luxor Ltd.* v. *Cooper*.[61] In the case of commercial documents familiar to commercial parties, terms can be implied, in particular as to the mode of carrying out a contract.[62]

Term not implied.—The Court of Appeal refused to imply into the contract a term providing a lock to the dressing room of an actor whose clothes were stolen (a case of master's liability towards servant),[63] or to the term of employment of a house physician who had to reside at a neighbouring hostel provided by the hospital and he was required to leave the key of his bedroom in the lock (also a case of master and servant);[64] or into a contract for a sale of a patent that the patent would be kept alive by the seller;[65] or into a contract for sale of jute which required licence of the Government of India that it was subject to the necessary licences and shipments should be subject to "quota system"; it being within the knowledge of the sellers how much quota they had; and the court would read an implied term only where both parties intended that term to operate;[66] or into a contract, where it was within the power of the owners and outside the power of the charterers, to obtain permission to load. The obligation "expected to load" in the charter party was sufficient for business efficacy;[67] or into a contract, where parties have made express contract for remuneration; the amount of and conditions under which it will become payable must be ascertained by reference to the terms of that contract.[68] From the phrase "purchasers to use diligence to obtain approval of scheme" there is no implied term to appeal to minister if scheme not approved by planning authority. They can rescind contract and recover deposit-*Hargreaves Transport* v. *Lynch*, (1969) 1 W.L.R. 215; (1969) 1 All E.R. 455.

A contract for the shipping of goods from Brazil was "subject to any Brazilian export licence" but the goods could not be shipped as the Bank of Brazil could not give a licence except on payment of prices higher than the contract prices.

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58 *Smt. Durga Devi Bhagat* v. *J.A. Advani & Co.* 76 Cal. W.N. 528, 541.

59 *Trollope & Colls Ltd.* v. *N.W. Metropolitian Regional Hospital Board* (1973) 2 All E.R. 260 (H.L.).

60 *Lynch* v. *Thorne* (1956) 1 A.E.R. 744; *Hancock* v. *B.W. Brazier (Anerley) Ltd.* (1966) 2 K.B. 113; (1931) 2 All E.R. 901, 904.

61 (1941) 1 All E.R. 33, 39 (H.L.).

62 *Scammel* v. *Outston*, 1941 A.C. 251; *Hilas & Co.* v. *Arcos Ltd.*, 147 L.T. 503.

63 *Deyong* v. *Shenburn* (1946) 1 All E.R. 226.

64 *Edwards* v. *West Herts Group Hospital Management Committee* (1957) 1 All E.R. 541.

65 *Re Railway & Electric Appliances Co.* (1888) 38 Ch.D. 597.

66 *Sethia (1944) Ltd.* v. *Partabmull Rameshwar* (1950) 1 All E.R. 51 (C.A.); (1951) 2 All E.R.

67 *Compagnie Algerienne de Meuniere* v. *Katana Societa* (1960) 2 W.L.R. 719, 724 (C.A.). Dictum of Scrutton L.J. *in re Comptoir Commercial Anversois & Power, Son & Co.* (1920) 1 K.B. at p. 899 applied. "It must be such a necessary term that both parties must have intended that it should be a term of the contract and have only not expressed it."

68 *Jones* v. *Lowe* (1945) K.B. 73; (1945) 1 All E.R. 194; *Raja Ram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29.

The court did not insert an implied term that if the sellers could not obtain a licence at the contract prices, they would have an option to cancel.[69] But Lord Atkin observed in *Bell's case:*[70]

"Nothing is more dangerous than to allow oneself the liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction... a condition should not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts."[70]

No term to be imported.—If a contract is reduced into writing no unexpressed condition should be considered as implied in the contract except such terms as are necessary to give the transaction the efficacy which the parties must have intended to give it. Therefore, if the contract can be performed as it stands and is effective, no term or condition can be imported simply because it would seem reasonable to imply such a term.[71]

The Headmasters of Secondary Schools allow their pupils to appear for examinations of the Secondary Board under implied terms of the contract of education.[72]

Incorporation of Conditions of Contract.—The reference in the purchase order to the respondent's General Conditions of contract obtainable on request was sufficient to incorporate into the contract between the parties the general conditions of contract and the meaning reasonably to be attributed to the reference was that the conditions referred to were those current at the date of the contract.[73]

Variation of Terms—effect of.—A new condition that withdrawal of the tender is liable to the contractor being blacklisted cannot be subsequently inserted to operate retrospectively.[74]

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69 *Brauer & Co.* v. *James Clark* (1952) 2 All E.R. 497, 500.
70 *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161; (1931) All E.R. Rep. 1, 32 (per Lord Atkin).
71 *Navnithal* v. *Kishanchand & Co.* (1956) A.B. 151, 153; *Harnandrai* v. *Pragdas,* 50 I.A. 9; 1923 A.PC. 54 reld. on; *Ganga Saran* v. *Ram Chand Ram Gopal* (1952) S.C.R. 36; 1952 A.SC. 54. But see the observations of Seller J. quoted in *Brauer & Co.* v. *James Clark* (1952) 2 All E.R. 497, 500.
72 *Sophy Kelly* v. *State of Maharashtra* (1968) A.B. 156, 168-9.
73 *Smith* v. *South Wales Switchgear Ltd.,* (1978) 1 All E.R. 18.
74 *Bhim Sain* v. *Union of India* (1981) A.D. 260.

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

The first paragraph of this section is developed and applied by the more specific provisions of several following sections, which will be considered as they occur.

As to contracts required to be in writing.—See s. 25, sub-ss. 1 and 3, and s. 28, Exception 2, below. See also Indian Companies Act, 1956, s. 15, as to memorandum of association, s.30 as to articles of association, and s. 46 as to contracts by companies. In this connection may also be noted the provisions of the Transfer of Property Act, 1882, which require a writing in the case of sale (s.54), of a mortgage (s. 59), lease (s.107) and gift (s.123), and the provisions of the Indian Trusts Act, 1882 which require a trust to be created in writing (s. 5); but these are not cases of contract in the proper sense of the word. Acknowledgements to save the law of limitation are required to be in writing by s.18 of the Limitation Act, 1963. Arbitration agreements under the Arbitration Act, 1940, are similarly required to be in writing.

Oral and documentary evidence.—The Act does not deal with the kind of proof generally required to establish the facts constituting a contract. In India the law on that subject is codified in the Indian Evidence Act, 1872. See especially ch. VI of that Act, ss. 91 *et seq*. as to the exclusion of oral by documentary evidence.

Variance between print and writing.—Print and other mechanical equivalents of handwriting are generally in the same position with regard to rules of evidence and construction. But where a contract is partly printed in a common form and partly written, the words added in writing are entitled, as Lord Ellenborough said in a judgment repeatedly approved,[1] if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words; inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions. But the print is not to be discarded altogether, and the Court should discover the real contract of the parties from the printed as well as from the written words.[2]

As to the law relating to Registration.—S. 17 of the Indian Registration Act, 1908, specifies documents which require to be registered; and s. 49 of the same Act provides that no document required by s. 17 to be registered shall affect any immovable property, unless it has been registered in accordance with the provisions of that Act.

Contracts.—A true contract requires the agreement of parties freely made with full knowledge and without any feeling of restraint. Under s.10 an agreement is a contract if it is made for a lawful purpose and object. Therefore an agreement between bidders at an auction

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1 *Robertson* v. *French* (1803) 4 East, 130; 7 R.R. 538, 540, approved in H.L.; *Glynn* v. *Margetson* (1893) A.C. 351; 357; in C.A., *Standard Marine Insurance Co.* (1889) 22 Q.B.D. 499, 501; *Noorbhai* v. *Allabux* (1917) 19 Bom.L.R. 845; 42 I.C. 820; *Moolchand Kesarimall* v. *Associated Agencies* (1941) 2 M.L.J. 281; 1942 A.M. 139; *Riley* v. *Coglan* (1967) 1 W.L.R. 1300, 1308; *China Cotton Exporters* v. *Biharilal Cotton Mills* (1961) 3 S.C.R. 845; (1961) A.SC. 1295. See *supra*, s. 2.

2 *Paul Beier* v. *Chotalal Javerdas* (1906) 30 Bom. 1.

Courts also recognize that all cases may not be governed by the same rule. In *Kashiba* v. *Shripat*[19] a Hindu widow above the age of sixteen and under the age of eighteen years, whose husband had his domicile in British India, executed a bond in Kolhapur (outside British India), where she was then residing. As the widow had not changed her domicile after the husband's death, her domicile was the same as that of her husband at his death, namely, British India. The question arose whether her liability on the bond was to be governed by the law of Kolhapur *(lex loci contractus),* or by the law of British India (law of domicile). According to the law obtaining in Kolhapur, which is Hindu law unaffected by the Contract Act, she would have been liable on the bond, as the age of majority according to that law is sixteen years,[20] and the bond was executed by her after she completed her sixteenth year. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the Contract Act, being the law of her domicile, and that under the Act she was not liable on the bond. But the Madras High Court[21] has held that where a person aged eighteen domiciled in British India endorsed certain negotiable instruments in Ceylon, by the laws of which he was a minor, he was not liable as an endorse, the contract being a mercantile one and governed by the *lex loci contractus.*

Minor's agreement.—If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: *No* person is competent to contract who is *not* of the age of majority according to the law to which he is subject; in other words, a minor is *not competent* to contract. This proposition is capable of two constructions: either that a minor is absolutely incompetent to contract, in which case his agreement is *void,* or that he is incompetent to contract only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner;[22] if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract be ratified by the minor on his attaining majority. The former current of Indian decisions was that, as under the English law, a minor's contract is only voidable at his option.[23] But in 1903, as mentioned above,[24] the Privy Council ruled that "the Act makes it essential that all contracting parties should be competent to contract," and especially provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It was accordingly held that a mortgage made by a minor is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under ss. 64 and 65 on a decree being made declaring the mortgage invalid. This decision leaves no doubt that a mortgage by a minor being void, no decree can be passed on the mortgage either against the mortgagor personally or against the mortgaged property.[25] Although an agreement with a minor is void, a compromise of a suit to which a minor is a party and which is made a decree of the Court is not void but voidable. If therefore, the minor desires to enforce it, it is not open to the defendant to plead that the compromise was void on the ground that the guardian did not obtain the consent of the Court.[26]

It was held by a Divisional Court that an infant who has paid for goods and received and used them cannot recover the money back.[27]

The Andhra Pradesh High Court has held that a contract with a minor is a nullity for want of legal competency and is not enforceable unless otherwise provided by Statute. It is

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19 (1894) 19 Bom. 697. See also *Rohilkhand and Kumaun Bank, Ltd.* v. *Row* (1885) 7 All. 490.
20 See Mayne's Hindu Law, 10 ed., s. 229
21 *T.N.S. Firm* v. *Mohammad Hussain,* 1933 A.M. 756; 65 Mad. L.J. 458; 146 I.C. 608.
22 *Suraj Narain* v. *Sukhu Ahir* (1928) 51 All. 164; 112 I.C. 159; 1928 A.A. 440; cp. *Indeshri* (or *Bindeshari*) *Bakhsh Singh* v. *Chandika Prasad* (1926) 49 All. 137 100 I.C. 748; 1927 A.A. 242. See notes on s. 25, below.
23 At this distance of time it seems useless to cite these judgments.
24 See *supra,* "Infancy".
25 *Saral Chand Mitter* v. *Mohun Bibi* (1898) 25 Cal. 371, in which a mortgage decree was passed, is no longer good law. See judgment of Jenkins, J. on p. 385 of the report.
26 *Hashem Howladar* v. *Sreenath,* A.I.R. 1946 Cal. 438, 224 I.C. 570.
27 *Valentini* v. *Canali,* 24 Q.B.D. 166.

not void but voidable at his option, if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessaries. There was formerly, however, a current opinion, countenanced by the lax forms in which some of the decisions were expressed, that infants' agreements were of three kinds: namely, that some were wholly void as being obviously not for the infant's benefit, some valid as being obviously for his benefit, and all others voidable. This opinion is now quite exploded,[14] but it was to be found in text-books at the time when the Indian Contract Act was framed. Still, there was never any authority for saying that infants were absolutely incompetent to contract. The literal construction of the present section requires being of the age of majority according to one's personal law as a necessary element of contractual capacity. Since, however, the Act, as a whole, purports to consolidate in the English law of contracts, with only such alteration as local circumstances require, and there is no trace in the report prefixed to the original draft, or any other relative document, of any intention to make a new rule as to the contracts of minors, the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed; but the Privy Council in 1903 declared that the literal construction is correct, and suggested that it was intended to give effect to the rule of Hindu law on the subject.[15]

We may mention that in England the powers of infants to contract and to ratify their contracts have been much restrained by the Infants' Relief Act, 1874, a statute of good intentions and imperfect workmanship; and the Sale of Goods Act, 1893, s. 2, has declared the liability of infants to pay a reasonable price[16] for necessaries sold and delivered to them, and has defined necessaries according to the latest and best judicial authorities. These enactments, of course, have no authority in India, and can be referred to only for the purpose of illustrating the common law rules. The result of the statutes is to bring the English law much nearer to the Indian law, for most practical purposes, than it might seem at first sight. We proceed to the details of the Indian law.

Age of majority.—This is now regulated by the Indian Majority Act, 1875. S. 3 of the Act declares that every person *domiciled in India* shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years. S.2 of the Act declares that nothing in the Act contained shall affect the capacity of any person to act in matters of marriage, dowry, divorce and adoption. An order discharging the guardian of a minor under s. 48 of the Guardians and Wards Act, 1890, does not terminate the minority when it is obtained by the fraud practised upon the Court by a third party.[17]

"Law to which he is subject."—The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. The general principle of English law is that the capacity of a person to enter into a contract is decided by the law of his domicile, and not the law governing the substance of the contract; but the later trend of authority is not to recognize the law of domicile as having an exclusive prerogative in all cases; and there is a body of English opinion in favour of the *lex loci contractus*, the place where the contract is made, in the case of what are usually described as ordinary mercantile contracts; while in the case of contracts relating to land the *lex situs*, the place where the land is situated, has a prior claim.[18] The following examples show that the Indian

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14 Anson, Law of Contract, 23rd ed., 184 *seq*.

15 *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 I.A. 114; 30 Cal. 539; followed in *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1912) 39 Cal. 232; 13 I.C. 331; *Ma Hnit* v. *Hashim* (1920) 22 Bom.L.R. 531; 55 I.C. 793.

16 It need not be the price contracted for. We shall recur to the significance of this point.

17 *Subramaniam* v. *Doraisinga* (1913) 24 Mad L.J. 49; 16 I.C. 943.

18 See Dicey: Conflict of Laws, 7th ed., pp. 740-745; *Cooper* v. *Cooper* (1883) 13 App. Cas. 88, esp. at pp. 105, 108; *Bank of Africa* v. *Cohen* (1909) 2 Ch. 129; *Republic of Gautemala* v. *Nunez* (1927) 1 K.B. 669; In re *Auziani* (1930) 1 Ch. 407. The suggestion with regard to mercantile contracts dates from Lord Eldon: *Male* v. *Roberts* (1790) 3 Esq. 163.

distinguish them; and all three cases seem to have been really decided on the ground that the contract was for the infant's benefit and that it would be unjust in the circumstances to deprive the latter of that benefit. But there is nothing in the Indian Contract Act corresponding to the rule of English law (saved by the Infants Relief Act, 1874) which makes a contract for the infant's benefit enforceable; all contracts in India made by an infant are void. In *Raj Rani* v. *Prem Adib*,[39] a film producer entered into an agreement with a minor girl to act in a film, and the same agreement was entered into by the father of the minor on her behalf with the producer. On a breach of the agreement, the minor sued the producer through her father as next friend. Desai J. held that the agreement with the father was void, seeing that the consideration moving from the father was the minor's promise to act, and as the minor could not in law promise, there was no consideration. On the other hand, had the consideration moved from the father in the shape of an undertaking by him that his daughter should act, the father could have sued, but could recover only the damages *he* had suffered.

Where a guardian, who himself is a partner along with other persons, gives consent in regard to the admission of a minor to the benefit of the partnership he can agree on behalf of the minor to be admitted to such benefits. Such a partnership deed is valid and can be registered under the Income Tax Act.[40] In an income tax case where the question was the registration of a firm, it was held by the Supreme Court that where one or more members of a Hindu undivided family enter into a partnership with a stranger, *qua* the latter they become partners and such a partnership will not be invalid merely because two or more of the persons who have agreed to share the profits of the business are members of the undivided family. In such a case it is not the Hindu undivided family which becomes a partner but it is the individual members who enter into the partnership.[41]

Fraudulent Representation.—In *Mohori Bibee's case* (30 I.A. 114) cited above it was contended on behalf of the money-lender that an order should be made for a return of the money advanced by him under s.41 of the Specific Relief Act, 1877. As to this part of the case the Privy Council said: "Another enactment relied upon as a reason why the mortgage money should be returned is s.41 of the Specific Relief Act (I of 1877), which is as follows: 'Sec. 41. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Sec. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised".[42]

The decision has been regarded by the Indian Courts as an authority that the circumstances of a particular case may be such that, having regard to s. 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument at the instance of a minor, require the minor to make compensation to the other party to the instrument.[43] It has accordingly been held that where a mortgage of his property by a minor is set aside by the Court, the Court may order compensation to the lender if the loan was obtained by the minor by fraudulently representing that he was of full age.[44] It was similarly been held that where a sale of his property by a minor, which, of course, is void under the Privy Council ruling, is set

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39 *Raj Rani* v. *Prem Adib* (1949) 51 Bom.L.R. 256, 1949 A.B. 215.

40 *Addepally Nageswara Rao and Brothers* v. *Commissioner of Income Tax. A.P.* 79 I.T.R. 306.

41 *Commissioner of Income Tax* v. *Hukamchand Mannalal & Co.* (1971) A.SC. 383, 384, 385. *Pichappa Chettiar* v. *Chokalingam Pillai* (1934) A.PC. 192; *Charan Das Haridas* v. *Commissioner of Income Tax, Bombay North Kutch and Saurashtra Ahmedabad* (1960) 39 I.T.R. 202; (1960) A.SC. 910 reld. on.

42 (1903) 30 I.A. 114, at p. 125; 30 Cal. 539, at p. 549; *Thurston* v. *Nottingham Permanent Building Society* (1902) 1 Ch. 1, 13 on app. (1903) A.C. 6.

43 See *Dattaram* v. *Vinayak* (1903) 28 Bom. 181, at p. 190; *Manmatha Kumar* v. *Exchange Loan Co.*, 1936 A.Cal. 567; 41 C.W.N. 115; 165 I.C. 363; (1937) 1 Cal. 283; s. 33 of S.R.A. 1963.

44 *Kamta Prasad* v. *Sheo Gopal Lal* (1904) 26 All. 342; *Indar Singh* v. *Narindar Singh* (1904) Punjab Rec. No. 33; *Vaikuntarama* v. *Authimoolam* (1915) 38 Mad. 1071.

aside by the Court, the Court may, if satisfied that the sale was procured by the minor by a fraudulent misrepresentation as to his age, direct the minor to make compensation to the purchaser.[45] There appears to be some difference of judicial opinion whether something in the nature of fraud on the part of the minor must be shown before the Court will exercise the powers given it under s.41.[46] It is submitted that the Court's discretion is not to be fettered, though, no doubt, it will always be more ready to exercise its discretion where the element of fraud is present.

It is well established in English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant": *Jennings* v. *Rundall,*[47] where it was held that an infant was not liable in tort for overriding a hired mare. A minor is not liable in tort if the tort is directly connected with the contract and is the means of effecting it and is a parcel of the same transaction.[48] "But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that, but for the contract, there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable. The distinction is established and well marked by a case where an infant hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose; the defendant allowed his companion to use the horse for jumping, whereby it was injured and died. It was held that using the horse in this manner positively forbidden by the contract was a mere trespass, for which the defendant was liable: *Burnard* v. *Haggis*".[49] This view of one of the learned authors[50] was adopted by the Court of Appeal in *Ballett* v. *Mingay,*[51] where a successful action in tort was brought to recover from an infant certain articles lent to him which he had, without authority, lent to a friend. In *R. Leslie, Ltd.* v. *Sheill*[52] the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. As to the extent to which the aid of equity can be invoked in cases of fraudulent misrepresentation as to age Lord Sumner said: "I think the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud... Restitution stopped where repayment began.[53] His Lordship then proceeded: "The money was paid over in order to be used as the defendant's own, and he has so used it and spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so".[54] In *R. Leslie, Ltd.* v. *Sheill* the loan was not secured by the mortgage. The principle of that decision was applied by the Privy Council to a

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45 *Jagar Nath Singh* v. *Lalta Prasad* (1908) 31 All. 21; *Shiam Lal* v. *Ram Piari* (1909) 32 All. 25; *Balak Ram* v. *Dadu* (1910) Punj. Rec. No. 76; *Muhammad Said* v. *Bishambhar Nath* (1923) 45 All. 644; 85 I.C. 79; 1924 A.A. 156; s. 33 of 1963 S.R. Act.

46 *Ko Maung U* v. *Ma Hla On* (1939) Rang. 543; 1939 A.R. 399; 185 I.C. 733; *Harimohan* v. *Dulu Miya* (1934) 61 Cal. 1075; 155 I.C. 1017; 1935 A.Cal. 198; contra *Hanumantha Rao* v. *Sitharamayya* (1939) Mad. 203; 182 I.C. 639; 1939 A.M. 106.

47 (1799) 8 T.R. 335, 4 R.R. 680.

48 *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854) 9 Ex. 422; 96 R.R. 778; *Burnard* v. *Haggis* (1863) 32 L.J. (C.P.) 189 per Byles J.; *Khan Gul* v. *Lakha Singh,* 9 Lah. 701, 714.

49 (1863) 14 C.B.N.S. 45.

50 Taken from Pollock on Contracts, 13th edn., 63.

51 (1943) 1 K.B. 281.

52 (1914) 3 K.B. 607; (1914-15) All E.R. Rep. 511; *Atiyah;* (1959) 22 Mad.L.R. 511, 518.

53 *Ibid.,* at p. 618.

54 *Ibid.,* at p. 619; *Leslie Ltd.* v. *Sheill* (1914) 3 K.B. 607; (1914-15) All E.R. Rep. 511, 518; Atiyah: (1959) 22 Mad.L.R. 273; *Mahomed Syedol Ariffin bin Mahomed Ariff* v. *Yesh Ooi Gark,* 43 I.A. 256; (1916) A.P.C. 242; *Latcharao* v. *Bhimmayya* (1956) A.Andh. 182.

case from the Straits Settlements where the loan was secured by a mortgage of the minor's property[55] If the defendant is an infant and the cause of action is in substance *ex contractu* and is so directly connected with the contract of loan that the action would be an indirect way of enforcing that contract, the action would fail. There are no cases which the minor was ordered to pay the plaintiff a sum equal to the principal sum borrowed.[56]

Debt of a minor in bankruptcy.—The judgment of Lindley J. in *Re King ex parte Unity Joint Stock Mutual Banking Association*[57] was in regard to a debt of a minor provable in bankruptcy which according to Lindley J. was the law in bankruptcy and could not be carried any further.

Where however an infant retains property obtained under the contract from the other party, the equitable remedy of restitution has been applied. even though the infant made no false representation as to his age. In *Clarke* v. *Cobley,*[58] a woman, at the time of her marriage with *D* was indebted to *P* on two promissory notes. After the marriage, *D* gave his bond for the amount of the notes, which *P* then delivered to *D*. *P* sued *D* on the bond. *D* pleaded infancy. Arden M.R., in the Chancery Court, ordered *D* to return the notes, and in any action *P* might bring on them, directed *D* to refrain from pleading any defence that could not have been pleaded when the bond was given.

In a transaction between an adult and an infant where an infant seeks unfairly to retain the benefit under the transaction while setting up its invalidity (and particularly in the case of an infant fraudulently misrepresenting his age) the courts have not allowed the infant to retain the unfair advantage.[59] Lush J. in *Stocks* v. *Wilson* expressed the opinion that delivery of goods to an infant under a contract of sale vests the property in the infant notwithstanding the contract being void.[60] There is a conflict of opinion as to whether this was *obiter dictum* or not. But the latter view has been accepted in Tasmania and New Zealand.[61] In *Stock's case,*[62] a minor obtained furniture and other articles by representing himself to be of age and promised to pay £300 therefor. The goods were not necessaries. He sold a portion of the goods and granted a bill of sale for the rest and were subsequently sold to the grantee.

The court held that he was liable to account to the plaintiff for this sum. Thus the judgment was *in personam* and was criticised in *Leslie Ltd.* v. *Sheil*[63] but not overruled.

S. 38 of the Specific Relief Act, 1963, as already observed, gives the Court power "to make any compensation which justice may require" in cases where cancellation of a void or voidable written instrument is ordered. The question is whether the Court in exercising this power is bound to follow the principles adopted by the English Courts and so lucidly described by Lord Sumner in *R. Leslie, Ltd.* v. *Sheil.*[63] The Lahore High Court has held that the power to give equitable relief is more extensive in India than in England and ordered a money compensation in a case where the infant had misrepresented his age.[64] The court may impose terms on a minor if he seeks its aid as a plaintiff and it may refuse to exercise its jurisdiction if he

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55 *Mahomed Syedol Ariffin* v. *Yesh Ooi Gark* (1916) 43 I.A. 256, at pp. 263-64; (1916) 2 A.C. 575; 39 I.C. 401; 21 C.W.N. 257; these authorities appear to rule out a dictum in *Radha Kishan* v. *Bhore Lal* (1928) 50 All. 862; 110 I.C. 373; 1928 A.A. 626. The decision is on the point of estoppel (*infra,* note 51), but of no value, as authorities, for some reason not apparent, were not even cited. See *Radha Shiam* v. *Behari Lal* (1918) 40 All. 558, 559-560. See also *Latcharao* v. *Bhimayya* (1956) A.Andh. 182.

56 Kennedy L.J. in *Leslie Ltd.* v. *Sheill* (1914) 3 K.B. 607; (1914-15) All E.R. 511, 519.

57 (1858) De G. & J. 63, 44 E.R. 1192.

58 (1789) 2 Cox 173, 30 E.R. 80.

59 *Hall* v. *Wells* (1962) Tas.S.R. 122; *Valentini* v. *Canali* (1889) 24 Q.B.D. 166 (infant not allowed to keep the goods purchased and recover price without making restitution); *Pearce* v. *Brain* (1929) 2 K.B. 310 (infant trading goods for others not permitted to recover them back while retaining benefit); *In re Henderson* (1916) 12 Tas.L.R. 40 (unpaid seller's right to possession from infant, if price not paid). See ss. 20 and 33 of the Specific Relief Act (47 of 1963).

60 (1913) 2 K.B. 235, 242; 108 L.T. 834.

61 Crisp J. *in re Henderson* (1916) 12 Tas.L.R. 40; Adams J. in *Nelson Guarantee Corporation* v. *Farrell* (1955) N.Z.L.R. 405; Burbury J. in *Hall* v. *Wells* (1962) Tas.S.R. 122, 129.

62 *Stocks* v. *Wilson* (1913) 2 K.B. 235; 108 L.T. 834.

63 (1914) 3 K.B. 607, 619; (1914-15) All E.R. Rep. 511 (per Lord Sumner). But see Pollock: *Principles of Contract* (13th Edn.), pp. 64-65.

64 *Khan Gul* v. *Lakha Singh* (1928) 9 Lah. 701; 111 I.C. 175; 1928 A.L. 609. The decision clearly goes

happens to be a defendant. All that can reasonably be said is that the court in deciding whether relief against fraud practised by an infant should or should not be granted will consider with other circumstances of the case the fact that the infant is a defendant and not a plaintiff.[65] In a later Full Bench case of Allahabad High Court[66] the Indian and English decisions were exhaustively reviewed and it was held that where money had been borrowed by two minors under a mortgage deed with a fraudulent concealment of their age, the mortgagee was not entitled to a mortgage decree, nor was he entitled to a decree, for the principal money under any equitable principles other than those recognized in England. This is also the view taken by the Nagpur High Court.[67] It is submitted that the judgment of Shadi Lal. CJ., in the Lahore case is the more correct. In India the Court derives its power from a statutory enactment which is expressed in the widest terms, and the word used is "compensation" not "restitution". In ordering compensation the Court is not necessarily giving effect to a contract which is in law a nullity, but is doing its best to put the parties, so far as possible, in the position which they occupied before the void transaction took place and from which one of them was only induced to depart by reason of the minor's fraud. This is not a performance of the contract but a negation of it. The relief is in equity against fraud and not on the contract.[68] This view has now received legislative recognition in the new Specific Relief Act (Act 47 of 1963),[69] and meets the criticism of the Allahabad High Court in *Ajudhia Prasad* v. *Chanda Lal*,[70] where it was observed:

> "If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law."

Thus in no circumstances can a claim for interest be allowed as part of the compensation; for that would be to enforce one of the stipulations of the contract.[71] The nature of the compensation "which justice may require" must depend on the circumstances of each case, and there is nothing which requires that justice to be interpreted as the exact counterpart of the English rules of equity.

Nottingham Permanent Benefit Building Society v. *Thurstan*[72]

was a case in which an infant became a member of a building society and obtained advances of which part was paid by the society to the vendor of a piece of land which the infant had agreed to purchase and the remainder was expended on improvement of the land. The infant gave mortgage in the original form of a building society mortgage to secure the advances and interest. The infant brought an action in the Chancery Division for a declaration that the mortgage was void and she was entitled to have it delivered to her and cancelled.

The mortgage was declared void but the society was held to have a lien on the land for that portion of the advances which had been paid to her. In what cases in particular equity will exert itself is not easy to determine.[73] A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which against that person the Legislature has declared to be void.[74] To pass a decree against a minor enforcing his pecuniary liability would, while holding the contract is void and unenforceable at the same time, be passing a decree against him on the footing that he had entered into the contract and had not carried out its terms.

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beyond the English doctrine of following property which was the ground of *Stocks* v. *Wilson* (1913) 2 K.B. 235; see s. 38 of Sp. R. Act of 1963.

65 *Khan Gul* v. *Lakha Singh*, 9 Lah. 701, 721. See also Kennedy L.J. in *R. Leslie Ltd.* v. *Sheill* (1914) 3 K.B. 607; (1914-15) All E.R. Rep. 511, 519; *Latcharao* v. *Bhimayya* (1956) A.Andhra 182 (restitution necessary—Lahore view not accepted).

66 *Ajudhia Prasad* v. *Chandan Lal* (1937) All. 860; 170 I.C. 934; 1937 A.A. 610 (F.B.).

67 *Tikkilal* v. *Kowalchand* (1940) Nag. 632; 1940 A.N. 327.

68 *Khan Gul* v. *Lakha Singh*, 9 Lah. 701, 722.

69 Sections 20 and 33 of Act 47 of 1963 (Specific Relief Act).

70 37 All. 860, 873.

71 *Manmatha Kumar* v. *Exchange Loan Co.* (1937) 1 Cal. 283; 1936 A.Cal. 567; 41 C.W.N. 115; 165 I.C. 363. Cf. *Kunhipi* v. *Kalliani*, 1939 A.M. 881; (1939) 2 Mad.L.J. 463.

72 1903 A.C. 6; 1900-3, All E.R. 830 refd. to in *Mohori Bibee* v. *Dharmodas Ghose*, 30 I.A. 114; 30 Cal. 539.

73 Knight Bruce V.C. in *Stikeman* v. *Dawson* (1847) 1 De.G. & Sin. 90; (1843-60) All E.R. Rep. 1076.

74 Romer L.J. in *Thurston* v. *Nottingham Permanent Building Society* (1902) Ch. 1, 13 on app. (1903) A.C. 6.

Burden of proof.—A party sued on an instrument who denies liability on the ground that at the date of its execution he was a minor must, of course, prove his allegation.[75]

Estoppel.—If a minor procures a loan or enters into any other agreement by representing that he is of full age, is he estopped by s. 115 of the Indian Evidence Act, 1872[76] from setting up that he was a minor when he executed the mortgage? The point was raised, but not decided in *Mohori Bibee's case*.[77] In that case the Privy Council said: "The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy." There were many conflicting decisions whether a minor could be estopped by a false representation as to his age. But the question is now settled by the case of *Sadik Ali Khan* v. *Jai Kishore*[78] where the Privy Council observed that a deed executed by a minor is a nullity and incapable of founding a plea of estoppel. The principle underlying the decision is that there can be no estoppel against a statute. The Bombay High Court has since this case reversed its former course of decisions.[79] And the law of estoppel in India as contained in section 115 is no different from the law in England.[80]

Mortgages and sales in favour of minors.—S. 7 of the Transfer of Property Act, 1882, provides that every person competent to contract and entitled to transferable property is competent to *transfer* such property. But it is not provided anywhere in the Act that a person not competent to contract is incapable of being a *transferee* of property. It has accordingly been held that though a sale or mortgage of his property by a minor is void,[81] a duly executed transfer by way of sale[82] or mortgage[83] in favour of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. A minor, therefore, in whose favour a deed of sale is executed is competent to sue for possession of the property conveyed thereby.[84] The Patna High Court, however, has held that a lease to a minor is void, as it imposes upon him obligations to pay rent and perform covenants.[85] A lessor—a

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75 *Narain Singh* v. *Chiranji Lal*. 46 All. 568; 79 I.C. 945; 1924 A.A. 730; followed in *Surja* v. *Suti Prasad* (1925) 47 All. 493; 87 I.C. 445.

76 "When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

77 (1903) 30 I.A. 114, 122; 30 Cal. 539, 545, referred to by Lord Sumner in his judgment in *R. Leslie Ltd.* v. *Sheill* (1914) 3 K.B. 607, at p. 615; *Lal Dhar* v. *Piarey Lal* (1921) 19 All L.J. 578; 62 I.C. 258; *Bhim Mandal* v. *Magaram* (1961) A.P. 21.

78 1928 A.P.C. 152; 30 Bom.L.R. 1346; 109 I.C. 387; *Khan Gul* v. *Lakha Singh*, 9 Lah 701. See *Bakaram Januji* v. *Kashirao* (1945) Nag. 1005, 1945 A.N. 288 (where estoppel by *res judicata* was negatived, in the absence of proof that the minor had knowledge of his infancy at the relevant time); *Levene* v. *Broagham*, 25 T.L.R. 365.

79 *Gadigeppa* v. *Balangauda* (1931) 55 Bom. 741; 135 I.C. 161; 1931 A.B. 561. Earlier cases are: *Kanhaya Lal* v. *Girdhari Lal* (1912) 9 All.L.J. 103; 13 I.C. 956; *Vaikuntrama* v. *Authimoolam* (1915) 38 Mad. 1071; 23 I.C. 799; *Golam Abdin* v. *Hem Chandra* (1916) 20 C.W.N. 418; 32 I.C. 388.

80 *Sarat Chunder Dey* v. *Gopal Chunder Laha*, 19 I.A. 203; 20 Cal. 296; *Khan Gul* v. *Lakha Singh*, 9 Lah. 701, 712; Cf. *Mohori Bibee* v. *Dhurmodas Ghose*, 30 Cal. 539; 30 I.A. 114.

81 *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 I.A. 114, 123; 30 Cal. 539, 547.

82 *Ulfat Rai* v. *Gauri Shanker* (1911) 33 All. 657; *Narain Das* v. *Musammat Dhania* (1916) 38 All. 154; 35 I.C. 23: *Munni Koer* v. *Modan Gopal* (1916) 38 All. 62; 31 I.C. 792; *Munia* v. *Perumal* (1911) 37 Mad. 390. See also *Maghan Duba* v. *Pran Singh* (1908) 30 All. 63 (purchase by a joint Hindu family in the name of a minor member); *Collector of Meerut* v. *Lala Hardian* (1945) All. 204, 1945 A.A. 156.

83 *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308 (F.B.), overruling *Navakotti* v. *Logalinga* (1909) 33 Mad. 312; *Madhab Koeri* v. *Baikuntha Karmaker* (1919) 4 Pat.L.J. 682; *Zafar Ahsan* v. *Zubaida Khatun*, 121 I.C. 398; (1929) All.L.J. 1114; 1929 A.A. 604.

84 33 All. 657, *supra*: 38 All. 62, *supra*: 37 Mad. 390, *supra:* 38 All. 154, *supra: Collector of Meerut* v. *Lala Hardian* (1945) All. 204, 1945 A.A. 156.

85 *Pramala Basi Das* v. *Jogeshar Mandal* (1918) 3 Pat.L.J. 518; 46 I.C. 670. S. 107 of the Transfer of Property Act has been amended and a lease must now be executed by both parties. A minor therefore cannot be a lessor or lessee. *Mir Sarwarjan* v. *Fakhar ud Din*, 39 I.A. 1; 39 Cal. 232; *Raghava Chariar* v. *Srinivasa*, 40 Mad. 308, 335 (Lease is void).

minor—who has been subject to covenants in a lease which are not binding on him has the right to avoid them. But he must elect to avoid the lease as a whole or adopt it; he cannot approbate and reprobate.[86] A guardian of a Muhammadan minor can lease a minor's property. A minor may not be bound by the lease if it is in excess of the guardian's power or not beneficial to him. But it is not the same thing as saying that the contract is void and the other party can ignore it. The minor can sue for the recovery of rent.[87] Similarly where property is conveyed to a minor, and the latter is subsequently ousted on suit by third parties, he is entitled to recover from the vendor the sum which he had paid as purchase money.[88] And it has been held by a Full Bench of the Madras High Court that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf.[89] The High Court of Madras had held, on the analogy of the above cases, that a promissory note executed in favour of a minor is not void and can be sued upon by him.[90]

Possession lawful at the inception does not become adverse under an arrangement made with a minor as the minor cannot give consent[91] Therefore, if the mortgagor is a minor at the time the agreement for the change of the nature of possession, the possession does not become adverse as the minor is incapable of giving consent.[92]

Ratification.—As it is now finally settled that a minor's agreement is void, it follows that there can be no question of ratifying it.[93] Upon the same principle a promissory note given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law. Such a note, the Madras High Court holds, is void for want of consideration.[94] In a Calcutta case [95] a bond was executed by *S*, after attaining majority, promising to pay within a year Rs. 7,000, being the price of piece goods sold to him during his minority, and also to repay Rs.76 advanced to him for necessaries. The obligee sued S on the bond, and it was held that *S* was liable. The Court said: "Here the contract on which the suit is brought is by a defendant of full age, it is a new contract, by it the plaintiff has debarred himself from suing until the expiration of one year after the date of the contract for moneys which are alleged to be due at the date of the contract, and he had made an advance of Rs. 76. There was thereupon a *new* consideration for the promise on which the defendant is sued, and in my opinion, in the absence of any statutory provision such as that to be found in England in s.2 of the Infant's Relief Act, 1874, he is liable." The only difference between this and the Madras case, so far as the note sued upon goes, is that in the latter case there was a promissory note passed during minority, and the note was *renewed* by the defendant on attaining majority, while in the Calcutta case there was no bond passed during minority, but the bond was executed for the first time after attaining majority. This circumstance however, cannot make any difference in principle, nor is there anything in the judgment in the Calcutta case to show that the decision proceeded upon any such difference. The ground of the decision was that there was a *new* consideration for the promise on which the defendant was sued. We fail to see how either the forbearance to sue or the advance for necessaries could be regarded as a new consideration, and we are of opinion

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86 *Jagannada Rao* v. *Venkata Kumara,* 54 Mad. 163; (1931) A.M. 140; *Zeebunnissa Begum* v. *Mrs. Danagher,* 59 Mad. 952; (1936) A.M. 564.

87 *Zeebunnissa Begum* v. *Mrs. Danagher,* 59 Mad. 952; (1936) A.M. 564. See S. 20 of Act 47 of 1963 (Specific Relief Act).

88 *Walidad Khan* v. *Janak Singh* (1913) 35 All. 370; 19 I.C. 610.

89 *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308; *Hari Mohan* v. *Mohini Mohan* (1917) 22 C.W.N. 130 I.C. 994.

90 *Rangarazu* v. *Maddura* (1913) 24 Mad.L.J. 363; *Madhab Koeri* v. *Baikuntha Karmaker* (1919) 4 Pat.L.J. 682.

91 *Padma Vithoba* v. *Mohammad Multani* (1963) A.S.C. 70.

92 *Padma Vithoba* v. *Mohammad Multani* (1963) A.S.C 70; *Kandasami* v. *Chinnabba,* 44 Mad. 253; 1921 A.M. 82 (Adverse possession for change of possession in case of majors).

93 *Gobind Ram* v. *Piranditta* (1935) 16 Lah. 456; 158 I.C. 243; 1935 A.L. 561 (F.B.); *Nazir Ahmad* v. *Jiwan Das,* 1938 A.L. 159; 177 I.C. 388; *Tukaram* v. *Mddhorao* (1947) Nag. 710; 1948 A.N. 293.

94 *Indrau Ramaswami* v. *Anthappa Chettiar* (1906) 16 Mad.L.J. 224; *Arumugan* v. *Duraisinga* (1914) 37 Mad. 38; 12 I.C. 568; *Suraj Narain* v. *Sukhu Ahir* (1928) 51 All. 164; 112 I.C. 159; 1928 A.A. 440, cited under "minor's agreement," above. See also *Chuah Hooi Guoh Neoh* v. *Khaw Sim Bee* (1915) 19 C.W.N. 786 (reopening settlement of property made during plaintiff's infancy).

95 *Kundan Bibi* v. *Sree Narayan* (1906) 11 C.W.N. 135, followed in *Karm Chand* v. *Basant Kuar* (1911) Punj. Rec. No. 31.

that the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law[96] In England it has been held that money advanced to a minor for the purchase of necessaries is recoverable in equity, on the ground that the lender stands in the place of the person paid.[97]

Contracts of marriage—Ratification of.—Contracts of marriage are included in s.2 of the Infants Relief Act and therefore no action can be brought upon a mere ratification after attaining majority of a minor's promise of marriage before majority.[98] The law in India it is submitted is the same.

Divorce.—A divorce brought about by minors without the consent of the guardians is not valid.[99]

Payment of debt incurred during minority.—Where a person on attaining majority pays a debt incurred by him during minority, no question of ratification of a contract arises, since an agreement with a minor is merely void and not unlawful, the sum paid cannot be sued for subsequently, and in law it must be regarded on the same footing as a gift.[1]

Specific performance.—A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Privy Council. The guardian of a minor unless competent to do so has no power to bind the minor by a contract for the purchase or sale of immovable property, and the minor therefore is not entitled to specific performance of the contract: so held by the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed.*[2] In the course of the judgment their Lordships said: "They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract," even though purchase was advantageous, as there was no mutuality.[3] But one of the learned authors of the Contract Act has said that: There is no reason why a minor's contract entered into by his guardian if it appears to the court to be for his benefit should not be valid and enforceable.[4] It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate, where the guardian or manager, as under Hindu Law, is competent to alienate property.[5] In *Suryaprakasham* v. *Gangaraju,*[6] it was held by a Full Bench of Andhra High Court that a contract entered into by a guardian of a Hindu minor for sale or purchase of immovable property is specifically enforceable against the minor but whether a Court of Equity would give a decree or not would depend upon the circumstances of each case. It was also held that as a result of

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96 The opinion here expressed was approved by the Lahore High Court: *Bhola Ram Harbans Lal* v. *Bhagat Ram* (1926) 99 I.C. 318; 1927 A.L. 24; *Karim Khan* v. *Jaikaran Godadmal* (1937) Nag. 458; 170 I.C. 543; 1937 A.N. 390. The decision in *Narain Singh* v. *Chiranji Lal* (1924) 46 All. 568; 79 I.C. 945; 1924 A.A. 730, seems of doubtful validity.

97 *Marlow* v. *Pitfield* (1719) 24 E.R. 516.

98 *Coxhead* v. *Mullis* (1878) 3 C.P.D. 439; *Northcote* v. *Doughty* (1879) 4 C.P.D. 385; *Watson* v. *Campbell* (1920) V.L.R. 347. S. 11 of Contract Act.

99 *Smt. Sodha* v. *Mansha Ram* (1971) A.HP. 27.

1 *Anant Rai* v. *Bhagwan Rai,* 1939 A.A. 12; (1939) All.L.J. 935; 187 I.C. 4; *Tukaram* v. *Madhorao* (1947) Nag. 710; 1948 A.N. 293.

2 (1912) 39 I.A. 1; 39 Cal. 232 reversing (1906) 34 Cal. 163. In *Amir Ahmmad* v. *Meer Nizam Ali,* 1952 A.Hyd. 120 F.B. it was held, it is submitted, erroneously, that there were Muslim texts which enabled the *de jure* guardian to enter into contracts for the sale of immovable property on behalf of a minor.

3 *Mir Sarwarjan* v. *Fakhar ud Din,* 39 Cal. 232; 39 I.A. 1; *Raghava Chariar* v. *Srinivasa.* 40 Mad. 308, 335 (case of a lease which was held void); Mulla's Transfer of Property Act, p. 72. But see s. 20(4) of Sp. Relief Act (47 of 1963).

4 Pollock on Contracts, 12th Edn., pp. 46 and 47.

5 Mulla's Hindu Law, 11th Ed. p. 617. *Suryaprakasam* v. *Gangaraju,* 1956 A.Andh. 33; *Zeebunnissa Begum* v. *Mrs. Danagher,* 59 Mad. 942; (1936) A.M. 564.

6 *Suryaprakasham* v. *Gangaraju,* 1956 A.Andhra 33.

the decision in *Subrahmanyam* v. *Subba Rao*.[7] all the decisions based on *Mir Sarwarjan's case*[8] were overruled. At page 40 of the A.I.R. Reports, Subba Rao C.J. was of the opinion that the judgment of the Privy Council in *Subrahmanyam's case*[7] was an authority for saying that in the case of contracts entered into by guardians acting within the powers prescribed by law, the contract can be specifically enforced both against and by the minor and as there is legal competence on the part of the guardian, in the circumstances, no question of mutuality can arise at all. Viswanath Sastri J.[9] criticised the applicability of the doctrine of mutuality to cases of contracts of minors and held that when a guardian of a minor enters into a contract for the sale of property of the minor for purposes considered as necessary under Hindu Law, the contract would be specifically enforced against the minor and the line of authorities beginning with *Mir Sarwarjan case*[8] had no application to such circumstances. The mere ground of want of mutuality is now under section 20 of Specific Relief Act of 1963 not a ground of refusing specific performance.[10] In such a case it has been held by the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor.[11] But if either of these two conditions is wanting, the contract cannot be specifically enforced at all.[12] But the Bombay High Court has held that a guardian of a minor has no authority to sell property on behalf of his ward.[13] This is, it is submitted, too broadly stated as the power of a guardian to sell would depend on the extent of the powers of a guardian which under Hindu Law extends to necessity or benefit to the estate. And it also appears that the law as stated in section 6 of the Transfer of Property Act and at page 372 of Mulla's Transfer of Property Act on the subject and what was decided by the Full Bench of the Madras High Court was not considered.[14] The principle of mutuality applies to the separate property of a minor and not where he is a coparcener or a co-tenant with adults and the contract is with regard to coparcenery or co-tenancy property.[15] A contract is not void for non-availability of the remedy of specific performance and therefore a lessee cannot avoid a lease on the ground of the lessor's infancy.[16] A court may refuse specific performance and award damages.[17]

It is also within the competence of a certificated guardian appointed by statute, such as the Guardian and Wards Act, 1890, or the various Courts of Wards Acts to enter into a contract for the purchase or sale of immovable property on behalf of the minor with the sanction of the Court[18] A guardian cannot contract on behalf of a minor so as to impose on him a personal liability.[19] Whether a guardian of a minor can or cannot make a contract for purchase of shares in a given set of circumstances or whether a minor can be placed on the register of

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7 *Subrahmanyam* v. *Subba Rao*, 75 I.A. 115.
8 *Mir Sarwarjan* v. *Fakruddin Mahamad*, 39 I.A. 1.
9 *Ramalingam Reddi* v. *Bavanambal Ammal*, 1951 A.M. 431; *Gujoba* v. *Nilkanth*, 1958 A.B. 202.
10 Section 20 of the Act 47 of 1963.
11 *Subramanyam* v. *Subba Rao* (1948) 75 I.A. 115, (1949) Mad. 141, 1948 A.P.C. 95; *Brahamdeo* v. *Haro Singh*, 1935 A.P. 237; *Ramalingam* v. *Babanam*, 1951 A.M. 431.
12 *Venkatachalam Pillai* v. *Sethuram Rao* (1932) 56 Mad. 433, 142 I.C. 315, 1933 A.M. 322; *Singara* v. *Ibrahim Baig*, 1947 A.M. 94, 229 I.C. 501; *Durga Charan* v. *Akbari Das*, 1949 A.Cal. 617; *Krishna Chandra* v. *Rishabha Kumar* (1940) Nag. 55, 1939 A.N. 265: *Abdul Haq* v. *Mohamed Yahya Khan*, 1924 A.P. 81. In the following cases specific performance was refused although legal necessity had been proved: *Srinath Bhattacharjee* v. *Jotindra Mohan*, 1926 A.Cal. 445; *Hari Mohan* v. *Sew Narayan*, 1949 A.Asm. 57; *Ramakrishna Reddiar* v. *Kasivasi*, 1928 A.M. 407; but in *Nageswara Rao* v. *Mandava*, 1928 A.Mad. 830, there was no proof of legal necessity and specific performance was rightly refused.
13 *Gopalkrishna* v. *Tubaram*, 1956 A.B. 566.
14 See *Raghava Chariar* v. *Srinivasa*, 40 Mad. 308.
15 *Sitarama Rao* v. *Venkatarama*, 1956 A.M. 261; *Ramalingam Reddi* v. *Babanambal Ammal* (1951) A.M. 431 disappd.
16 *Zeebunnissa Begum* v. *Mrs. Danagher* (1936) 59 Mad. 942; (1936) A.M. 564; *Zouchu* v. *Parsons*, 97 E.R. 1103 refd. to.
17 *Zeebunnissa Begum* v. *Mrs. Danagher*, 59 Mad. 952; (1936) A.M. 564; *James Jones & Sons Ltd.* v. *Tankerville* (1909) 2 Ch. 440.
18 *Babu Ram* v. *Said-un-Nissa* (1913) 35 All. 499, 20 I.C. 916; *Etwari* v. *Chandra Nath* (1906) 10 C.W.N. 763; *Innatunnessa* v. *Janaki Nath* (1917) 22 C.W.N. 477.
19 *Waghela Rajsanji* v. *Sheikh Masludin*, 16 I.A. 89, 96; 11 Bom. 551, 561.

members was raised before by a full bench of the Delhi High Court but not decided in *Golconda Industries* v. *Companies Registrar*.[20]

Membership of Societies.—Subject to certain conditions a minor can become a member of a friendly society, an industrial and Provident Society, a trade union or building society.[21] That is English Law but all this is based on Statute Law. It is submitted that in India the law would not be different provided such memberships are for the benefit of the minor or a requirement of conditions of service or for the welfare of the minor or his family.

Necessaries.—S. 68, below, provides for liability in respect of necessaries supplied to a person *incapable of entering into a contract*. A minor is a person incapable of contracting within the meaning of that section,[22] and, therefore, the provisions of that section apply to his case. It will be observed that the minor's property is liable for necessaries, and no personal liability is incurred by him, as it may be under English law. S. 70 cannot be read so as to create any personal liability in such a case. Under English law the liability is not on the express promise, if any there be; the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied: Sale of Goods Act, 1893, s.2. It would probably be held that this only declares the common law,[23] and, therefore, that the rule is the same as to necessaries other than goods. Necessaries must be things which the minor actually needs; therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use, they will not be necessary if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not.[24] It may be presumed that Courts in India would follow the English decisions on this point, which does not appear to be precisely covered by the language of s.68. Objects of mere luxury cannot be necessaries, nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessaries.[25] See notes to s. 68. below.

There has been in English law some extension as to necessaries. What are necessaries for a minor's wife & child are necessaries for him[26] Though he is not responsible for his wife's debt unless she has his authority to pledge his credit yet the minor husband of a minor wife will be liable for household necessaries purchased by the wife.[27] It is submitted the law in India will be the same.

Bond jointly passed by a minor and an adult.—*A* and *B* jointly pass a bond to *C*. *A* is a minor at the date of the bond. *B* is liable on the bond, though *A* may not be liable.[28] Similarly, where a minor was one of the executants of a promissory note, his immunity from liability cannot absolve the other adult promisors from liability.[29]

"Of sound mind."—See s. 12 below, for the definition of soundness of mind. By English law a lunatic's contract is void, but voidable at his option, and this only if the other party had notice of his insanity at the time of making the contract.[30] But, after the decision that this section makes a minor's agreement wholly void, it is clear that a person of unsound mind must in India be held absolutely incompetent to contract. And it has in fact been held to be so in a

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20 (1968) A.D. 170 (F.B.).
21 Chitty on Contracts (24th Ed.) para 525.
22 *Watkins* v. *Dhunnoo Baboo* (1881) 7 Cal. 140, 143; *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 I.A. 114; 30 Cal. 539
23 See *Nash* v. *Inman* (1908) 2 K.B. 1, C.A., especially the judgment of Fletcher Moulton, L.J.
24 *Johnstone* v. *Marks* (1887) 19 Q.B.D. 509, followed in *Jagon Ram* v. *Mahadeo Prasad* (1909) 36 Cal. 768; *Daw Nyun* v. *Maung Nyi Pu*, 1938 A.R. 359; 178 I.C. 680. Previous English decisions were conflicting, but the point may now be taken as settled. *Cp*. the Sale of Goods Act, 1893, s. 2.
25 The classical English authority is *Ryder* v. *Wombwell* (1868) L.R. 4 Ex. 32. The minuteness of the English cases on this point seems due, as matter of fact, to the general bias of juries in favour of tradesmen, and their opinion that it is shabby to plead infancy.
26 Chitty: on Contract, Vol. I para 486 (24th ed.)
27 *Ibid*.
28 *Jamna Bai* v. *Vasanta Rao* (1916) 43 I.A. 99, at p. 103; 39 Mad. 409. See also *Rup Chand* v. *Fazal Ilahi* (1917) Punj. Rec. No. 40, p. 156; 41 I.C. 70 (lease to a minor and an adult in equal shares).
29 *Sulochana* v. *The Pandiyan Bank Ltd*. (1975) A.M. 70, 72.
30 *Imperial Loan Co*. v. *Stone* (1892) 1 Q.B.599, C.A., confirming previous authorities.

Madras case.[31] The supply of necessaries to lunatics, among other persons "incapable of entering into a contract," is dealt with by s. 68 of the Act; see the illustrations.

Persons otherwise "disqualified from contracting."—The capacity of a woman to contract is not affected by her marriage either under the Hindu or Mahomedan law. A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. It is not necessary to the validity of the contract that her husband should have consented to it. When she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act; and she may bind him by her contract, in certain circumstances,[32] even without his authority, the law empowering her on the ground of necessity to pledge her husband's credit. Otherwise a married woman cannot bind her husband without his authority, but she is then liable on the contract to the extent of her *stridhanam* (separate property).[33] Similarly, a married Hindu woman may contract jointly with her husband, but then she is liable to the extent of her *stridhanam* only.[34] In the same way a married Mahomedan woman is not by reason of her marriage disqualified from entering into a contract.

Turning next to persons of other denominations, there are two Indian enactments that create the separate property of married women, and impliedly confer upon them, as an incident of such property, the capacity to contract in respect thereof. The one is the Indian Succession Act, 1925, sec. 20, and the other the Married Women's Property Act, 1874. Both these enactments apply to the whole of India, but neither of them applies to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mahomedan, Buddhist, Sikh, or Jain religion.[35] S. 20 of the Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that on or after January 1st, 1866, all married women to whose marriages the Act applied became absolute owners of all property vested in, or acquired by them, and their husbands did not by their marriage acquire any interest in such property.[36] It was subsequently considered expedient to make due provision for the enjoyment of wages and earnings by women married before 1866,[37] and Married Women's Property Act enacted that the wages and earnings of any married woman acquired or gained by her after the passing of that Act in any employment, occupation, or trade carried on by her, and all money or other property acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed to be her separate property (s.4). The Act also provides that a married woman may sue and may be sued in her own name in respect of her separate property (s.7), and that a person entering into a contract with her with reference to such property may sue her, and to the extent of her separate property recover against her, as if she were unmarried (s.8).

Certain classes of persons may be disqualified under certain enactments from entering into contracts in respect of matters specified in those enactments. Thus where a person in Oudh is declared a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act, 1876, he is not competent to alienate his property, and the same incapacity extends to contracts entered into by him, though they relate to property situate outside the province of Oudh.[38]

Contract by insolvent—formation.—There is no prohibition against a contract by an insolvent after the insolvency proceedings have commenced but before adjudication. Insolvency

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31 *Machaima* v. *Usman Beari* (1907) 17 Mad.L.J. 78; see also *Kamola Ram* v. *Kaura Khan* (1912) Punj. Rec. No. 41.

32 E.g., pressing necessity: *Pusi* v. *Mahadeo Prasad* (1880) 3 All. 122, at p. 124.

33 Per Cur. in *Nathhubhai* v. *Javher* (1876) 1 Bom. 121.

34 *Govindji* v. *Lakmidas* (1879) 4 Bom. 318; *Narotam* v. *Nanka* (1882) 6 Bom. 473.

35 See The Married Women's Property Act, 1874, s. 2, and the Indian Succession Act, 1925, s. 20.

36 The Indian Succession Act, 1925, s. 20(2).

37 See the preamble to The Married Women's Property Act, 1874.

38 *Lacmi Narain* v. *Fateh Bahadur Singh* (1902) 25 All. 195, 202; *Jethalal* v. *D.S.A. Laxamanwala*, 1953 A. Sau. 177.

does not determine a contract nor operate *per se* as rescission thereof.[39] There is no statutory prohibition against the sale of property by an insolvent after insolvency proceedings have been initiated. The vesting of the property in the Official Receiver is for the benefit of the creditors and so does not purport to affect the transactions between the insolvent and other persons except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transaction are concerned they are binding on them. A sale deed executed by the insolvent before the insolvency petition was filed but registration whereof took place in the course of insolvency proceedings was held valid and binding on the parties by the Madras High Court.[40]

An English barrister, enrolled as an advocate of an Indian High Court, is not a person "disqualified from contracting by any law to which he is subject" so as to prevent him from suing for his fees in India. *Qua* advocate the law to which he is subject is that of the bar where he is practising.[41]

Capacity of Governments.—Every contract is an agreement between parties who are 'persons' within the meaning of the Contract Act. A State Government is a "person" within that section and enters into contracts as such person.[42] The Government of India or Government of a State are not incompetent to enter into contracts like a minor.[43]

The disability of alien enemies to sue in our Courts without licence is a matter of general public policy not coming under this head.

Gift deed by a person of unsound mind:—Consolidation of Laws.—Where a deed of gift is made by a person of unsound mind and the land comprised in the deed becomes the subject matter of consideration proceedings, the civil suit even if at the appellate stage will abate under S 4(c) of the Bihar Consideration of Lands and Prevention of Fragmentation Act and the matter will have to be decided by the consolidation authorities and not by the civil courts.[44]

What is a sound mind for the purposes of contracting.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.[45]

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.[46]

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or from a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

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39 *Rama Raju* v. *Official Receiver* (1964) A.AP. 299. P.T.I. Act, s. 65; P.I. Act, ss. 53, 54.

40 *Peraya* v. *Kondayya,* 1948 Mad. 872, (1948) A.M. 430; Mulla's Law of Insolvency in India (2nd Ed.) 270.

41 *Nihal Chand* v. *Dilawar* (1933) 55 All. 570; 143 I.C. 727; 1933 A.A. 417 (F.B.); see also *Reg.* v. *Doutre* (1884) 9 App. Cas. 745, a Privy Council decision.

42 Articles 295 and 299 of the Constitution; S. 3 of General Clauses Act; *State of U.P.* v. *P.V. Kanhaiya Lal,* 1956 A.A. 383.

43 *State of West Bengal* v. *B.K. Mandal & Sons* (1962) A.SC. 779, 789; (1962) 1 S.C.R. 876. See also Arts. 295 & 299.

44 *Tarkeshwar Upadhaya* v. *Mahesh Kahar* (1981) A.P. 348, 350.

45 As to evidence of unsound mind see *Ram Sundar Saha* v. *Kali Narain Sen* 1927 A. Cal. 889; 104 I.C. 527.

46 See for an elementary illustration the facts in *Jai Narain* v. *Mahabir Prasad* (1926) 2 Luck. 226; 95 I.C. 857; 1926 A.O. 470.

Burden of proof.—The difficulty of understanding what is really the effect of this section, in conjunction with s. 11, has already been pointed out. The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact.[47] A disposition by a lunatic is completely void.[48] Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. Lunatic is not a person who is continuously in state of unsoundness of mind; once it has been established that a person is of unsound mind, the onus is on the person who alleges execution of a document during a lucid interval.[49] In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract. In order to establish the plea of being incapable of comprehending the meaning and effect of an agreement, it has to be shown that the party was so drunk as to be unable to do so and that the other party was aware of his condition.[50] Questions of undue influence and of incapacity by reason of unsoundness of mind must not be mixed up, involving as they do totally different issues.[51]

Not capable of understanding.—An instrument of conveyance executed by a person incapable of understanding its effect, in the sense of its general purport, is not on that account void though in the circumstances it may be voidable by the conveyor or his representatives.[52] A person though he may apparently be of sound mind may still be incapable of understanding the nature of the transaction or to judge whether it is to his benefit or not. To such a person the principles applicable to a *pardanashin* lady will apply. A man incapable of judging the consequences of this act should not be held to be bound by his contract.[53]

Contract in lucid interval.—The second paragraph of the section provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus even a patient in a lunatic asylum may contract during lucid intervals (see illustration (*a*)). The question may arise whether a lunatic adjudged to be so under the Indian Lunacy Act, 1912, and of whose property a committee or manager is appointed, can contract during intervals of sound mind. In England, a lunatic not so found, or before he is so found, by inquisition is not by reason of that fact absolutely incapable of contracting, though the burden of proof in such a case is on the party maintaining that he is not insane, or that the contract was made during a lucid interval,[54] and the same would appear to be the law in India. Where, however, a committee or a manager of the estate of a lunatic adjudged to be so is appointed under either of the Indian Acts, no contract can be entered into by a lunatic in respect of his estate, even though at the time of the contract he may be in a lucid interval. Similarly it is now settled in England that a person found lunatic by inquisition is incapable of dealing with his property *inter vivos* while the inquisition is in force.[55]

Undue advantage to one party.—The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, include pover-

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47 *U Aung Ye* v. *Ma E Mai* 1932 A.R. 24; 137 I.C. 766; *Tilok Chand* v. *Mahandu* 1933 A.L. 458; 144 I.C. 741; *Mst. Hazrabi* v. *Mst. Fatmabi* 1938 A.N. 204; 177 I.C. 80. Medical evidence is almost essential: *Kanhaiyalal* v. *Harsingh* (1944) Nag. 698, 1944 A.N. 232; *Chunilal* v. *Chandra,* 1953 A. Asm. 94.

48 *Re Walker* (1905) 1 Ch. 160; *Re Marshall* (1920) 1 Ch. 284 (not a lunatic so found but a receiver appointed).

49 *Subramanya Sastri* v. *Lakshminarasamma* (1958) A.A.P. 22.

50 *Flax Lands Development Ltd.* v. *Joll* (1926) Gazette L.R. 470 (N.Z. case); Mc Garvie & Pannam. Cases & Materials on Contract page 638 (1966 Edn.) Australian; *Bromley* v. *Ryan,* (1956) 99 C.L.R. 362, 405; *Cooke* v. *Clayworth,* 34 E.R. 222 (inadequacy of consideration). See p. 120.

51 *Sayad Muhammad* v. *Fatteh Muhammad* (1894) 22 I.A. 4, at p. 10; 22 Cal. 324; *Durga Bakhsh Singh* v. *Mirza Muhammad Ali Beg* (1904) 31 I.A. 235; *Subramanya Sastri* v. *Lakshminarasamma* (1958) A.A.P. 22.

52 *Gibson* v. *Wright* (1954) 91 C.L.R. 423.

53 *Inder Singh* v. *Parmeshwardhan Singh* (1957) A.P. 491; See *Subramanya Sastri* v. *Lakshminarasamma* (1958) A.A.P. 22.

54 *Hall* v. *Warren* (1805) 9 Ves. 605; 7 R.R. 306, to which *Snook* v. *Watts* (1848) 11 Beav. 105, adds nothing material; *Mohanlal Madangopal* v. *Vinayak* 1941 A.N. 251; 196 I.C. 660.

55 *Re Walker* (1905) 1 Ch. 160, C.A. Of a will it is otherwise for the reason explained under S. 23 (other rules of law in force in India), *infra*.

ty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance and explanation are necessary. The common characteristic seem to be that they have the effect of placing one party at a serious disadvantage *vis-a-vis*- the other.[56]

Drunkenness and Specific Performance.—Mere drunkenness affords no ground for resisting a suit to enforce a contract. But where the judgment of one party was, to the knowledge of the other party, seriously affected by drink, equity will generally refuse specific performance at the suit of the other. And, where the court is satisfied that a contract disadvantageous to the party affected has been obtained by "drawing him in to drink" or that there has been real unfairness in taking advantage of his position, the contract may be set aside.[57] Specific performance was refused in the case of a sale where the seller had been indulging in bouts of drunkenness, the consideration was inadequate, at the time of contract of sale for £25,000; £5 was paid as deposit; the consideration was payable in more than four years and the interest thereon was only 4% p.a.[58]

In *Pitt* v. *Smith*[59] it was held that a person in a state of complete drunkenness "has no agreeing mind". In a later case it was held that if a party was drunk when he signed an agreement the document is a nullity.[60] It has now been held that equity has a wider jurisdiction to set aside an unfair or unconscionable transaction entered into by a person affected by drink.[61]

According to another well known author[62] a liability on a contract cannot be avoided if a person's commercial judgment was befuddled at the time of the contract but equity will not enforce a contract by specific performance where a party has taken advantage of another's intoxication.[63] But in England the contract is voidable if the latter could not understand the transaction and the other party knew[64] it unless it is ratified during a period of sobriety.[65] But a drunken person is liable for necessaries supplied to him while suffering from incapacity to contract.[66] According to Indian law the contract would be void, it is submitted, and therefore unenforceable.

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

Apparent and real consent.—The language of this section is, on the face of it, more of a judicial or expository than of a legislative kind. As an authoritative definition it does not seem to define very much. It would need some courage to maintain that persons can be said to consent when they do not agree upon the same thing, or that if they do not agree in the same sense they can be said to agree in any sense at all.

If the section is to cover all kinds of contracts, as presumably it does, the word "thing" must obviously be taken as widely as possible, though it seems most appropriate where the contract has to do with corporeal property. We must understand by "the same thing" the whole content of the agreement, whether it consists, wholly or in part, of delivery of material

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56 *Bromley* v. *Ryan* (1956) 99 C.L.R. 362, 405; *Cooke* v. *Clayworth* 54 E.R. 222 (inadequacy of consideration).
57 *Bromley* v. *Ryan* (1956) 99 C.L.R. 362, 405, See n. 34, p. 119.
58 *Bromley* v. *Ryan* (1956) 99 C.L.R. 362, 406. See n. 34, p. 119.
59 (1811) 3 Camp. 33, 13R.R. 741.
60 *Fenton* v. *Holloway* (1815) 1 Stark 126.
61 *Cooke* v. *Clayworth* (1811) 18 Ves. 12; *Butler* v. *Mulvihill* (1823) 1 Bligh 137; *Wiltshire* v. *Marshall* (1866) 14 L.T. (N.S.) 396; *Bromley* v. *Ryan* (1956) 99 C.L.R. 362; Chitty: On Contract (24th Ed.) para 545.
62 Treitel: Outlines of the Law of Contract (2nd Ed.) P. 206.
63 *Malins* v. *Freeman* (1837) 2 Keen 25, 34.
64 *Gore* v. *Gibson* (1843) 13 M.&.W. 623.
65 *Mathews* v. *Baxter* (1873) L.R.8 Exch. 132.
66 Treitel: Outlines of the Law of Contract (2nd Ed.) p. 206.

objects, or payment, or other executed acts or promises. The phrase comes originally from the New York Civil Code, but it has, at all events, high judicial sanction, and the passage in which it was used by the late Lord Hannen, in the year before this Act was passed, is perhaps the best commentary on the general significance of the present section:—

"It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: *Raffles* v. *Wichelhaus*.[67]

"But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott* v. *Littledale*.[68]

"But if in the last mentioned case the purchaser, in the course of the negotiations preliminary to the contract, has discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock[69] cited from Paley,[70] that a promise is to be performed 'in that sense in which the promisor apprehended at the time the promisee received it,' and may be thus expressed: 'The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it.' And in considering the question in what sense a promisee is entitled to enforce a promise it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent.[71] It is a question of construction whether the execution of a further contract is a condition or term of the contract or a mere expression of a desire of the parties as to the manner in which the transaction already agreed to will in fact go through".[72]

Students and young practitioners must be warned not to exaggerate the working importance of cases which are quoted and discussed for the very reason that they are exceptional. Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words; and that effect must be determined, if necessary, by the Court, according to the settled rules of interpretation. Whoever becomes a party to a written contract "agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the

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67 2 H. & C. 906; 133 R.R. 853. This is a very peculiar case of an equivocal term understood in different senses by the parties. There were two ships of the same name sailing at different times. The decision was on the pleadings, so that the questions of fact which might arise in the proof of such a defence were not and could not be considered.

68 8 E. & B. 815. (Note that the sale was of a specific cargo, and the seller misled the buyer, though innocently. If any one was entitled to set aside the contract, it was the buyer.)

69 Charles Pollock, then Q.C., afterwards a Baron of the Court of Exchequer and a member of the Exchequer and Queen's Bench Divisions of the High Court of Justice (died 1897).

70 Moral and Political Philosophy, Book III, Chap. V. Paley's rule, however, is not quite correct. The true test is not what either promisor or promisee actually thought, but the sense in which the promise would reasonably be understood by the promisee: Whately's note to Paley, *l.c.*, and *per* Blackburn J. in *Fowkes* v. *Manchester and London Assurance Association* (1863) 3 B. & S. 917, 929; *cp.* L.Q.R. xxi, 219, 537. See also under s.7.

71 *Per* Hannen J., *Smith* v. *Hughes* (1871) L.R. 6, Q.B. 597, at p. 609.

72 *Per* Parker J., in *Von Hatzfeldt Wildenberg* v. *Alexander* (1912) 1 Ch. 284, 288; appd. in *Hukam Chand* v. *Ram Bahadur Singh* (1924) A.PC. 156; 51 I.A. 208; *Harichand* v. *Govind* (1923) A.PC. 47; 50 I.A. 25; *Currimbhoy & Co. Ltd.* v. *A. Creet* (1933) A.PC. 29; 60 I.A.

instrument," whatever meaning he may attach to it in his own mind.[73] Exceptions to this rule exist, but they are admitted only for special and carefully limited reasons.

Warning is also still needed, having regard to the language current in all but the most modern text-books, against the habit of using the word "mistake" as if it denoted any general legal principle, or was capable, taken alone, of explaining any departure from the normal grounds of decision.[74]

The cases of mistake so far discussed by the learned authors have all been instances of what has been called mutual mistake, that is where the parties have misunderstood one another. For such a mistake to render an agreement void the mistake must first be as to a term in the agreement. If *A* buy oats believing them to be old oats when in fact they are new oats, *A* cannot plead that the agreement is void for mistake: *A* must prove that he believed that the seller warranted them to be old oats. The difference, as Blackburn J. put it in *Smith* v. *Hughes,*[75] is between buying a horse believed to be sound, and buying a horse believed to be warranted sound. The former case is one of mistaken motive, giving no relief to the disappointed buyer, whereas in the latter case the buyer has proved the first essential in establishing operative mutual mistake. Secondly the mistake as to a term in the agreement must either be known to the other party, or reasonable in the circumstances. *Scriven* v. *Hindley*[76] is a case where the mistake was reasonable in the circumstances. There are a buyer purchased tow at an auction, believing he was buying hemp, a more valuable commodity. The Court held that there was no contract: the mistake was reasonable in the circumstances, as the catalogue was misleading, and also it was unique for hemp and tow to bear the same shipping marks. This case may be contrasted with *Van Praagh* v. *Everidge,*[77] where the defendant, at an auction, bid for lot 1 when he believed that lot 2 was being offered, and the Court decreed specific performance of the agreement to buy lot 1, there being nothing to mislead, and the auctioneer being unaware of the defendant's misapprehension, which was probably due to his deafness.

If both parties are behaving reasonably, but have different things in mind, as in *Raffles* v. *Wichelhaus (supra),* there is no contract: there the Court, considering the matter objectively, was unable to determine which ship was the contract ship. Owing to the mistake of one party an offer may be innocently accepted in a different sense from that in which it was intended by the offeror and the terms in which the contract is expressed may suffer from such latent ambiguity that it is impossible to say that the conduct of the parties points to one solution rather than another. ...The contract will be void because the terms of the offer and the acceptance did not coincide.[78]

It is sometimes stated that the mistake as to a term in the agreement must be a mistake as to a fundamental term, before the Court will hold the agreement void. In *Smith* v. *Hughes (supra),* Blackburn J. lays down no such requirement, but Cockburn C.J. does speak of essential terms,[79] and this is the better view, which finds support from the judgment of Blackburn J. himself in *Kennedy* v. *Panama Royal Mail Co.*[80]

Ambiguity.—Sometimes an apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are in fact extremely

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73 Per Lord Watson, *Stewart* v. *Kennedy* (1890) 15 App.Ca 108, 123; *Sunitibala Debi* v. *Manindra Chandra Roy,* 1930 A.P.C. 217; 52 Cal. L.J. 435; 127 I.C. 739; *Sathappa Rai* v. *Santhiraja* (1938) 1 Mad. L.J. 676; 178 I.C. 563; 1938 A.M. 426.

74 Sir W. Anson's pages on this subject (Law of Contract, 20th Ed., Chap. V, 22nd Ed., Chap. VIII) should be carefully read by all students. They are the most concise exposition to be found in English books of repute, of which this is one of the most accurate.

75 (1871) 6 Q.B. 597, 608. This is the old and new oats case.

76 (1913) 3 K.B. 564.

77 (1902) Ch. 266.

78 Anson: Law of Contract (22nd Edn.) 269. Cited with approval in *Alampi* v. *Swartz* (1963) 38 D.L.R. (2nd) 300.

79 *Supra,* at p. 606

80 (1867) L.R. 2 Q.B. 580, 587.

rare. It usually turns out either that the terms have an ascertained sense by which both parties are bound, and there is a contract which neither can dispute, whatever either of them may profess to have thought, or that, when the facts are established, there was really never a proposal accepted according to its terms, and therefore the conditions of a binding contract were not satisfied. Many of the cases cited in the books under the head of mistake belong to the latter class, as where a broker employed to sell goods delivered to the intending vendor and the intending purchaser two sale-notes describing goods of different qualities.[81] "The contract" said the Court, "must be on the one side to sell, and on the other side to accept, one and the same thing." No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake. If bought and sold notes show a material variation, neither of them nor both of them taken together can be relied upon for the purposes of proving the terms of the contract and if the two notes agree they would constitute a binding contract.[82] In another case the defendant wanted to order three rifles by telegraph, and a blunder in transmitting the message turned *three* into *the,* which the plaintiff naturally took as referring to the number of *fifty* mentioned in a previous letter. Here it was held that the telegraph clerk had no authority to send the message except as it was delivered to him, so that the message as communicated to the plaintiff was not the defendant's offer at all.[83] This, again, has really nothing to do with mistake in point of law. It was immaterial whether the wrong message was sent by the clerk's mistake, or by fraudulent alteration, or through some external accident, such as a thunderstorm, affecting the instruments. Similarly if the addressee of a cipher or code message conveying a proposal misreads the proposal not unreasonably, and accepts it according to his own understanding, he cannot be held bound to the contract which the proposer intended. If the terms are really ambiguous there is nothing in such a case which either party can enforce.[84]

Fundamental error.—In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may have been given under a mistake, which the party is not precluded from showing, and which is so complete as to prevent the formation of any real agreement "upon the same thing." Such fundamental error may relate to the nature of the transaction, to the person dealt with, or to the subject-matter of the agreement.[85] Acceptance of an offer must be in the same sense in which it was made.[86]

A mutual mistake as to some fact which by the common contention of the parties to a contract, whether express or implied, constitutes the underlying assumption without which the parties would not have made the contract they did, which, therefore, affects the substance of the whole consideration, is sufficient to render the contract void.[87]

As to the nature of the transaction.—A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled, not only to set it aside against the other party on the ground of any fraud or misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by any one. In an English case the defendant had purported to endorse a bill of exchange which he was told was a guaranty. The plaintiff was a subsequent holder for value, and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action. But the Court held that his signature, not being intended as an endorsement of a bill of exchange, or as a signature to any negotiable instrument at all, was wholly inoperative, as much so as if the signature had been written on a blank piece of paper

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81 *Thornton* v. *Kempster* (1814) 5 Taunt. 786; 15 R.R. 658.

82 *Radhakrishna Sivadutta Rai* v. *Tayeballi* (1962) Supp. (1) S.C.R. 81; 1962 A.SC. 538; *John Cowie* v. *William Remfry* (1845) 3 Moo. I.A. 448; 5 Moo P.C. 232; *Sievewright* v. *Archibald* (1851) 117 E.R. 1221; 17 Q.B. 103; *Ah Shain Shoke* v. *Moothia Chetty,* 27 I.A. 30; 27 Cal. 403 (P.C.); *Fort Gloster Industries* v. *Sethia Mercantile (P)Ltd.* (1968) A.SC. 1308.

83 *Henkel* v. *Pape* (1870) L.R. 6 Ex. 7.

84 *Falck* v. *Williams* (1900) A.C. 176, a decision of the Privy Council on very peculiar facts.

85 *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161; (1931) All E.R. Rep. 1.

86 *Bhagwandas* v. *Girdharilal* (1966) A.SC. 543.

87 *Bell* v. *Lever Bros. Ltd.,* 1932 A.C. 161; 1931 All E.R. Rep. I; *U.P. Government* v. *Nanboomal* (1960) A.A. 420; Cheshire & Fifoot: Law of Contract (6th Ed.) 188-9.

first, and a bill or note written on the other side afterwards.[88] There are much older authorities showing that if a deed is falsely read over to an illiterate man, and he executes the deed relying on the false reading as being the true substance of the transaction, his act is wholly void.[89]

We may expect to find fraud as an element in cases of this class. But it is not the decisive element. A signature attached to a document supposed to be of a wholly different kind, or not to contain a clause so important as substantially to alter its character, is invalid unless the signor is estopped by negligence from denying that he understood what he was signing, and this "not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended".[90] Neither is fraud a necessary element. The principle was applied by the High Court of Bombay, while this Act was still recent, to a case[91] where, in very peculiar circumstances, there was a misrepresentation by inadvertence, but no question of fraud. There the plaintiffs, who were creditors of the defendants, sued to have the signature of their agent to a composition deed cancelled, and to have it declared that the deed was not binding on the plaintiffs. The deed was signed under these circumstances: the defendants' firm had suspended payment, and at a creditors' meeting it was resolved that the business of the defendants' firm should be wound up by voluntary liquidation under the supervision of a committee. This resolution was confirmed at a subsequent meeting, and it was further resolved that a composition deed should be prepared in pursuance of the above resolutions. No mention was made at either of the meetings of any release of the claims of the creditors. After a few days a deed was tendered by one of the defendants' firm to the plaintiffs' agent for execution. He was then engaged with urgent English mail business, and he declined to sign it without being able to read it. The debtor then earnestly pressed him to execute the document at once, stating that it was of the utmost importance that no time should be lost, and adding that the deed was nothing more than an assignment to trustees for the benefit of creditors as agreed to at the creditors' meeting. Upon the faith of that assurance the plaintiffs' agent executed the deed. As a matter of fact the deed contained a release by the creditors to the debtors. As soon as the plaintiffs' agent came to know of this he repudiated his signature and refused to be bound by the deed. On behalf of the plaintiffs it was contended that the deed, so far as it operated as a release, was a different deed from that which the plaintiffs' agent intended to execute, for he believed he was signing a deed for the benefit of the creditors, whereas in fact it was for the benefit of the debtors, and that his signature could not therefore be held to be a consent to its contents. This argument was upheld, and it was declared that the deed was not the deed of the plaintiffs, but void *ab initio* and a nullity so far as it purported to operate as a release to the debtors. The Court proceeded further to hold that the transaction was brought about by misrepresentation within the meaning of s.18, cl. 2 (which see below). It is difficult to see why sub-s. 2 was more in point than sub-s. 1; but in any case it would seem that, having found that the supposed contract was void because there was no contract at all, the Court had no need to consider whether or not the consent, if any, was free within the meaning of s.14.[92] In a Calcut-

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88 *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704. It has been observed that it is arguable that the case was not one of *non est factum* at all, since the defendant was assured he was signing a guarantee, whereas in fact he put his signature to an endorsement of a bill of exchange, which *is* a guarantee for many purposes: 37 L.Q.R. 514, 39 L.Q.R. 131. 20 Can. Bar. Rev. 748. 61 L.Q.R. 194.

89 *Thoroughgood's Case,* 2 Co. Rep. 9 b, and other books cited in *Foster* v. *Mackinnon* (to be used with some caution at this day).

90 *Foster* v. *Mackinnon,* L.R. 4 C.P. 704, at p. 711. Followed in *Sarat Chandra* v. *Kanai Lal,* 26 Cal. W.N. 479, 1921 A. Cal. 786; *Raja Singh* v. *Chaichoo Singh,* 1940 A. Pat. 201, 185 I.C. 816; *Appanna* v. *Venkatappdu,* 1953 A.M. 611.

91 *Oriental Bank Corporation* v. *Fleming* (1879) 3 Bom. 242.

92 It will be seen in this case that the mistake as to the nature of the transaction was caused by the misrepresentation of the other contracting party. Sir W.R. Anson suggests (Principles of the Law of Contract, p. 156, 17th ed.) that in such a case the contract is only voidable for misrepresentation, and that it is void on the ground of mistake only if the mistake is brought about by the act of a third party. This view is not supported by any English authority, and is contrary to *Oriental Bank Corporation* v. *Fleming*. The element of truth in it is that *A*, who has misled *B*, however innocently, is estopped from disputing the validity of the contract as against *B*, if it turns out to be *B*'s interest to affirm it. But still

ta case, where a document was signed only on the first page, but was not signed on the other pages, the executant having discovered that it was not in accordance with the terms previously agreed upon, it was held that the document was a nullity.[93]

The decision in *Oriental Bank Corporation* v. *Fleming (supra),* although supportable on the ground that the deed was voidable for misrepresentation, is, in so far as it holds the deed void *ab initio,* contrary to English decisions on *non est factum,* which require a mistake not merely as to the contents, but as to the character of the instrument signed. *Banku Behari Shaha* v. *Krishto Gohindo (supra)* is open to the same objection, and is not supportable on the alternate ground, as the plaintiff had to prove the deed void not merely voidable. The English doctrine is illustrated by *Howatson* v. *Webb.*[94] There *H* took a lease of land in the name of his employee *D.* When *D* was leaving *H*'s service, *H* required him to execute a transfer of the leasehold property in *H*'s favour. *D* of course agreed, but the document on which *H* procured *D*'s signature was in fact a mortgage to *W,* acknowledging that *D* had received £1,000/- from *W,* a client of *H* for whom *H* had agreed to find an investment. *H* retained the £1,000/- advanced by *W,* and paid back only £200/-. *P, W*'s assignee, ultimately sued *D* for the balance of £800/-. *D* pleaded *non est factum,* but the Court of Appeal held *D* bound, although he was a victim of *H*'s fraud, seeing that the mistake was only as to contents: *D* realised the document dealt with the leasehold property, merely believing it to be a deed of transfer instead of a mortgage deed. In Canada the High Court of Ontario has,[95] however, reached a decision similar to that of Sargent J. in the *Fleming Case (supra).* There the plaintiff's husband had executed a policy of life insurance for her benefit, to secure her a lump sum of $1,000/- and an annuity of $50/- per month. Later the husband, being financially embarrassed, wanted to borrow from the insurance company on the policy. Not wishing to disclose his financial difficulties to his wife, he obtained her signature by misrepresenting that the policy was being altered to provide her with a lump sum of $10,000/-, in place of the annuity and the lump sum of $1,000. After the husband's death, McRuer C.J. held that the charge in favour of the company was absolutely void so far as the plaintiff was concerned: it was a case of *non est factum,* she believing the document she was signing conferred a benefit upon her, while in fact it created an immediate obligation. It seems that in England this would have been held to be a mistake merely as to contents, rather than as to the character of the document.

It has been mentioned that a signatory may be estopped by negligence from pleading *non est factum.* The Court of Appeal has however held in *Carlisle & Cumberland Banking Co.* v. *Bragg,*[96] that a signatory can treat as a nullity a document in a category different from the one he intended to sign, even though he has been negligent, unless he has in fact signed a negotiable instrument. This case has been much criticised,[97] mainly on the ground that it is arbitrary and illogical to hold that the need for the signatory to take care and his consequent liability should ever depend upon the document he has in fact signed, irrespective of what he believed he was signing, when *ex hypothesi* he is ignorant of its nature.[98]

Consent and estoppel.—The Indian Courts have followed English authority in holding that, in normal circumstances, a man is not allowed to deny that he consented to that which he has in fact done, or enabled to be done with his apparent authority.[99] Thus when a person en-

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the transaction is void in the sense that even innocent third persons cannot acquire rights under it against *B*'s will.

93 *Banku Behari Shaha* v. *Krishto Gohindo* (1903) 30 Cal. 433.

94 (1908) 1 Ch. 1. Followed in *Mohammed Hussain* v. *Fida Hussain,* 1952 A. Punj. 224.

95 *Marks* v. *Imperial Life Assurance Co. of Canada* (1949) 1 D.L.R. 613.

96 (1911) 1 K.B. 489.

97 28 L.Q.R. 190; Can Bar. Rev. 661.

98 Professor Goodhart in 46 L.Q.R. 263 argues that *Foster* v. *Mackinnon* is only a weak authority for the view that negligence defeats a plea of *non est factum* where a negotiable instrument has in fact been signed.

99 But where a person was told that a stipulation in a written contract would not be enforced, it was held that she could not be said to have assented to it and therefore that the document did not represent the real agreement between the parties: *Tyagaraja Mudaliar* v. *Vedathanni* (1935) 63 I.A. 126; 59 Mad. 446; 160 I.C. 384: 1936 A.P.C. 70. Where a person signed after stating that he had understood the terms, he was bound by the contract: *Mitha Shah* v. *Devi Dass,* 1944 A. Pesh. 23. See also *Rameswar* v. *Nurul Huq,* 1949 A.F.C. 78.

trusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the good faith of the transaction, it is presumed that the bond was drawn in accordance with the obligor's wishes and instructions.[1] As to inchoate stamped negotiable instruments provision is made by the Negotiable Instruments Act, 1881, s. 20. which is as follows:—"Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount conveyed by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder." As to the existence or non-existence of apparent authority in particular circumstances very delicate questions may arise under the law and practice of English company business. It would not be useful to pursue these here.[2]

Estoppel by Conduct.—Where an owner entrusted his property (a car) to the care of another person and that person by his conduct albeit intentionally led a third person to believe that the owner had no title or had a limited title and the third person acted on that belief, the owner would be estopped from asserting his title against the third person if it would be unjust or inequitable to allow him to do so. Therefore where HPI was set up as an organisation to give information about hire-purchase of vehicles and the plaintiff was a member of it and it gave the information of no hire-purchase of the plaintiff's car, the information was attributable to the plaintiff and he was bound by it.[3]

Parda-nishin cases.—It might be possible to refer to this head some of the cases in which gifts or other acts, practically amounting to acts of bounty, of *parda-nishin*[4] women have been set aside. But it is certainly not necessary for this purpose to show that the nature of the act was not understood at all. The jurisdiction rests on a presumption of imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *parda-nishin* woman to show that the deed was explained to her and understood by her,[5] so that the ordinary burden of proof is reversed. These cases accordingly belong to the head of undue influence.

Contract inter praesentes.—"There is no branch of law of contract which is more uncertain and difficult" than that involved in cases where the question of identity of the promisor is involved.[6] The test is "How ought the promisee to have interpreted the promise" and not Pothier's test "What did the promisor intend when he made the promise" which if taken literally seems to involve inquisition into the "feelings" and into the motives of the promisor.[7]

Error as to the person of the other party.—There can be no real formation of an agreement by proposal and acceptance unless a proposal is accepted by the person or one of a class or number of persons to whom it is made. Similarly the acceptance must be directed to the proposer, at least the acceptor must have so acted as to entitle the proposer to treat the acceptance as meant for him.

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1 *Wahidunessa* v. *Surgadass* (1879) 5 Cal. 39.
2 *George Whitechurch Ltd.* v. *Cavanagh* (1902) A.C. 117; *Ruben* v. *Great Fingall Consolidated* (1904) 2 K.B. 712, C.A.
3 *Moorgate Mercantile Co. Ltd.* v. *Witchings* (1975) 3 All E.R. 314, 323; (C.A.) *Att. General* v. *Cotton* (1916) 2 K.B. 193, 203; *Eastern Distributors* v. *Goldring* (1953) 2 All E.R. 525, 529. applied.
4 *The current spelling nashin* is a mere blunder. It does not even represent a current mispronounciation.
5 *Annoda Mohun Rai* v. *Bhuban Mohini Debi* (1901) 28 Cal. 546, 548.
6 *Ingram* v. *Little* (1961) 1 O.B. 31; (1960) 3 All E.R. 332, 338; *Fawcett* v. *Star Car Sales Ltd.* (1960) N.Z.L.R. p.406; Goodhart: L.Q.R. Vol. 57, pp.228, 240.
7 *Ingram* v. *Little* (1961) 1 Q.B. 31; (1960) 3 All E.R. 332, 340, per Pearce L.J. Goodhart: (1941) 57 L.Q.R. 228, 244. (It is certainly time that Pothier's statement was firmly and finally buried.)

Mistake as to the identity of the person with whom the contract is made[8] may often be of no importance. For instance an auctioneer who accepts a bid at a public auction is generally not concerned with the identity of the bidder nor can one, who invites an offer by advertisement, say that he was mistaken as to the identity of the acceptor.[9] But a person cannot constitute himself a contracting party with one, whom he knows or ought to know, has no intention of contracting with him.[10] A mistake as to the person dealt with prevents the contract from coming into existence for want of assent.[11]

Fundamental Fact.—But Barwick C.J. held that the effect of the mistake as to the identity of the borrower in the case of a mortgage is not fundamental to the transaction.[12]

Impersonating by one party to a purported contract makes the contract void. So that if the seller believes that he is entering into a contract with the person impersonated and the impersonator knows it then there is no contract.[13] Mistake as to the identity of a person is of two kinds—(i) where the parties are dealing with each other from a distance and (ii) where the parties are in each others' presence.

Parties at a distance.—Three cases illustrative of the former are: *Boulton* v. *Jones;*[14] *Upton-on-Severn R.D.C.*v. *Powell*[15] and *Cundy* v. *Lindsay.*[16]

In *Boulton* v. *Jones,*[17]

there had been dealings between Jones and one Brocklehurst against whom Jones had a set off and who had recently transferred his business to his foreman Boulton. Jones sent an order to Brocklehurst which was complied with by Jones without disclosing the change of ownership. Jones refused to pay.

The court held he was not liable; the rule being that if *A* intends to contract with *B, C* cannot give himself any right under it. But the buyer would be bound as on a new contract if after notice he treated the sale as subsisting.[18] But where a general offer is made, e.g. by advertisement, the offeror cannot say he was mistaken as to the identity of the acceptor.[19]

In *Upton-on-Severn R.D.C.* v. *Powell*[20] the defendant sent for the fire brigade of a wrong area and the call was accepted in good faith;

the defendant was held contractually liable to pay.

In *Cundy* v. *Lindsay,*[21]

one Blenkarn pretending to be the respectable firm Blenkiron & Co. fraudulently induced the respondents to send the goods to his address and then sold the goods to the appellant. The respondents sued for the return of the goods.

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8 Goodhart: (1941) 57 L.Q.R. 228; Wilson: (1954) 17 Mod. L.R. 515; Unger: (1955) 18 Mod. L.R. 259; Hall: (1961) Camb. L.J. 86.

9 *Dennant* v.*Skinner* (1948) 2 K.B. 164; *Ingram* v. *Little* (1961) 1 Q.B. 31, 57; (1960) 3 All E.R. 332; *Smith* v. *Wheatcraft* (1878) 9 Ch.D. 223.

10 Anson; Law of Contract (22nd Ed.), p. 274.

11 Kerr on Fraud and Mistake (7th Ed.) 156; *Fawcett* v. *Star Sales Ltd.* (1960) N,Z.L. 406,414 (Gresson P.) but contra, pp. 426, 430 (Majority). Also contra per Barwick C.J. in *Porter* v. *Latec Finance Ltd.* (1964) 111 C.L.R. 177; 38 A.J.L.R. 184, 187; Anson: Law of Contract (22nd Ed.) p.274.

12 *Porter* v. *Latec Finance (Q.L.D.) Pty. Ltd.* (1964) 111 C.L.R. 177; 38 A.J.L.R. 184. 187.

13 *Ingram* v. *Little* (1961) 1 Q.B. 31; (1960) 3 All E.R. 332; but see Devlin L.J., p. 338; *Philips* v. *Brooks Ltd.* (1919) 2 K.B. 243; *Lake* v. *Simmons* (1927) A.C. 487; (1927) All E.R. Rep. 49 and *Fawcett* v. *Star Sales Ltd.* (1960) N.Z.L.R. 406 refd to; *Porter* v. *Latec Finance (Q.L.D.) Ltd.* (1964) 111 C.L.R. 177, 194; Dr. Goodhart: (1941) L.Q.R. 228.

14 (1857) 2 H. & N. 564; (1857) 6 W.R. 107 (Boulton knew of the set off).

15 (1942) 1 All E.R. 220

16 (1878) 3 App. Cas. 459.

17 (1857) 2 H. & N. 564, 565; 115 R.R. 695 folld. by the Supreme Court of Massachusetts in *Boston Ice Co.* v. *Potter,* 123 Mass. 28 (1877). See Benjamin on Sale (6th Edn.) 119. 120, where the learned author's suggestion of some different equitable rule is not supported by his latest editors. Sir Frederick Pollock was never able to accept it.

18 See *Mitchell* v. *Lapage* (1816) Holt N.P. 253; 17 R.R. 633

19 *Dennant* v. *Skinner* (1948) 2 K.B. 164; (1948) 2 All E.R. 29; *Ingram* v. *Little* (1961) 1 Q.B. 31, 57; (1960) 3 All E.R. 332.

20 (1942) 1 All E.R. 220.

21 (1878) 3 App. Cas. 459, 465. Quaere: What would have been the result if by some lucky accident the

The House of Lords held that the contract never came into existence and was void *ab initio* and not merely voidable and therefore the respondents were entitled to succeed. Similarly, in a Punjab case[22] where *A* entered into a contract with *B*, a brother of *C*, on the representation of *B* that he was *C*, the then Chief Court of the Punjab held that the case came within the section and there was no contract between *A* and *B*. But if the mistake is not as to identity of the other party but as to his attributes, e.g. solvency or social position, then the mistake is insufficient. In *Edridge's case*[23] the plaintiff supplied metal wire to Wallis who sent the order under the name of a non-existing firm Hallam & Co., making it appear a substantial firm with a large factory. The contract was held not void on the ground of mistake as the plaintiffs had contracted with him. The purchaser from Wallis got a good title as there was no mistake as to identity.[23]

Mistake inter praesentes.—A more difficult problem is raised by cases where transactions are between persons in each others' presence. In such cases the party contracting has to prove not only that he did not intend to contract with the person with whom the contract was made but with a third identifiable person with whom he intended to make the contract.[24]

In *Ingram* v. *Little*,[25]

a rogue calling himself Hutchinson came to two sisters, the Misses Ingrams and offered to buy their car which was advertised for sale. He offered to give them a cheque which they refused. Then one of the sisters went to the Post Office and ascertained from the telephone directory that there was such a person as Hutchinson at the address given by the rogue. The cheque was accepted and the car taken away by the rogue, and sold to a third person who took it in good faith. The cheque was discovered to be worthless.

The contract was held to be void on the ground that it was with Hutchinson that the ladies intended to deal and not with the person who was physically present before them and the swindler knew this. The offer was therefore one which was not capable of being accepted by him. But in *Fawcett* v. *Star Car Sales Ltd.*[26] where the facts were similar, the New Zealand Court of Appeal held that the sale passed the property to the buyer and the sale was not void but voidable. Similarly in *Lewis* v. *Averay* where the facts were similar the judgment was given for the *bona fide* purchaser for value but this judgment was reversed.[27]

In *Hardman* v. *Booth*,[28]

one of the plaintiffs was fraudulently persuaded by one Edward Gandell that he was a member of Gandell & Co. which in fact consisted only of Thomas Gandell.

It was held that there was no contract since plaintiff's offer was made to Thomas only and this Edward also knew.

In *Philips* v. *Brooks Ltd.*[29]

the rogue North went into a shop and inspected goods for a considerable time and selected some pieces of jewellery. He then wrote out a cheque saying "I am Sir George Bullough"—a person known by reputation to the plaintiff. He took away the goods and pledged them with the defendant who accepted them in good faith.

The plaintiff's action failed as it was held that the contract was with "the person present and identified by sight and hearing" and was not therefore void on the ground of mistake but voidable on the ground of fraud.

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goods had been delivered to Blenkiron & Co.? It seems they might have treated the goods as offered to them. They would not, of course, have been bound to accept them.

22 *Jagganath* v. *Secretary of State*, 21 P.R. 1886.

23 *King's Norton Metal Co.* v. *Edridge Merrett & Co. Ltd.* (1897) 14 T.L.R. 98; dist. in *Ingram* v. *Little* (1960) 1 All E.R. 332, 337; *Cf. Newborne* v. *Sensolid (Great Britain) Ltd.* (1954) 1 Q.B. 45; (1953) 1 All E.R. 708 (a contract with a company not registered a nullity).

24 Goodhart: (1941) 57 L.Q.R. 228; Unger: (1955) 18 Mod. L.R. 259.

25 *Ingram* v. *Little* (1961) 1 Q.B. 31; (1960) 3 All E.R. 332 (Devlin J. dissenting). Goodhart: (1941) 57 L.Q.R. 228 at p. 231 quoted with approval.

26 (1960) N.Z.L.R. 406 (Gresson P. Dissenting).

27 (1972) 1 Q.B. 198 (C.A.); (1973) 1 W.L.R. 510; (1973) 3 All E.R. 329.

28 (1863) 1 H. & C. 803.

29 (1919) 2 K.B. 243; see Goodhart: (1941) 57 L.Q.R. 228, 241 dist. in *Ingram* v. *Little* (1961) 1 Q.B. 31;

This case was distinguished in *Lake* v. *Simmons*[30] where it was pointed out that the misrepresentation by North of his identity had not occurred until after the sale had concluded and the property had passed. Dr. Goodhart has thus discussed *Philips* case:[31]

Did the shopkeeper believe that he was entering into a contract with Sir George Bullough and did North know it? If both answers are in the affirmative then it is submitted that there was no contract.

In *Lake* v. *Simmons*[32]

jewellery was entrusted by a jeweller to a customer who had purchased articles of small value and paid for them. She misrepresented herself to be the wife of a certain person and wanted to show the jewellery to her husband and another person for approval but she disposed it of for her benefit.

Her conduct was held fraudulent and she was guilty of larceny by trick and therefore the transaction was not within the exemption clause of an insurance policy. i.e. "loss by theft or dishonesty committed by... any customer ...in respect of goods entrusted to them by the assured."[32]

In *Lewis* v. *Averay*[33] a rogue appeared before Lewis who had a car to sell and purchased the car impersonating a film actor Richard Green and gave a cheque for £450 and signed it in the name of R.A. Green. He convinced the vendor by showing his special pass in the name of Richard A. Green with a photograph which was of the rogue himself. Being convinced the vendor gave the car and the log book and registration certificate to the rogue and the papers. The latter soon after sold the car to Averay a music student who paid £200/- for the car and he now pretended to be Lewis. The cheque in favour of Lewis was dishonoured and Lewis brought a suit claiming the car as his. The question before the Court was which of the two innocent persons must suffer. The Court of Appeal held in favour of the ultimate buyer Averay. Denning M.R. observed that Lewis should suffer because he made it possible for the rogue to commit the fraud. He further observed that when two parties have come to a contract the fact that one party is mistaken as to identity of the other does not mean that there is no contract. Further, when a deal is made between a seller and a buyer the presumption in law is that there is a contract in spite of fraudulent representation although such a contract is voidable for fraud, but it is a good contract till it is set aside. Not only *Philips* v. *Brooks*[34] but American cases[35] have held that "the Courts hold that if 'A' appeared in person before 'B' impersonating 'C' an innocent purchaser from 'A' gets the property in the goods against 'B' *Ingram* v. *Little*[36] was not followed by the Court of Appeal.

It is difficult to reconcile the decision in *Philips* v. *Brooks*[29] (1919) 2 K.B. 243 and *Ingrams* v. *Little*[29] (1961) 1 Q.B. 31. In the former, the shopkeeper at least of the existence of Sir George Bullough; in the latter, the plaintiffs had never heard of Hutchinson, and therefore there was less reason for attributing to them as intention to deal with him rather than with the person identified by sight and hearing. In all cases of this type, the vital factor in the mind of the seller is the ability of the buyer to pay, but there seems to be little substantial dif-

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(1960) 3 All E.R. 332; *Lewis* v. *Averay*, (1971) 3 All E.R. 907. (Sale to a rogue who posed as a famous actor. Sale not void but voidable as identity was not shown to be of vital importance. The mistake was as to credit-worthiness).

30 (1927) A.C. 487; dist. in *Rigby, John (Haulage) Ltd.* v. *Reliance Insurance Co. Ltd.* (1956) 2 Q.B. 468; (1956) 3 All E.R. 1, 6; and *Ingram* v. *Little* (1961) 1 Q.B. 31 at p. 71; (1960) 3 All E.R. 332.

31 *Philips* v. *North* (1919) 2 K.B. 243, question posed by Dr. Goodhart in (1941) 57 L.Q.R. 228, 240; Quoted by Seller L.J. in *Ingram* v. *Little* (1961) 1 Q.B. 31; (1960) 3 All E.R. 332, 338; but see Devlin L.J. (dissenting). But in *Lewis* v. *Averay* (1972) 1 Q.B. 198; (1971) 3 All E.R. 907 the C.A. approved *Philips* case (1919) 2 K.B. 243; (1918-19) All E.R. Rep. 241.

32 (1927) A.C. 487; (1927) All E.R. Rep. 49.

33 (1972) 1 Q.B. 198; *King Norton Metal Co. Ltd.* v. *Eldridge Merrett & Co. Ltd.* (1897) 14 T.L.R. 98 applied.

34 (1919) 2 K.B. 243; (1918-19) All E.R. Rep. 241.

35 The passage is from Corbin on Contracts Vol. 3 S. 602. appld.

36 (1961) 1 Q.B. 31, 61; (1960) 3 All E.R. 332, 344 not folld.

ference between a mistaken reliance upon the credit-worthiness of a non-existent person and of a person who indeed exists but of whom the mistaken party has never heard.[37]

No third party in existence.—A little more different problem is where there is no third person in existence, i.e. *A* makes a contract with *B* believing that *B* is not *B* and *B* knows of this error. The contract is not void *ab initio* but may be voidable by fraud.

In *Gordon* v. *Street*,[38]

one Isaac Gordon—a self-confessed extortionate and usurious money-lender under a concealed identity of Addison offered to lend money to the public. The defendant borrowed from him on a promissory note which he would not have done had he known the identity of the lender.

The contract was held voidable for fraud and not void.

In *Sowler* v. *Potter*,[39]

the defendant had previously been convicted under the name Ann Robinson of keeping a disorderly cafe. Concealing her identity under the name Ann Potter she took on lease the plaintiff's premises.

The contention of the plaintiff that the contract was void for mistake was upheld by Tucker J. The contract should have been held voidable.[40]

Mistake (contd.)

Where personal considerations enter into a contract error as to the person with whom the contract is made annuls the contract.[41]

Therefore where the plaintiff knew that the theatre would not contract with him by the sale of a ticket and yet he purchased one through and under the name of Pollock the plaintiff could not constitute himself a contractor with the theatre. If he was evicted there would be no breach of the contract.[42]

American and New Zealand Laws.—According to an American decision, *Edmunds* v. *Merchants' Despatch Transportation Co.*,[43]

"(i) if *A*, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to *A*. (ii) If *A*, representing himself to be a brother of a reputable merchant in a certain town buying for him, buys, in person, goods of another, the property in the goods does not pass to *A*."

In New Zealand the doctrine of mistake was not applied to a sale by a woman impersonating the true owner of the car.[44]

A car in that case was sold by Mrs. Fawcett to one Saint Merat who the very same day sold it to *Star Car Sales Ltd.* through a woman who purported to be Mrs. Fawcett. The cheque for price of the car issued by the buyer Saint Merat was dishonoured and Mrs. Fawcett got the car seized in execution of the judgment. *The Star Car Sales Ltd.* brought interpleader proceedings claiming the car; Mrs. Fawcett pleaded that the sale between *Star Car Sales Ltd* and the personator was void for mistake.

Gresson P. held the contract to be void for mistake as the transaction failed to bring about a concluded contract. The car was purchased under the mistaken belief that the seller was Mrs. Fawcett. Thus there was no *consensus ad idem*.[45] But the other two judges held

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37 Cheshire and Fifoot, The Law of Contract, 6th Edn., p. 212; *Levis* v. *Averay*, (1971) 3 All E.R. 907.
38 (1899) 2 Q.B. 641.
39 (1940) 1 K.B. 271.
40 Criticised by Denning L.J. in *Solle* v. *Butcher* (1950) 1 K.B. 671, 691; by Goodhart (1941) 57 L.Q.R. 228; Anson: Law of Contract (22nd Ed.) 282.
41 *Smith* v. *Wheatcroft* (1879) 9 Ch.D. 223, 230 quoting with approval Pothier: *Traite' des Obligations* 3.19. Fry on Specific Performance, s. 229. But see Goodhart: (1941) 57 L.Q.R. 228, 244. ("It is certainly time that Pothier's statement was firmly and finally buried.")
42 *Said* v. *Butt* (1920) 3 K.B. 497, 502.
43 (1883) 135 Mass. 283.
44 *Fawcett* v. *Star Car Sales Ltd.* (1960) N.Z.L.R. 406. (Gresson P. contra).
45 *Fawcett* v. *Star Car Sales Ltd.* (1960) N.Z.L.R. 406, 414, 426-430; Barwick C.J. in *Porter* v. *Latec Finance Pty. Ltd.* (1964) 111 C.L.R. 177; 38 A.L.J.R. 184, 187. See Kerr on Fraud and Mistake (7th Edn.) 156—(A mistake as to the person dealt with prevents the contract from coming into existence

against that view. North J. held it a case of false description and Cleary J. a case of agency.[46]

As to the subject-matter of the agreement.—It is quite possible for the parties to a contract to be under a common mistake of this kind. If the mistake is not common, it may happen, in very exceptional cases, that by reason of an ambiguous name, or the like, each party is mistaken as to the other's intention and neither is estopped from showing his own intention.[47] Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake, not common to both parties, only where it is induced by fraud or misrepresentation. We shall find (see below on s. 18) that wilful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances. If the mistake is common, it can seldom, if ever, be said that there was no consent. A simpler and more correct explanation is to say that there was an agreement subject to a condition understood or implied in the nature of the agreement itself, though not expressed, and that condition has not been fulfilled. It may be that at the date of the agreement the condition is already incapable of fulfilment by reason of some fact unknown to the parties, as in the case of an agreement for the sale of a horse which in fact is dead, or a specific cargo which in fact is lost. In that case no operative obligation ever arises under the agreement. But this may be the case with any conditional contract. The interposition of a time of suspense, during which it cannot be known whether there will be an operative contract or not, can make no difference to the legal nature of the transaction. This particular class of cases, however, is specially dealt with by s. 20 of the Act.

In many cases falling under the foregoing heads, though not in all, the same result may be arrived at by observing that there is no consideration for the promise which it is sought to enforce.

Coercion wholly excluding consent.—Coercion might possibly be such as not only to prevent consent from being free (ss. 14, 15), but to exclude any real or intelligent consent altogether. In two English cases marriages have been declared void, in extremely peculiar circumstances, on the ground of combined fraud and coercion having operated on the pretended wife to such an extent that the marriage was not her voluntary act.[48] No case of this kind is known to have occurred in the region of ordinary contract.

14. Consent is said to be free when it is not caused by—

"Free consent" defined.

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake subject to the provisions of sections 20, 21, and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Unfree consent.—Not only consent but free consent is declared by s. 10 to be necessary to the complete validity of a contract. The Act now proceeds to declare the meaning of this addition. Where there is no consent or no real and certain object of consent (*cf.* s. 29, below) there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully ex-

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for want of assent). Chitty: On Contract (22nd Edn). para. 216; (24th Edn.) para 297 (Contract was void *ab initio.*).

46 23 Can. Bar. Rev. 271, 381.

47 *Baffles* v. *Wichelhaus,* 8 E. & B. 815; *Falck* v. *Williams* (1900) A.C. 176, where an offer made by an ambiguous code message was accepted unconditionally, but in fact not in the proposer's sense, and there was no contract.

48 *Scott* v. *Sebright* (1886) 12 P.D. 21; *Ford* v. *Stier* (1896) P. 1, where the woman thought the ceremony was only a betrothal.

plained by the later sections referred to in the text. In one respect the language is open to objection. It seems, when read together with that of other relevant sections, to assume that there are cases in which a contract is voidable on the ground of mistake. We are not aware of any such cases. We have seen that certain kinds of mistake may exclude consent altogether. In such cases no real agreement is ever formed, or there is no real object on which the parties are agreed, and the seeming agreement is wholly void. Otherwise mistake, if not induced by misrepresentation or fraud, is inoperative. If there be any specific exceptions to this rule, the Act gives no clue to them; in fact, we do not believe there are any. The specific provisions of the Act, however, cover the ground sufficiently to avoid any danger of serious error in practice.

Since the learned authors wrote these words, the English Court of Appeal in *Solle* v. *Butcher*[49] has held a contract voidable on the ground of mutual mistake.[50] There *D* proposed to let a flat to *P*. It was doubtful whether the flat was subject to the Rent Restriction Acts, and a maximum rent of £140/- per annum. The parties believed that the flat had changed its identity because of rebuilding, and was no longer subject to this maximum. A lease for seven years was executed at a rent of £250/- per annum. The Court held that there had been no change of identity, and that the parties had been labouring under a mistake of fact. They granted rescission to *D* on the ground of mutual mistake.[51]

The decision purported to be based on equitable grounds, but it seems on the new equity that Denning L.J. has often advocated,[52] rather on established doctrine of the Chancery Courts. The Court relied on *Cooper* v. *Phibbs*,[53] where *A* agreed to take a lease of a salmon fishery for three years from *R*, but thereafter it transpired that *A* was already entitled to possession of the fishery as tenant in tail. The House of Lords viewed *A*'s request to be relieved from the lease with favour, but *R*, who was trustee of the estate, had spent large sums in obtaining an Act of Parliament to sanction diversion of the stream to decrease the height the salmon had to leap, and might have a lien on the property for his expenditure, which would be binding on the remaindermen who were not before the Court, and could not be the subject of adjudication in their absence. *A*'s petition was therefore stood over, with liberty to apply to bring the remaindermen as parties before the Court. It is not clear whether the Court regarded the lease as *prima facie* void or voidable. Their Lordships declare that the lease ought to be set aside, suggesting voidability, but Lord Cranworth, one of the two judges, observes that the rent must be repaid,[54] indicating that in his view the agreement was void, though it appears from the judgment of Lord Westbury[55] and from the actual order that no rent had been paid as the mistake had been discovered before any rent became due. The better view is that the agreement was void, and the case is no authority for any doctrine that contracts may be voidable in equity for mistake. This view is confirmed by the remarks in *Bell* v. *Lever Bros.* of Lord Atkin in the House of Lords,[56] and of Scrutton and Lawrence L.JJ. in the Court of Appeal.[57] All three learned judges dicuss *Cooper* v. *Phibbs* and say that the agreement was void. "See under s. 20 Mistake and under s. 19 *Restitutio in integrum* and under s. 13."

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49 (1950) 1 K.B. 671.

50 Sir Frederick Pollock has observed (*infra* Part II, Chapter III) that "mutual" is bad English for "common", where as here the parties do not mistake each other, but make the same mistake. Cheshire and Fifoot, Law of Contract, 3rd edn. 175 make the same point.

51 The advantage of rescission to *D* was that before the new lease, he could serve a notice on *P* under the Rent Restriction Acts making lawful increases in the rent of £140/- During the running of a lease such a notice would be ineffective.

52 In *Rose* v. *Pim* (1953) 2 Q.B. 450, 460, Denning L.J. indicates his readiness, had the facts permitted, to follow the doctrine of voidability for mutual mistake that he laid down in *Solle* v. *Butcher*. His view has been applied by the Supreme Court of Newfoundland in *O'Flaherty* v. *McKinlay* (1953) 2 D.L.R. 514, 518. In 69 L.Q.R. 291. Professor Goodhart however observes that this novel doctrine has found little support, and was held not applicable by Pilcher J. in *Harrison* v. *Bunten* (1953) 1 Q.B. 646.

53 (1867) L.R. 2 H.L. 149.

54 At page 164.

55 At page 171. See also p. 153 in the statement of facts.

56 (1932) A.C. at p. 218.

57 (1931) 1 K.B. at pp. 585, 591.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

"Coercion" defined

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at that time when or place where the act was done:

Extent of "Coercion" under the Act.—The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. In the original draft the word "coercion" is used but not defined. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract, or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at common law has been almost rendered obsolete[58] partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of Undue Influence.[59] Detaining property is not duress. Two singular cases of marriage under coercion have been cited under s. 13 above. As to repayment under s. 72 of money paid under coercion (not necessarily within the present definition), see the commentary on that section.

Duress.—To constitute duress of any kind there has to be coercion of will so as to vitiate consent.[60]

During the course of a struggle for power between 'A' and 'B' over 'L' Ltd., 'A' threatened 'B' on various occasions with death if 'L' Ltd. did not agree to pay a sum of money and purchase his shares. The evidence showed that 'B' was frightened by those threats, but they had not influenced him in executing a deed on behalf of 'L' Limited. 'B' sought a declaration that the deed was secured under duress and was void. The Privy Council[61] held that if a man threatens another with unpleasant consequences if he does not act in a particular manner he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible. They further held that 'A's' threats may have been unnecessary. but it would be unrealistic to hold that they played no part in making 'B' decide to execute the documents. The proper inference to be drawn from the facts found was that though it may be that 'B' would have executed the documents even if 'A' had made no threats and exerted no unlawful pressure to induce him to do so, the threats and unlawful

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58 In *Gnapp* v. *Petroleum Board* (1949) 1 All E.R. 980, the plaintiff sued the Board to recover money overpaid for short delivery of eleven gallons of petrol. The Board were the sole suppliers of petrol to retailers under war-time conditions. The provisions of sale precluded the plaintiff *G* from objecting to short delivery, and the Court held that the overpayment could not be recovered as *G* was not acting under duress, although he was compelled to accept the Board's terms if he wanted any supply of petrol at all.

59 This view is confirmed by reference to *Talbot* v. *Von Boris* (1911) 1 K.B. 854, one of the few cases where duress has been pleaded in this century: a plea of undue influence would have given the defendant just the same chance of obtaining relief.

60 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65. *Barton* v. *Armstrong* (1976) A.C. 104, 108; (1975) 2 All E.R. 465, 476-77 reld. on See also (1980) 54 ALJ 633.

61 *Barton* v. *Armstrong* (1976) A.C. 104; (1975) 2 All E.R. 465 (P.C.)

pressure in fact contributed to 'B's' decision to sign the documents and recommend their execution. The Privy Council made the declaration that the deeds in question were executed by 'B' under duress and were void so far as the rights or obligations *inter se* of the parties to the deed were concerned.

Duress, Contract under.—A disposition made under duress or under undue influence was to be regarded in the same manner as disposition made as the result of fraudulent misrepresentation.[62]

Duress—Commercial or economic pressure.—The Privy Council has held in a later case[63] that a guarantee is not voidable because of duress on the plaintiffs part. To constitute duress of any kind there has to be coercion of will so as to vitiate the consent and in relation to a contract, commercial pressure alone did not constitute duress. Coercion vitiating consent depended on whether the person alleged to have been coerced did or did not protest, whether he had an alternative course open to him (e.g. adequate legal remedy) at the time of coercion alleged, whether he was independently advised and whether after entering into the contract he had taken steps to avoid it. For economic duress see (1980) 54 ALJ 381.

Economic duress.—In a shipbuilding contract[64] the price was to be paid in US dollars. On the devaluation of the dollar the builders demanded corresponding increase in instalments of price remaining unpaid and threatened to terminate the contract. After sometime the owners agreed to pay the increased price without protest and the builders agreed to increase the amount of the letter of credit for repayment. When the vessel was ready the owners took delivery of the vessel without protest. They then laid claim to the return of the increase in price on the ground of economic duress which made the contract voidable. It was held that the agreement was voidable. But as the owners had affirmed the contract by failing to protest, the owners were not entitled to the return of the increase.

The recovery of money on the ground that it had been paid under duress other than under duress to the person is not limited to cases where there had been duress to goods: The duress could also take the form of economic duress which could be constituted by a threat to break the contract that led to a further contract. That contract even though for good consideration is voidable by reason of economic duress. But if a party who had entered into a contract under the economic duress later affirmed the contract, he was bound by it.[65]

Recently in two English cases[66] it was recognised that commercial or economic pressure may constitute duress the pressure of which may render the contract voidable. Both cases stressed that pressure must be such that the victim's consent is not a voluntary act on his part. The Privy Council[67] while recognising this said that there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable provided the basis of such recognition is that it must amount to coercion of will which vitiates consent. It must be shown that payment made or contract entered into was not a voluntary act. American Law[68] also recognises that a contract may be avoided on the ground of economic duress.

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62 *Barton* v. *Armstrong and others* (1975) 2 All E.R. 465 PC.

63 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65,78 (P.C.); *Barton* v. *Armstrong* (1975) 2 All E.R. 465, 476-477 (Lord Wilberforce & Lord Simond) applied. *The Siboen and the Sibotre* (1976) 1 Lloyds Reports 293, 336 appd.

64 *North Ocean Shipping* v. *Hyundai Construction Co. Ltd* (1978) 3 All E.R. 1170, 1182-4; *Smith* v. *William Charlick Ltd.* (1924) 34 CLR 38, 56 applied

65 *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd. and another* (1978) 3 All E.R. 1170; dictum of Isacs J in *Smith* v. *William Charlick Ltd.* (1924) 34 CLR 38 at 56 appld.; *Skeate* v. *Beale* (1840) Ad & El 984; 52 R.R. 558 considered.Recognised by Privy Council in *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 78-79.

66 Per Kerr J. *in the Siboen & the Sibotre* (1976) 1 Lloyds Rep. 293. PerMocatta J. in *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* (1978) 3 All E.R. 1170. Recognised by the Privy Council in *Barton* v. *Armstrong* (1975) 2 All E.R. 465, 477-8 (Lord Wilberforce & Lord Simon of Glaisdale).

67 All cases applied in *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 78-79.

68 Williston on Contract (3rd Ed.) 1970 Ch. 47 ref. to.

The defendant, International Transport Workers Federation, held up the plaintiff-Shipowners vessel and prevented it from sailing unless the shipowners paid a large sum of money towards the seafarers International Welfare Protection and Assistance Fund. The shipowners were made to sign a typed script for payment to the defendant Federation a sum of money towards the abovementioned Protection Fund and difference in wages claimed. The payment was only means by which the shipowners could get possession of their vessel and make it free for sailing. It was held that there was no protection under the Trade Disputes Act for the sum of money which the shipowners were made to pay towards the Seafarer Protection Fund which was extorted by means of a tort. The law did not allow a union to add a demand unconnected with a trade dispute to a claim which fell within the Act.[69]

Burden of proof is Contracts under duress.—In a contract made between parties where duress was not the sole reason for entering into a contract there is no burden on the party threatened to show that but for the threat no agreement would have been made. Such an agreement is void unless the party who made the threats can show that the threats contributed nothing to the other party's decision to enter the agreement.[70]

Consideration: Duress—public policy.—Where the consideration for a promise is an existing contractual duty to a third party, which was otherwise valid consideration, it is not invalid as being against public policy (in the absence of proof of duress) merely because the promise was secured by a threat of repudiation of an existing contract or by the unfair use of a dominant bargaining position. In the case of businessmen negotiating at arms length, it was unnecessary to invoke that position for the achievement of justice, because what justice required was that businessmen must be held to their bargain unless the consent is shown to have been vitiated by fraud, mistake or duress. Accordingly the consideration for the indemnity established by extrinsic evidence was not invalidated on the ground of public policy.[71]

Act forbidden by the Penal Code.—The words "act forbidden by the Indian Penal Code" make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency and in fear of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion," though the agreement may be void as opposed to public policy within the meaning of s. 23.[72] It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent.[73] So far as we are aware, there is no Indian case decided with express reference to the branch of the section now under consideration.[74] In *Banda Ali* v. *Banspat Singh,*[75] the High Court of Allahabad refused to enforce a bond executed by a judgment debtor in favour of the decree holder to procure his release from custody in execution of a decree of a Court which had no jurisdiction to entertain the suit. The Court held that the bond was obtained when the judgment debtor was in duress, and it could be said with some amount of certainty that the decision proceeded on the ground (though no reasons are stated) that the alleged act of coercion amounted to an offence within the meaning of the Penal Code.[76] The judgment of the High Court, so far as it holds that the bond was executed under coercion, seems open to question as involving the assumption that the arrest of a judgment debtor in execution of an apparently regular decree amounts to the offence of wrongful confinement if the

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69 *Universe Yorkships Inc. of Moravia* v. *International Transport Workers Federation:* decided on 2.4.1980 by Parker J. published in the London Times of 10.4.1980.

70 *Barton* v. *Armstrong and others* (1975) 2 All E.R. 465 PC.

71 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 77, 78 (P.C.); *Marris* v. *Watson* (1775-1802) All E.R. Rep. 493; *Stilk* v. *Myrick* (1809) 2 Camp. 317 disting.

72 *Gobardhan Das* v. *Jai Kishen Das* (1900) 22 All. 224; *Masjidi* v. *Mussammat Ayisha* (1882) Punj. Rec. No. 135.

73 22 All 224, at p. 227, citing *Jones* v. *Merionethshire Building Society* (1892) 1 Ch. 173.

74 See, however, *Amiraju* v. *Seshama* (1918) 41 Mad. 33, *infra,* note 37.

75 40 I.C. 352; (1882) 4 All 352.

76 See extract from judgment of the District Judge, 4 All 352, at p. 354.

Court is ultimately found to have no jurisdiction. This would be a dangerous doctrine to adopt in India, where the majority of suitors consist as a rule of illiterate and ignorant persons who cannot be expected to understand the respective jurisdictions of the Courts of various grades spread over different parts of the country. In the next place, assuming that the defendant abetted the offence of wrongful confinement, it does not appear that he did it with the intention of causing the plaintiff to execute the bond, though the plaintiff may have signed the bond with the object of procuring his release from custody. There is yet another case which might be considered under the present head. In that case[77] the High Court of Madras held that an adoption by a Hindu widow thirteen years old[78] was not binding upon her, it having been found that the relatives of the adopted boy obstructed the removal of the corpse of her husband from her house until she consented to the adoption. The decision proceeded on the ground that the widow's consent to the adoption was not free. The Court seem to have thought that the act of the relatives in obstructing the removal of the corpse was within the present section as being forbidden by the Indian Penal Code, but it does not appear under what section of the Code they would have held it punishable. The only section possibly applicable to obstructing the removal of a corpse would seem to be s. 297, which enacts *inter alia* that whoever with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded, offers an indignity to any human corpse, or causes disturbance to any person assembled for the performance of funeral ceremonies, is liable to imprisonment or fine or both. On the facts of the case there could hardly be any doubt that the act was done with intent to wound the widow's feelings, or at any rate with the knowledge that her feelings would be wounded. The fact, therefore, would constitute an offence if obstructing the removal of the corpose could be regarded as an indignity offered to the corpse, or as a disturbance to the persons assembled to perform the funeral ceremonies. The act constituting coercion did not proceed from any party to the agreement, but the words of the section, as pointed out above, make this immaterial. In any event there would have been no difficulty in holding that the widow's consent was obtained by undue influence within the meaning of s. 16 of the Act.

In a later Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this section. Wallis C.J. and Seshagiri Aiyar J. answered the question in the affirmative, holding in effect that though a threat to commit suicide was not *punishable* under the Indian Penal Code, it must be deemed to be *forbidden,* as an *attempt* to commit suicide was punishable under the Code (s. 309). Oldfield J. answered the question in the negative on the ground that the present section should be construed strictly, and that an act that was not punishable under the Penal Code could not be said to be forbidden by that Code.[79] This view seems to be correct. A penal code forbids only what it declares punishable. It might be well to amend the present section by adding after "forbidden" such words as "or an attempt to commit which is forbidden"; but that is the business of the legislature, not of the Courts. The truth is that the language of the Act had omitted to take account of a singular case.

Compulsion of law.—Compulsion of law is not coercion under s. 15 of Contract Act and in the eye of law it is freely made.[80] Under Andhra Pradesh Sugar (Regulation of Supply and Purchase) Act, the cane-grower is not bound to offer cane to the factory of his area but if he does, the factory is bound to accept it. This is an agreement not caused by coercion, undue influence, fraud, misrepresentation or mistake. Under s. 14, compulsion of law is not coercion

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77 *Ranganayakamma* v. *Alwar Setti* (1889) 13 Mad. 214.

78 The Indian Majority Act, 1875, does not affect the capacity of any person to act in matters of adoption (s. 2). The capacity to adopt is determined by the personal law to which the party adopting is subject.

79 *Amiraju* v. *Seshama* (1917) 41 Mad. 33.

80 *Andhra Sugars Ltd.* v. *State of Andhra Pradesh* (1968) A.SC. 599; *Palaniappa Mudaliar* v. *Kandaswamy Mudaliar* (1971) 1 My.L.J. 258; *Rameshwar Marwari* v. *Surendranath Das* (1926) A.Cal. 455.

under s. 15 and in the eye of the law it is freely made. It is neither void nor voidable. The transaction is a contract under s. 10.[81] *Andhra Sugar Case*[80] was a case of the exigibility of sales tax on "sales" of sugar. Bachawat J. relied on the Court's decision in *India Steel & Wire Products Ltd.* v. *the State of Madras*[82] which was a case of "sale" by the company (the assessee) to a third party of its steel products under the orders of the Steel Controller. The company it was held had certain amount of flexibility and manoeuvreability and it could not be said that nothing was left to mutual "assent". The Controller's directions were confined to narrow limits and there were several matters which the parties could decide by mutual assent; and freedom to *contract, was because of economic compulsions, and* freedom to contract being confined to narrower limits.[83] It is submitted that *Andhra Sugar case* goes much further than the *Indian Steel case*. There was no manoeuvreability in this case nor mutual assent. The provisions of s.10, require not only consent but free consent, and the Act[84] in that case discussed and adjudicated upon excluded free consent. It cannot be said that the occupier of a factory who accepts and is compelled to accept the sugar-cane offered to him under threat of prosecution is exercising free consent so as to result in a contractual relationship.[85] Where there is an element of compulsion, e.g. of law there is no contractual relationship.[86]. It is also submitted that where law is to be changed because it no longer conforms to the prevailing social philosophy the proper forum for that is the legislature and not the courts.[87]

Unlawful detaining of property.—A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section.[88]

Proof of Coercion.—Where the defendant relied in defence on the plea of coercion and undue influence, fraud and misrepresentation, he should set out all the facts constituting these invalidating circumstances.[89] The mere fact that the plaintiff could get a receiver appointed by the Court who would have acted in pursuance of the warrant to take possession of the goods and the premises cannot amount to coercion within s. 15 of the Act, nor would a suit for dissolution of partnership amount to coercion.[90]

"Undue influence" defined.

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

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81 *Ibid, Indian Steel & Products Ltd.* v. *State of Madras* (1968) A.SC. 478; folld.; Treitel: Law of Contract (2nd Ed). p. 5 not accepted; *Ridge Nominee* v. *I.R.C.* (1962) 2 W.L.R. refd. to; *New India Sugar Mills Ltd.* v. *Commissioner of Sales Tax* (1963) Supp. 2 S.C.R. 459, 499; (1963) A.SC. 1207, 1222 dist.; *Cf. Pfizer Corporation* v. *Ministry of Health* (1965) A.C. 512; (1965) 1 All E.R. 450 (Drugs supplied under Public Health Scheme. There is no sale which is a consensual contract).

82 (1968) A.S.C 478.

83 *Kirkness* v. *John Hudson & Co. Ltd.* (1955) A.C. 696; (1955) 2 All E.R. 345 dist.

84 Andhra Pradesh Sugarcane (Regulations of Supply & Purchase) Act (Andhra Pradesh Act 45 of 1961).

85 See also S. 14 of the Contract Act and the comment thereunder.

86 Treitel: The Law of the Contract (5th Edn.) page 5; and the cases discussed therein.

87 See *Scruttons Ltd.* v. *Midland Silicones Ltd.* (1962) A.C. 446; (1961) 2 W.L.R. 189,191; (1962) 1 All E.R. 1 (per Viscount Simonds). See also p. 134. *supra.*

88 *Bengal Stone Co. Ltd.* v. *Joseph Hyam* (1918) 27 Cal. L.J. 78, 80-82. Detaining office books, etc., left in the hands of an outgoing agent may, of course, fall under the section: *Muthiah Chettiar* v. *Karuppan Chetti* (1927) 50 Mad. 786; 105 I.C. 5; 1927 A.M. 852, reported chiefly on an independent question of counsel's authority to compromise.

89 *Palaniappa Mudaliar* v. *Kandaswamy Mudaliar* (1971) 1 Mys. L.J. 258; *Bishundeo Narain* v. *Seogeni Rai* (1951) A.SC. 280 reld. on.

90 *Palaniappa Mudaliar* v. *Kandaswamy Mudaliar* (1971) 1 Mys. L.J. 258; *Rameshwar Marwari* v. *Surendranath Das* (1926) A. Cal. 455 reld. on.

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable,[91] the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1972.

Illustrations

(a) *A*, having advanced money to his son, *B*, during his minority, upon *B*'s coming of age obtains, by misuse of parental influence, a bound from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.[92]

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant, to agree to pay *B*, an unreasonable sum for his professional services. *B* employs undue influence.[93]

(c) *A*, being in debt to *B*, the money lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

This section was submitted for the original s. 16 by the Indian Contract (Amendment) Act, 1899 (VI of 1899), s.2.

The section before it was amended stood as follows:—

" 'Undue influence' is said to be employed in the following cases:—

"(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other which, but for such confidence or authority, he could not have obtained;

"(2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion."

There were no illustrations appended to the old section. Illustrations (a) and (b) of the present section are elementary law.[94] They were intended to be added to the section in its original form, but for some reason withdrawn before the Act was passed. Illustrations (c) and (d) are evidently intended to explain the application and the limits of para 3.

The doctrine of undue influence in England.—"The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."[95] The Supreme Court has,

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91 This condition is essential for throwing the burden of proof on the person who was in a dominating position. Otherwise the actual use of that position must be proved as a fact: *Poosathurai* v. *Kannappa Chettiar* (1919) 47 I.A. 1; 43 Mad. 456; 55 I.C. 447; *Mahmud-un-Nissa* v. *Barkatullah* (1926) 48 All. 666; 96 I.C. 684.

92 *Carpenter* v. *Heriot* (1759) 1 Eden 338.

93 *Diala Ram* v. *Sargha* (1927) 102 I.C. 707; 1927 A.L. 536.

94 As to the relation between medical attendant and patient, see *Dent* v. *Bennett* (1839) 4 My & Cr. 269; 48 R.R. 94. A gift of this kind may of course (like any other voidable transactions) become unimpeachable by subsequent confirmation: *Mitchell* v. *Homfray* (1881) 8 Q.B.D. 587. The English doctor and patient cases are collected in Pollock on Contracts, 13th edn., 492.

95 Lindley L.J. in *Allcard* v. *Skinner* (1887) 36 Ch.D. 145,183; (1886-90) All E.R. Rep. 90

in two cases, considered the essential ingredients of undue influence and has held that section 16 of the Contract Act is based substantially on the rules of English common law.[96] In a leading case,[97] Lord Chelmsford stated the principle of undue influence thus:

> "Wherever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which necessarily grows out of that confidence is possessed by the other and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

In *Allcard* v. *Skinner,*[98] Lindley, L.J. prescribed its boundaries as follows:

> "The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful."

The doctrine applies alike to acts of pure bounty by way of gift and to transactions in the form of contract which are clearly more advantageous to one party than to the other.[99] According to the Madras High Court a partition is not a contract where there was an offer and acceptance and passing of consideration. Hence s. 16 will not apply. It is submitted however that where a partition is proved to be the result of undue influence and is an unfair transaction equity will step in and the transaction avoided.[1] In combination with other special rules it may even be applied to transactions which do not show on the face of them any "unfair advantage." S. 16 of the Act, as it stood till 1899, did not adequately represent the generality of the English doctrine. In fact, however, one at least of the Indian High Court acted boldly and beneficially on the general principles of English equity without fettering itself by the precise words of the Act. Another defect now remedied was that nothing was said in the Contract Act about the important question of burden of proof, and magistrates and practitioners were left to discover for themselves that the real working strength of this section could be understood only by reading it with s.111 of the Evidence Act.[2]

The English authorities are numerous, and many of them are complicated by questions on the one hand of actual fraud[3] or on the other hand of breach of some special duty, such as that of an agent, which is independent of the state of mind of the parties. It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the test of the Act. The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle.[4] It is obvious that the same power which can "dominate the will" of a

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96 *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270,300; (1963) A.SC. 1279, 1290 (per Shah J.); *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 334; (1967) A.SC. 878, 881 referring to *Raghunath Prasad* v. *Sarju Prasad,* 51 I.A. 101; (1924) A.P.C. 60; *Poosathurai* v. *Kanappa Chettiar,* 47 I.A. 1; 43 Mad. 546; (1920) A.PC. 65; but *contra* in *Bholaram* v. *Peari Devi* (1962) A.P. 168. 171 (our law is slightly different).

97 *Tate* v. *Williamson* (1886) 2 Ch. App. 55, 61, quoted in *Karnal Distillery Co.* v. *Ladli Prasad* (1958) A. Punj. 190, 204. (On app. (1964) 1 S.C.R. 331; (1963) A.SC. 1279. Cheshire & Fifoot: Law of Contract pp. 244-5 (6th Ed.); *Johnson* v. *Buttress* (1936) 56 C.L.R. 113,135.

98 (1887) 36 Ch.D. 145; (1886-1890) All E.R. Rep. 90, 99.

99 *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270, 300; (1963) A.SC. 1279; *Subhas Chandra Mushib* v. *Ganga Prosad Mushib* (1967) 1 S.C.R. 331, 334; (1967) A.SC. 878; *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.SC. 163,168.

1 *Harekrishna Sahu* v. *Bhagirthi Sahu* (1975) A. Or. 97, 99. Contra *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.SC. 163, 168 (A case of gift *inter vivos*).

2 See the judgment of the Privy Council in *Raghunath Prasad* v. *Sarju Prasad* (1923) 51 I.A. 101; 3 Pat. 279; 82 I.C. 817; 1924 A.P.C. 60. Even now the rule as to burden of proof seems not to be always understood, see *Safdarali* v. *Nur Mahomed* (1929) 118 I.C. 737, 740; 1930 A.S. 25.

3 For a curious case of this kind, adding nothing to the law, see *Satgur Prasad* v. *Har Narain Das* (1928) 111 I.C. 817; 1929 A.O. 44. The judgment reviews the history of Sikh schisms and controversies.

4 *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 334; (1967) A.SC. 878, 880; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270, 300; (1963) A.SC. 1279; *Raghunath Prasad* v. *Sarju Prasad,* 51 I.A. 101; (1924) A,PC. 60; *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1; 43 Mad. 546.

weaker party is often also in a position to suppress the evidence which would be required to prove more constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is required to show that, in the absence of any of the relations which are generally accompanied by more or less control on one side and submission on the other, the consent of a contracting party was not free. In the case of a pure voluntary gift (though there is no general presumption against the validity of gifts) the proof is less difficult; but this is not within our subject.

Influence—Undue Influence.—"Influence" has been defined as the ascendancy acquired by one person over another. "Undue influence" is improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts.[5]

Sub-s. 1: Undue influence generally.—The first paragraph gives the elements of undue influence: a dominant position and the use of it to obtain an unfair advantage. It requires the court trying a case to consider two things:[6]

(i) are the relations between the donor and donee such that the donee is in a position to dominate the will of the donor; and
(ii) has the donee used that position to obtain an unfair advantage over the donor?[7]

It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction: he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position.[8]

The words "unfair advantage" must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. Relief in equity is not restricted to cases of fiduciary relationship strictly so called.[9] "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed",[9] or, as Sir Samuel Romilly expressed it in his celebrated argument in *Huguenin* v. *Baseley,* which has been made authoritative by repeated judicial approval,[10] "to all the variety of relations in which dominion may be exercised by one person over another." "As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties".[11] "Allowing a fair latitude of construction, acts of undue influence must range themselves under one or other of these heads—coercion or fraud.[12] But the English cases on the subject have been said

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5 *Union Bank of Australia.* v. *Whitelaw* (1906) V.L.R. 711, 720.
6 *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 334; (1967) A.SC. 878, 880; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270; at page 300;(1963) A.S.C. 1279; *Raghunath Prasad* v. *Sarju Prasad,* 51 I.A. 101.
7 *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.SC. 163.
8 *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270; (1963) A.S.C. 1279; *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1, 3; 43 Mad. 546; (1920) A.P.C. 65, 66; *Govinda Naik* v. *Gururao* (1971) A. Mys. S. 30, 330; *Smt. Chinnamma* v. *Devanga Sangha* (1973) A. My. 338, 348; *Subhash Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 633, (1967) A.SC. 878, 880; *Mohinder Singh* v. *Achal Trust Agra* (1970) 2 All. 94 (A case under ss 19 & 19A); *Jitendra Nath Bose* v. *National Rolling & Steel Ropes Ltd.* (1973) 2 Cal. 508; *Raghunath Altia* v. *Arjuno Altia* (1973) A.Or. 76, 78 (must give particulars under O.E.R.U.C.P.L.); *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327, (1976) A.SC. 163 (*onus probandi*).
9 Lord Kingsdown in *Smith* v. *Kay* (1859) 7 H.L.C. 750, at p. 779. This was a case of general control obtained by an older man over a younger one during his minority without any spiritual influence or other defined fiduciary relation. Quoted in *Karnal Distillery Co.* v. *Ladli Prasad Jaiswal* (1958) A. Punj. 190, 204. This was reversed by the Supreme Court but not on this point. *Sattema* v. *Subbi Reddy* (1963) A.AP. 72, 75; *Mahboob Khan* v. *Abdul Rahim* (1964) A. Raj. 250.
10 (1807) 14 Ves. 285; 9 R.R. 283; 48 R.R. 102; per Wright J. (1893) 1 Ch. 752.
11 Lindley L.J. in *Allcard* v. *Skinner* (1887) 36 Ch. D. 145 at p. 183; (1886-90) All E.R. Rep. 90.
12 *Someshwar Dutt* v. *Tribhuwan Dutt,* 61 I.A. 224; 1934 A.PC. 130, 133, adopting the view of Lord

by the same authority to be divisible into two groups, according as the charge against the donee (to use this word for shortness' sake) was of aggressive circumvention or of abusing the opportunities given by a duty.

"First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor...

"The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor or even to manage his property for him.... In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made".[13] Cotton L.J. in the same case divided the cases relating to influence into two categories: first where the court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, and secondly where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence on the donor.[14] The first class of cases depends on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases, the court interferes not on the ground that any wrongful act has in fact been committed but on the ground of public policy and to prevent relations between the parties and the influence arising therefrom being abused.[15]

It is an essential condition for the application of the section that one of the parties should be in a position to dominate the will of the other.[16] No further question arises until this is proved. A plea of undue influence can only be raised by a party to the contract and not by a third party.[17]

"Undue influence", "fraud" and "misrepresentation" to be specifically pleaded.—Although "undue influence", "fraud" and "misrepresentation" are cognate vices and may in part overlap in some cases, yet in law they are distinct categories and in view of O.6 rule 4 read with O.6 rule 2 C.P.C. they require to be pleaded separately with particularity and precision. A general allegation that the plaintiff was an old man of 90 who had a great deal of confidence in the defendant is insufficient to amount to averment of undue influence.[18]

Onus.—Where fraud, misrepresentation or undue influence is alleged by a party the onus is on him to show such fraud, etc. But where a transaction is with an illiterate woman and the other party is in a fiduciary relation with her the burden of proving want of fraud, etc. is on such person who being in that capacity deals with her. The Court will jealously watch all transactions between the parties no placed.[19]

Sub.-s. 2: Different forms of influence.—The second paragraph of the present section is illustrative as to when a person is considered to be in a position to dominate the will of the other.[20] It makes a division of the subject-matter on a different principle, according to the

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Cranworth in *Boyse* v. *Rossborough* (1857) 6 H.L. Cas. 2.

13 Ibid., at p. 181.

14 (1887) 36 Ch. D. 145; (1886-90) All E.R. Rep. 90.

15 *Allcard* v. *Skinner* (1887) 36 Ch. D. 145; (1886-90) All E.R. Rep. 90, 98.

16 *Raghunath Prasad* v. *Sarju Prasad, supra,* note 57; *Sanwal Das* v. *Kure Mal* (1927) 9 Lah. 470; 109 I.C. 729; 1928 A.L. 224; *Bahore Mahton* v. *Juro Sahu,* 1936 A.P. 78; 160 I.C. 1073; *Gafur Mohammad* v. *Mohammad Sharif,* 1932 A.P.C. 202; 34 Bom. L.R. 1194; 36 C.W.N. 994; 137 I.C. 893; *Latif Jahan Begum* v. *Mahomed Nabi Khan,* 1932 A.A. 174; (1932) All. L.J. 9; 137 I.C. 231; *Santhappa Rai* v. *Santhiraja,* 1938 A.M. 426; (1938) 1 Mad. L.J. 676; 178 I.C. 563.

17 *Kotumal* v. *Dur Mahomed,* 1931 A.S. 78; *Natha Ram* v. *Sohan Devi,* 1952 A.E.P. 277.

18 *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.SC. 163,167.

19 *Guljan Bibi* v. *Nazir-ud-din Mia* (1975) A. Gau. 30. *Ballo* v. *Paras Ram* (1972) A.H.P. 33. See Supra under Subsection 1: "Undue influence"

20 *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331 at page 334; (1967) A.SC. 878, 880; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270 at page 300; (1963) A.SC. 1279, 1290; *Raghunath Prasad* v. *Sarju Prasad,* 51 I.A. 101; (1924) A.PC. 60.

origin of the relation of dependence, continuing or transitory, which makes undue influence possible. Such a relation may arise (a) from a special authority or confidence committed to the donee, or (b) from the feebleness in body or mind of the donor. However, it is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. According to the Supreme Court[20] it lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to another or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reasons of age, illness or mental or bodily distress.[20] Where it is proved that a person is in a position to dominate the will of another, such proof being furnished either by evidence or by the presumption arising under sub-section (2) and he enters into a transaction with that person, which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. The Madras High Court has held that the mere existence of fiduciary relation raises the presumption of undue influence.[21] The facts were peculiar. The donor was under the influence of his mother, he had given away all his property to her and the transaction was held to be improvident. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable and prudent course is to insist on the other party taking independent advice.[22] Following these principles, the High Court of Allahabad set aside a gift of the whole of his property by a Hindu well advanced in years to his *guru,* or spiritual adviser, the only reason for the gift as disclosed by the deed being the donor's desire to secure benefits to his soul in the next world.[23] Similarly, where a *cestui que trust* had no independent advice, it was held that a gift by him to the trustee of certain shares forming part of the trust funds was void, though in the same case a gift of shares which did not form part of the trust funds was upheld.[24] The case of *Wajid Khan* v. *Ewaz Ali,*[25] in which the Privy Council set aside a deed of gift executed by an old illiterate Mahomedan lady in favour of her confidential managing agent, comes under this head. And so does the case in which the Calcutta High Court refused to enforce an agreement executed by a poor woman in favour of her *mookhtear* by which she bound herself to give him, by way of remuneration for his services, one half of the property which she might recover by his assistance.[26]

Fiduciary relationship.—In cases of fiduciary relationship between the parties there is a presumption of one having undue influence over the other. But in such cases it is necessary to show that one party relies on the other to such an extent that complete trust and confidence is

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21 *M.A. Abdel Malik Sahib* v. *Mohammad Yousuf Sahib* (1961) A.M. 190.

22 In the case of a *gift* from client to solicitor it is an essential condition to the validity of the gift that the client should have competent independent advice: *Liles* v. *Terry* (1895) 2 Q.B. 679, C.A., following and explaining *Rhodes* v. *Bate* (1865) L.R. 1 Ch. 252, and other earlier authorities: and the Court must also be satisfied that the influence has in fact ceased: *Wright* v. *Carter* (1903) 1 Ch. 27. It is hardly too much to say that such a gift, whatever it may be in form, is practically revocable. The principle of *Liles* v. *Terry* was followed in *Rajah Papamma Row* v. *Sitaramayya* (1895) 5 Mad. L.J. 234, and *Vasireddi Bala Chendra* v. *Unnaya Subbaya Garu* (1929) 120 I.C. 882; 1929 Mad. W.N. 360. The independent advice must of course have been given before the transaction: *Mackenzie* v. *Royal Bank of Canada* (1934) A.C. 468; 151 I.C. 981; 1934 A.P.C. 210; *Babu Nisar Ahmad* v. *Raja Mohan Manucha* (1940) 67 I.A. 431; 43 Bom. L.R. 465; 191 I.C. 94; 1940 A.P.C. 204; see *infra.*

23 *Mannu Singh* v. *Umadat Pande* (1890) 12 All. 523; *Manbhari* v. *Sri Ram* (1936) All. L.J. 1215; 165 I.C. 240; 1936 A.A. 672. But see *Allcard* v. *Skinner* (1887) 36 Ch. D. 145; (1886-90) All E.R. Rep. 90 (case of gift to mother superior).

24 *Raghunath* v. *Varjivandas* (1906) 30 Bom. 578; *Knight v. Majoribanks* (1849) 2 Mac. & G. 10; 2 H. & Tw. 308. As to purchase by a trustee from a beneficiary, see Indian Trusts Act, 1882. s. 53.

25 (1891) 18 I.A. 144; 18 Cal. 545

26 *Pushong* v. *Mania Halwani* (1868) 1 B.L.R.A.C. 95; *Ram Kalap* v. *Bansidhar,* 1947 A.O. 89, 227 I.C. 9 (an old man and his manager). In *Tufton* v. *Sperni* (1952) 2 T.L.R. 516, *D* had sold a house to *P* for a Muslim cultural centre at more than twice its value and upon onerous terms. Both parties were members of a committee concerned with the foundation of such a centre. The Court of Appeal held that *D* stood in a fiduciary relation to *P* and set aside the sale.

placed in the other enabling him to influence the former and the burden of proof of there being no undue influence is on such other. In *Tate* v. *Williamson*[27] a contract for sale was set aside because the purchaser who owed a fiduciary relation to the vendor did not advise him that the estate had been valued at a much higher price.

An old man was advised by his bank, where a Company started by his son also had an account to guarantee the overdraft of the Company and also to mortgage his farm to guarantee the same. The Company failed and the Bank enforced the guarantee and the mortgage. The Court of Appeal held (1) that there was a special relationship of trust and confidentiality between the Bank and the defendant, (2) the execution of the mortgage and the guarantee was of benefit to the bank and it involved a conflict of interests and it could have left the defendant destitute in his old age, (3) the bank was under a duty to advise the defendant to have independent advice to the wisdom of the transaction (4) The Bank was in breach of its duty of care to the defendant. The guarantee and the mortgage were therefore set aside.[28]

Where the daughter's paramour stayed in the same house with her and her father, and the father gifted away the whole of his property to the paramour, it was held that there was a presumption that the gift was obtained by undue influence.[29] So also in the case of a paramour and mistress.[30] The same principles apply to agreements for remuneration between an attorney and a client,[31] between a managing clerk in an attorney's office and a client.[32] and between and elder sister's husband who was the manager of the estate and two younger sisters.[33] Their father and mother were both dead and they executed a promissory note in favour of the elder sister's husband.[33] The rule of undue influence applies to all variety of relations in which dominion may be exercised by one person over another.[34] In *Subhas Chandra* v. *Ganga Prosad,*[35] Mitter J. observed:

> "Generally speaking the relation of solicitor and client, trustee and *cestui que trust,* spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16(2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him."

But a gift to the advocate's wife if it is an object of bounty and as a matter of gratitude will be upheld.[36] This case must however be confined to its own facts. A parent stands in a fiduciary relation towards his child, and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by courts of equity, and the burden will be on the parent or third party claiming the benefit of showing that the child in entering into the transaction had independent advice, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made.[37] If a gift is made to a parent or guardian soon after the donor attains majority, the presumption of the parents' influence continues. It has been

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27 (1) (1866) 2 Ch. App. 55.

28 *Lloyds Bank Ltd.* v. *Bundy* (1975) Q.B. 326, 329. *Tate* v. *Williamson* (1866) 2 Ch. App. 55 reviewed.

29 *Ram Chander* v. *Sital Prasad,* 1948 A.P. 130.

30 *Shivgangawa* v. *Basengowda* (1938) A.B. 304; *Sattemma* v. *Subbi Reddy* (1963) A.A.P. 72 held undue influence not proved.

31 *Brojendra Nath* v. *Sreemutty Luckhey Money* (1901) 6 C.W.N. 816; *Shamaldhone Dubt* v. *Lakshimani Debi* (1908) 36 Cal. 493; *Sandersons & Morgans* v. *Mohanlal,* 1955 A. Cal. 319; *Amritlal* v. *Ram Kumar* (1962) 2 Punj. 201; (1962) A. Punj. 325 (p.36); *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 335; (1967) A.SC. 878, 881 (per Mittar J). In *McMaster* v. *Byrne* (1952) 1 All E.R. 1362, the Privy Council held that the confidence arising from the relationship continues even though the solicitor is not acting for the client in the particular transaction, but independent advice is not absolutely necessary.

32 *Harivalabhdas* v. *Bhai Jivanji* (1902) 26 Bom. 689.

33 *Palanivelu* v. *Neelavathi,* 1937 A.P.C. 50; 39 Bom. L.R. 720; 167 I.C. 5; *Subbamma* v. *Mohamed Abdul,* 1950 A. Hyd. 55.

34 *Dant* v. *Bennett,* 41 E.R. 105 at page 108; *Smith* v. *Kay* (1859) 7 H.L.C. 750; 11 E.R. 299; *Aylesford* v. *Morris* (1873) 8 Ch. 484, 491; *Johnson* v. *Buttress* (1936) 56 C.L.R. 113, 119 (a case of illiterate and weakminded person); See *Huguenin* v. *Baseley* (1807) 14 Ves. 273; 33 E.R. 526

35 (1967) 1 S.C.R. 331, 335 at page 336; (1967) A.S.C. 878, 881 per Mitter J.; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270, 300; (1963) A.S.C. 1279, 1290.

36 *Bireswar Sen* v. *Ashalata Ghose* (1969) A. Cal. 111.

37 *Mariam Bibi* v. *C.E. Malim* (1940) Rang. L.R. 35; 1939 A.R. 278; 184 I.C. 171

held to exist in England upto the age of 23 and 25 and it continues till the child is emancipated.[38] Same will be the case of a daughter who shortly before her marriage stood surety for her mother in an important moneylending transaction.[39] Upon these principles the High Court of Madras refused to enforce against an adopted son a deed of trust of joint family property executed by him and his adoptive father whereby annuities were created in favour of certain relations of the father, in a suit brought by them after the father's death to recover arrears of annuities. The deed was executed by the son soon after he attained majority, and there was no evidence to show that the son had independent advice, or that he understood the nature of the transaction, or that his father's influence had ceased when the document was executed.[40] The donee must show that the donor was emancipated or was equated to emancipation by the possession of independent advice.[41]

Equitable presumption—Husband and Wife.—A wife gave a second mortgage of some property owned by her to help her husband to borrow money for buying a piece of land and a house thereon. The vendors—the mortgagees, issued a writ against the wife and the husband the borrower as the interest and the principal remained unpaid. The wife succeeded in her defence of undue influence and decree was passed against the husband. Dixon J. in appeal said that the relationship of husband and wife was such that presumption of undue influence does not arise in their case but "it has never been divested completely of what may be called equitable presumption of an invalidating tendency."

His Honor then referred to three principles applying to the voluntary disposition by the wife in favour of the husband which are: firstly, if impeached places the onus on the husband to prove that it was not improperly or unfairly procured, secondly a third party dealing with the wife through the husband in a transaction with the wife to the husband's advantage may by that fact alone be affected by any equity between the husband and the wife; and thirdly it still is or may be a condition of the validity of the transaction that she adequately understood the actual nature and consequences of the transaction. All these three principles will apply to suretyship where the wife without recompense except advantage to the husband saddles herself or her separate property with a liability for the debt. But in this case, the wife went to the Solicitors office to execute the mortgage and he fully and properly explained to her and she was under no misapprehension that the solicitor was acting for her. If the transaction is understood by the wife or on reasonable grounds the creditor believes it to have been understood, the transaction cannot be set aside.[42]

Similarly, where a creditor obtains a document from his debtor and a third party knowing full well that the transaction was the result of undue influence exercised by the debtor over the third party, the creditor will not be allowed to enforce the transaction against such third party.[43] When a third party, who benefits by a transaction, has notice of the facts which raise the presumption of undue influence he is in no better position than the person exercising the influence.[44] The relations subsisting between a *malik* and a cultivator are such that the *malik* is in a position to dominate the will of the cultivator.[45] But an agreement between a landlord and tenant that the landlord will get compensation money in case of acquisition is not an unconscionable transaction where the consideration is the transfer of possession to a tenant without

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38 *Abdul Malick* v. *Mohammad Yousuf* (1961) A.M. 190, 193; Ashburners *Principles of Equity* (2nd Edn.) p. 302 refd. to.

39 *Lancashire Loans Ltd.* v. *Black* (1934) 1 K.B. 380.

40 *Lakshmi Doss* v. *Roop Loll* (1907) 30 Mad. 169, on app. from 29 Mad. 1.

41 *Powell* v. *Powell* (1900) 1 Ch. 243.

42 *Yarkley* v. *Jones* (1940) 63 C.L.R. 649, 675-676; *Yarkley* v. *Jones* (1940) 63 C.L.R. 649,688,689; *Bank of Victoria Ltd.* v. *Mueller* (1925) V.L.R. 642; (per Cussen J.) *Howes* v. *Bishop* (1909) 2 K.B. 390; *Talbot* v. *Von Boris* (Philimore J.) 27 T.L.R. 95 appld.

43 *Rama Patter* v. *Lingappa Gounder* (1934) 58 Mad. 454; 158. I.C. 485; 1935 A.M. 726.

44 *Tungabai* v. *Yeshwant,* 71 I.A. 184; (1945) Bom. 180; (1945) A.P.C. 8, 10; *Lancashire Loans Ltd.* v. *Black* (1934) 1 K.B. 380; *Badiatannessa Bibee* v. *Ambika Charan Ghose,* 18 C.W.N. 1183. See p. 152 *infra*.

45 *Kashi Nath* v. *Durga Prasad* (1916) 1 Pat. L.J. 604. As to transactions between a guardian and a ward, soon after the ward has ceased to be a minor, see Guardian and Wards Act, 1890, s. 20.

payment of salami; nor does it raise the presumption of undue influence.[46] But the presumption of undue influence does not apply to a gift by a mother to her daughter. If such a gift is sought to be set aside on the ground of undue influence, the burden lies upon those who seek to avoid it to establish domination on the part of the daughter and subjection of the mother,[47] nor does the presumption of undue influence arise between husband and wife.[48] The Privy Council upheld the plea of undue influence in a case of a husband exercising undue influence over his wife who was illiterate though she could sign her name, whose properties he was managing and she passively acquiesced in what he did and signed whatever documents she was asked to execute.[49] In such a case it is unnecessary that there was an actual fraud, it is sufficient if it is shown that the wife was acting under the influence of her husband and not as a free agent.[50] It has also been held that the relation of master and servant is not by itself enough to show a dominant position,[51] nor is the circumstance that the defendant is daughter-in-law of a ruler, and the plaintiff a subject.[52] But an undertaking given by a Stenographer to the Deputy Registrar of a High Court in a matter which the latter was otherwise bound to do[53] was held to be a result of undue influence. Age and capacity are important elements in determining whether consent was free in the absence of any confidential relation, but as against the presumption arising from the existence of such a relation they count for very little.[54]

In order to constitute undue influence it is necessary that a person should have utilised his position for obtaining an undue advantage. If it is shown that a person has embezzled money and if the victim exerts his influence that the embezzler should make a partial separation without the victim getting an undue advantage then there is no case of undue influence.[55]

Bargaining Power.—Where an agreement between the plaintiff and the other party was made in circumstances in which there was inequality of bargaining powers and the other party had received no independent legal advice before signing the agreement and the terms of the agreement were manifestly unfair it followed that there was a presumption that the agreement was invalid.[56]

Clause *(b)* of this paragraph seems to include the principle, established by a series of English decisions, that "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction".[57] Inadequacy of price is not *per se* sufficient to authorise the vacating of a contract, but coupled with other inexperience and absence of competent advice on the part of the seller are sufficient to set in motion the protective powers of the Court of equity.[58] Infirmity of body or mind on the vendor's part will make it still more difficult to uphold any such contract. There is no absolute rule as to the necessity or sufficiency of independent advice.[59] It is not the only possible proof of a donor's competence and understanding; on the other hand,

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46 *Radha Gobinda Rai* v. *Dibakar Mahto* (1960) A.P. 194 (F.B.).
47 *Ismail Mussajee* v. *Hafiz Boo* (1906) 33 Cal. 773; 33 I.A. 86.
48 *Sarfaraz Ali Khan* v. *Ahmad Kamil Mustafa Khan* (1944) All. 141, 214 I.C. 135, 1944 A.A. 104. So held by the Privy Council in *Bank of Montreal* v. *Stuart* (1911) A.C. 120.
49 *Tungabai* v. *Yashwant,* 1945 Bom. 189; (1945) A.P.C. 8; 71 I.A. 184. See *Mackenzie* v. *Royal Bank of Canada* (1934) A.C. 468 (P.C.) (a case of undue influence of husband and misrepresentation by the Bank's manager).
50 *Tungabai* v. *Yeshwant,* 71 I.A. 184; (1945) Bom. 189; (1945) A.P.C. 8.
51 *Daulat* v. *Gulabrao,* 1925 A.N. 369; 88 I.C. 295. But see *Bhagwan Das* v. *Mt. Bitton* (1945)All. 148, 1945 A.A. 227 (where the relationship was between an old woman, who had no relatives, and a trusted servant). *J.K. Cotton Manufacturers Ltd.* v. *J. N. Tewari,* 1959 A.A. 639.
52 *Bhagwan Pancha* v. *Nayankunvarba,* A.I.R. A.Sau. 53.
53 *U.P.* v. *J. R. Bhatia* (1956) A.A. 439.
54 *Rhodes* v. *Bate* (1866) 1 Ch. 252, at p. 257.
55 *Mahendra Singh* v. *Achal Trust Agra* (1970) 2 All. 94, 104.
56 *Clifford Davis Management Ltd.* v. *WEA Records Ltd.* (1975) 1 All E.R. 237, 240, 241; *Schroeder Music Publishing Co. Ltd.* v. *Macaulay* (1974) 3 All E.R. 616; & *Lloyds Bank Ltd* v. *Bundy,* (1974) 3 All E.R. 757, 765 applied.
57 Per Kay J., *Fry* v. *Lane* (1888) 4 Ch.D. 312. 322.
58 *Q'Rorke* v. *Bolingbroke* (1878) 2 A.C. 814 (a case of expectant heirs against the consequences of their not being on equal terms with the buyer).
59 Approved per Lawrence L.J. in *Lancashire Loans* v. *Black* (1934) 1 K.B. 380, 413. Applied in *McMaster* v. *Byrne* (1952) 1 All E.R. 1362 (P.C.).

advice relied on to support the transaction must not only be independent, but "must be given with knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.[60] As to the effect of inadequacy of consideration see s. 25. expl. 2, below.

What is competent and independent advice?—Competent and independent advice does not mean independent and competent approval. All that is necessary is that some independent person free from the taint of the relationship or of the consideration of interest which would affect the act should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do the act. It applies to adults who are competent to form an opinion. In the case of those who are not capable of managing their own affairs in the broadest sense of the word other conditions may arise.[61]

There is no absolute rule of law absolutely requiring independent advice.... cases on the subject carefully read show that the issue is: was it really the result of his own free will and that the question of independent advice is a subsidiary, the answer to which comes in to help to determine the ultimate issue in the case.[62]

Mental distress.—"A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." The mere fact, therefore, that a submission to arbitration was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence." It was so held by the High Court of Allahabad[63] in a case decided under the old section. The decision would, it seems, be the same under the section as it now stands. It could not be said in the case above that the plaintiff was in a position to dominate the will of the defendant merely by reason of the fact that criminal proceedings had been pending against the defendant at the time when the submission was executed by him; but assuming that he was there is nothing to show in the facts of the case that the plaintiff used any such position to obtain an unfair advantage over the defendant. "The law says that (1) not only must the defendant *have a dominant position,* but (2) he must use it".[64] Both these elements were present in the case where the High Court of Madras refused to enforce an agreement entered into by a Hindu widow to adopt a boy to her husband, it appearing on the evidence that the relatives of the boy obstructed the removal of her husband's corpse from the house until she consented to the adoption.[65] The same elements are also to be found in the case where the Allahabad High Court set aside a deed of gift executed by an indigent Brahman to a temple of which the defendant had charge, it having been found that the gift left the donor without any means, and that the defendant had motives of personal gain in procuring it. The gift was made while the donor was living in the defendant's house, where he was fed and maintained by him, and during the pendency of a suit to recover the property prosecuted by the defendant on behalf of the donor at his own expense.[66] An aged father executed deeds of gift and a *wakfnama* at a time when he

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60 *Inche Noriah* v. *Shaik Allie Bin Omar* (1929) A.C. 127, 135; *Mahboob Khan* v. *Abdul Rochman* (1964) A.Raj. 250; *Lakshmi Doss* v. *Roop Loll,* 30 Mad. 169, *cp.* the other judgments of the Privy Council cited under "Transactions with *Parda-nishin women*" below, and *Ram Sumran Prasad* v. *Gobind Das* (1926) 5 Pat. 646, 661; 99 I.C. 782; 1926 A.P. 582, where the substantial question was of Hindu law. *Mt. Sewti* v. *Rattan,* 1951 A.H.P. 54.

61 *Insare Coomber, Coomber* v. *Coomber* (1911) 1 Ch. 723, 730.

62 *Equity, Trustees, Executors & Agency Co. Ltd.* (1919) 27 C.L.R. 231, 234-235; *Griffiths* v. *Robins* (1914) 18 C.L.R. 544 explained; *Linderstam* v. *Barnett* (1915) 19 C.L.R. 528; *Kali Bakhsh Singh* v. *Ram Gopal Singh* 41 S.A. 23, 28, 29; 36 All. 81, 89 applied.

63 *Gobardhan Das* v. *Jai Kishen Das* (1900) 22 All. 224. See also *Masjidi* v. *Mussammat Ayisha* (1882) Punj Rec. No. 135.

64 *Amjadennessa Bibi* v. *Rahim Buksh* (1915) 42 Cal. 286. See also *Bara Estate, Ltd.* v. *Anup Chand* (1917) 2 Pat.L.J. 663, at p. 670; 41 I.C. 337; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270; (1963) A.SC. 1279; *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1, 3; 43 Mad. 546; (1920) A.PC. 65, 66.

65 *Ranganayakamma* v. *Alwar Setti* (1889) 13 Mad. 214.

66 *Sital Prasad* v. *Parbhu Lal* (1888) 10 All. 535.

was in a weak state of mind as the result of a long drawn out illness. These transactions were brought about at the instance of his son and had the effect of depriving the other members of the family of their just share of the inheritance. As it was proved that the son was in a position to dominate the will of the father and that he used that position to his own advantage, the deeds of gift and the *wakfnama* were set aside.[67]

In an Australian case the facts were as follows:

A Miss 'D' an elderly lady employed the defendants as her estate agents and financial advisers and they had worked for her for quite a number of years. In 1957 she advanced money to her estate agents on a mortgage. In 1960 Miss 'D' signed a discharge of the mortgage but without payment of the mortgage money. The mortgagees contended that she had had made a 'gift' of the mortgage to them for their long service.' This document was lodged for registration and the executors of Miss '*D*'s' estate sought to have the discharge of the mortgage set aside on the ground of undue influence. Gillard J. raised two points to decide about the nature of the gift-(1) What was the relationship of the parties, and (2) Was the act of the lady "purely voluntary" and "well understood". The Court found the relationship to be that of trust and confidence reposed by the lady in the Estate Agents and, therefore, the onus was on them to rebut the presumption of undue influence and even though it may be proved that the lady was competent and capable of understanding the nature of the transaction, equity might set in and set aside the gift: Relying on what Lord Eldon observed in *Hugerenin* v. *Baseley*[68] the question in such a case is not whether the donor knew what he was doing but how the intention was proved. Gillard J. considering the size of the gift and that there was no independent advice, set aside the gift.[69]

Instances of undue influence

Noriah's case was that

Gift by a feeble old woman, who was even unable to leave her house, to her nephew upon whom she was relying, for everything for food and clothing and leaving the management of her affairs to him and she was completely in the donee's hands.

In such a case the presumption of undue influence arises.[70]

The plaintiffs who were both old and infirm with no one to look after them, were helped by a brother's grandson during illness. They agreed to make a will in his favour but actually a deed of gift was got executed

which was held unconscionable because the donee was in a position to dominate the old couple.[71] But in *Raghunath Rai* v. *Shri Ram Janki,*[72]

no inference of undue influence was drawn in the case of a waqf deed executed by a lady 80 years old because the deed had been read and explained to her by the scribe and she herself had read it.

An illiterate woman, executed a document—a deed of gift—under the impression that it was a deed authorising management of her property.

It was held that the deed was vitiated by fraud. But the question whether an illiterate woman could be equated to a pardanashin lady was not decided[73] It would be difficult to equate the two but the decision will depend upon the circumstances of each case. Another case of undue influence was of

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67 *Abdur Rauff* v. *Aymona Bibi* 1937 A. Cal. 492.
68 *Hugrenin* v. *Baseley* (1807) 14 Ves. Jun. 273.
69 *Union Fidelity Trustee Co. of Australia Ltd* v. *Gibson* (1971) V.L.R. 573.
70 *Inche Noriah* v. *Shaik Allie* (1929) A.C. 127; (1929) A.P.C. 3; *Allcard* v. *Skinner* (1887) 36 Ch.D. 145 approved.
71 *Debi Prasad* v. *Chhotey Lal* (1966) A.A. 438. See *Johnson* v. *Buttress* (1936) 56 C.L.R. 113, where in somewhat similar circumstances a transfer was set aside.
72 (1964) A.P. 284.
73 *Patalbala Debi* v. *Santimoy Mazumdar* (1956) A.Cal. 575; *Sonia Parshini* v. *Moula Baksh* (1955) A.Cal. 51; *Hodges* v. *Delhi & London Bank Ltd.*, 27 I.A. 168; 23 All. 137 refd to.

A maternal uncle over his niece who became a widow at nine and was brought up by his maternal uncle.[74]

Cases of undue influence arise not only where family or confidential relationship exists between the parties, but also where one of the parties is necessitous or in duress.

No undue influence.—No presumption of undue influence was held to arise in a case where a sister gifted her share in the property descended from the father to her brothers. She was married a long time and was residing with her husband in a separate house. The document was attested by her husband. The properties were the family property owned by the father and the plaintiff's share was only a fractional share in the total estate. It was also proved that when she was married she was given 70 gold sovereigns as a marriage gift.[75]

It is not sufficient to show for a person seeking relief that the relations of the parties were such that one naturally relied on the advice of the other and the other was in a position to dominate the will of the first in giving it. More than mere influence must be proved so as to render influence in the language of the law "undue".[76]

A mortgage was executed by a woman looking after her affairs personally. The transaction was not unconscionable. The woman's brother was under the influence of the mortgagee's father. In such a case the brother being under the influence of the mortgagee's father is irrelevant in deciding the question of undue influence.[77]

Undue influence not established.—An old woman of eightyone had carried on business which she sold to a company in lieu of certain paid up shares in the company. She gave almost half the shares to her son who resided with her, managed the business and gave her advice. Other shares were given to the other children and employees. The Public Curator who took charge of her affairs sought to have the gift to the son set aside. The Jury found that the son stood in a confidential relation to his mother, that the agreement made between her and the Company and transfer to the son were the result of her own will freely exercised that she was capable of understanding these transactions and that she did not sufficiently understand them. The trial Judge gave a judgment for the Public Curator declaring the son to be a trustee for the shares and accountable for all profits. The son appealed. The High Court of Australia took the Jury's answer to mean that she did not fail to understand the transaction but she failed to grasp the consequences that would ensue to her financially. In this case the donor was not dependent upon the donee physically as was the case in *Equity Trustees, Executors & Agency Co. Ltd.* v. *Haskew.*[78] The Court decided that the donor did not sufficiently understand the transaction relating to matters of general reasoning and business wisdom and acumen as opposed to facts known to the donee in virtue of his position and not disclosed, is not enough by itself to invalidate the gift.[79]

By his will a testator provided for trustees to carry on his business according to the terms of the will. The trustees were his wife and his eldest son and the beneficiaries all the children. From time to time the trustees borrowed money from the plaintiff bank. As they wanted further advances the trustees arranged that their account should be guaranteed by the beneficiaries under the will for whose benefit the business was carried on. The plaintiff Bank did not have anything to do with the procuring of the guarantee except in relation to one beneficiary, but simply received it duly completed. Action was brought by the principal against the trustees as principals and the beneficiaries as sureties. It was held that there was no undue influence because the Bank had nothing to do with getting of the guarantee. They were brought to the Bank to secure the account and the guarantee was signed by persons who were known to the Bank to be beneficiaries and that there was no duty cast upon the Bank to make any inquiries or to search after the persons who had signed the guarantee, the guarantee was

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74 *Narayan Doss* v. *Buchraj* (1928) A.M. 6.
75 *T. Syed Mohamed* v. *Ahmed Fathummal* (1973) A.M. 302, 305.
76 *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.S.C. 163, 168
77 *Kanwarani Madna Vati* v. *Raghunath Singh* (1976) A.HP. 41, 49.
78 (1918) 27 C.L.R. 231.
79 *Jenyns* v. *Public Curator* (1953) 90 C.L.R. 113, 133,-134. *Moody* v. *Cox* (1917) 2 Ch.71, 80.

held to be binding on all the beneficiaries excepting the one which the Bank had been involved in obtaining.[80]

Wherever one member of the family exercises weighty influence in the domestic counsels either from age, from character or from superior position acquired from other circumstances, an inference as to existence of undue influence has been drawn.[81] Undue influence may be inferred when the benefit is such as the taker had no right to demand (i.e. not natural or moral claim) and the grantor had no rational motive to give.[82] From the mere fact that the donor is old or of weak character no presumption of imposition or fraud arises, e.g. there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law or made during the donor's illness and a few days before his death.[83] Where there is no relationship shown to exist from which undue influence is presumed that influence must be provided.[84]

"...in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others.[85]

A deed of settlement by a widow having absolute estate in the property in favour of the defendant was held void for undue influence. The circumstances were that the defendant took the widow to Madras and a few days later got the deed executed when the widow had no independent advice and further the onus was on the defendant to prove the voluntary nature of the transaction which he failed to do.[86]

A brother got a release deed from his unmarried sister soon after she attained majority and she was being looked after by that brother of hers and had no independent advice. The transaction was set aside as being one executed under undue influence.[87]

Where a collateral of the 4th degree got a deed of gift from an old widow whose nearest heir was a widowed daughter who was indigent and lived with her mother but was temporarily away and the donee took a leading part in getting the gift executed, the transaction was set aside on the ground of undue influence, the gift itself being unconscionable.[88]

Where an old illiterate woman suffering from cancer gifted the whole of her property to a Society and had to depend on the Society for maintenance and medical treatment until death; the transaction was held to be unconscionable under s.16 (2) (b) and the onus was on the Society to prove the want of undue influence.[89]

A family consisting of a septuanagerian, his wife and a half witted daughter were living together in amity but after an argument with his wife the husband left to stay with his sister's son. During that period he settled the whole of his property on his nephews to take effect after his death. This was challenged on the ground of undue influence. The High Court of Andhra Pradesh set aside the settlement. It held "that where a situation exists in which dominion may be exercised by one person over another the Court will annul the transaction which is unconscionable or immoderate in its effect or terms, if the person possessing such power takes

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80 *Union Bank of Australia* v. *Whitelaw* (1906) V.L.R. 711, 721.
81 17 *Corpus Juris Secundum*, p. 541.
82 *Karnal Distillery Co.* v. *Ladli Prasad Jaiswal* (1958) A.Punj. 190, 204 (revd. on app. but on another point (1964) 1 S.C.R. 331; (1963) A.SC. 1279). Pollock: On Contract (12th Ed.) 494 refd. to.
83 Halsbury Laws in England, 3rd Edn., Vol. 17, pages 678-681, quoted my Mitter J. in *Subhas Chandra*
84 Halsbury's Laws of England (3rd Ed.) p. 674, qouted by Mitter J. in *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 335-6; (1967) A.SC. 878, 881.
85 *Poosathurai* v. *Kannappa Chettiar*, 47 I.A. 1; (1920) A.P.C. 65; 43 Mad. 546, 549.
86 *Rathnam Naidu* v. *Kani Ammal* (1972) A.M. 413.
87 *Rajamani Ammal* v. *Bhoorasami* (1974) A.M. 36; *Abdul Mallick Saheb* v. *Md. Yousuf Sahib*, (1961) A.M. 190; 2 Mad.L.J. 355.
88 *Smt. Kartari* v. *Kewal Krishan* (1972) A.H.P. 117, 120.
89 *Smt. Chinnamma* v. *Devanga Sangha* (1973) A.Mys. 338, 348; *Ladli Prasad Jaiswal* v. *Karnal Distillery* (1963) A.SC. 1279 (1963) 1 S.C.R. 270; *Lakshmi Amma* v. *Talengala Narayana Bhatta* (1970) A.SC. 1367.

thereby a benefit, unless he can show that the transaction is a right one "and the burden is on him to show that the transaction was free from the taint of undue influence.[90]

In a peculiar case of undue influence in Australia the facts were that the deceased, an old illiterate and unstable man, unstable in his relation with other persons, transferred his property without receiving any consideration to the defendant who had looked after his ailing wife who died. Then the old man visited the defendant frequently. He then transferred his property, a cottage on the rent of which he was living. His other property was a few pieces of furniture and a life policy of £50. The transfer deed was prepared by the defendant's solicitor and consideration was natural love and affection. He then went to stay with the defendant but stayed 3 weeks only. He had a son who had ceased to please him and a sister who had a daughter and he made a will in their favour. He visited the defendant a number of times and ultimately transferred all his property to the defendant. The Australian High Court set aside the transaction saying: "The first and most important consideration affecting the question is the standard of intelligence and character of Buttress" (the deceased) "No doubt once it is established the relation of influence exists, presumption arises independently of these matters .....in this particular case it is the man's illiteracy, his ignorance of affairs and his strangeness in dispositions and manner that provide the foundation of the suggested relation". Considering the circumstances of the case the burden of proving that the transaction was the exercise of the donor's independent will." This not having been done, the transaction was set aside.[91]

The plaintiff, a widow with pressing financial obligations. desired to sell a farm in order to purchase a house in Melbourne which she urgently needed. She engaged the defendant, a real estate agent, to find a suitable home for her and to sell the farm. The agent was well acquainted with her financial position and her problems. He inspected the farm and obtained reliable information as to what it was worth. But he wrote to the widow unduly deprecating the farm and suggesting a lower price than she was demanding. Some time later he wrote to her offering to exchange his suburban house on terms most advantageous to himself and highly disadvantageous to the plaintiff. He sold the farm to a third party at an increased price. The plaintiff commenced an action and claimed rescission of the agreement and retransfer of the property, accounts, and alternatively damages for deceit and negligence. The Court held him to be an agent. It was not shown by the defendant that he made reasonable use of the confidence or that he furnished the plaintiff all the knowledge which he himself possessed. On the contrary he set out to make a bargain with her as advantageous to himself as possible and to the end suppressed the information he had obtained knowing full well that the land could be sold at a higher price. He took no steps to find a purchaser and wrote an untruthful report to her. In these circumstances the plaintiff was held entitled to have the agreement set aside. But as the rights of the third parties had intervened in that the farm having been resold and remortgaged a decree for payment of compensation was given rather than rescission, and the claim for damages and negligence and deceit were held not made out.[92]

No undue influence shown and relationship was the test.—Relief has been given even where no undue influence is shown if the relationship between the parties is such that one of them is able to take unfair advantage of the other. Such a relationship has been held to exist between parents and child, doctor and patient, solicitor and client, trustee and beneficiary, religious leader and disciple, in some cases between fiance and fiancee but not husband and wife. The relief is not confined to any particular relationship; it applies when even one party is in a position to take unfair advantage of the other because of a relationship of trust and con-

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90 *Krishnamurthy* v. *Bhramaramba* (1974) And. Pra. 1102, 1118; *Subhas Chandra* v. *Ganga Prosad* (1967) A.SC. 878 dist. *Tungabai* v. *Yeshwant* (1945) A.PC. 4; *Smith* v. *Kay* (1859) 7 H.L.C. 750; 15 R.R. 367; *Incha Nariah* v. *Shaikh Allie Bin Omar* (1929) A.C. 127 (P.C.) *Bank of Montreal* v. *Stuart* (1911) A.C. 120; *Morley* v. *Longman* (1843) 1 Ch.D. 736, 750; & *Bennet* v. *Vade* 2 Ves. 627; folld.

91 *Johnson* v. *Buttress* (1936) C.L.R. 113, 137, 138.

92 *McKenzie* v. *McDonald* (1927) V.L.R. 134, 145-146; *Davies* v. *London & Provincial Marine Insurance Co.* (1878) 8 Ch.D. 469, 474; *Moody* v. *Cox & Hatt* (1917) 2 Ch. 71, 80; *Gibson* v. *Jeyes* (1801) 6 Ves. J. 266, 278; 31 E.R. 1044, 1050; *Lowther* v. *Lowther* (1806) 13 Ves. J. 95, 103; 33 E.R. 230, 233. relied on.

fidence existing between them. In all these cases there is presumption of undue influence which may be discharged by showing that the complaining party had the advantage of independent advice.[93] It is submitted that the presumption will arise between husband and wife in India where the wife is generally in much weaker position.

In *Bundy's case*[94] the transaction—the guarantee given by the father in regard to the debt of his son which was given on the manager's advice and the father was held to have complete faith without any outside advice the Court of Appeal held the transaction between the Bank and the father was very unfair and had resulted from the inequality in the bargaining powers of the parties. *Macauley's case*[95] was one of a songwriter and publishers. The songwriter had been engaged by the publisher for five years. It was also provided that he must assign to the publishers full copy right of all his musical works but there was no undertaking by the Company to publish those works. The songwriter applied after 4 years of working with the Company to get the contract declared void. The agreement was held to be in restraint of trade by the House of Lords. In this case the contract was held to be simply an unfair bargain. Lord Denning in *Clifford Davis Management Ltd.* v. *W.E.A. Records Ltd.*[96] interpreted the speech of Lord Diplock in *Macauley's* case[95] as "if one party uses his superior bargaining power so as to extract terms that are unfairly onerous or to drive an unconscionable bargain, then the Courts will relieve the other party of his legal duty to fulfil it".

The result of all these decisions is that the contract will not be unconscionable if the difference between parties is slight difference in the bargaining power. But if there is such a degree of inequality that the more powerful party is able to force the weaker into a contract of his choosing, i.e., the bargaining power of one party is "grievously impaired" or there is gross inequality of bargaining power, the transaction will be set aside.[97]

B a young man (a Maltese) was charged with criminally corrupting a girl of 15 in 1953. When released on bail, he was told by his Solicitor that he was bound to be convicted even though he was innocent. Because of this fright he married the girl at her father's insistence and then they went to live in England. After acquiring an English domicile B sought a declaration to have the marriage declared void as it was on the Solicitor's advice which had induced fear. The declaration was granted.[98]

In a case under Election Law, undue influence was thus described:[99]

> "A friendly advice or an influence arising from gratitude or esteem is not undue influence unless thereby the functioning of a free mind is destroyed. Mere suggestions or appeals cannot have such an effect. An influence which exists from attachment or respect or which results from arguments or appeals to the reasons and judgement is not undue."

Duress at common law could only be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful source.[1] The tort of intimidation comprehends not only threats of criminal or tortious acts but also threats of breaches of contract.[2] Said Lord Reid:

> "I can see no difference in principle between a threat to break a contract and a threat to commit a tort".[3]

In *Rookes* v. *Bernard*,[4]

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93 Treitel: Law of Contract (2nd Ed.) p. 154. *Tate* v. *Williamson* (1866) 2 Ch.App. 55; *Lloyds Bank Ltd* v. *Bundy* (1975) Q.B. 326; (1974) 3 W.L.R. 501; (1974) 3 All E.R. 757.
94 *Ibid.*
95 (1974) 1 W.L.R. 1308; (1974) 3 All E.R. 616 affirming (1974) 1 All E.R. 171.
96 (1975) 1 W.L.R. 61.
97 P.H. Clarke: Unequal bargaining power in the Law of Contract, 49 A.L.J. 229, 232, 233.
98 *Buckland* v. *Buckland* (1968) p. 296.
99 *Amirchand* v. *Sucheta Kripalani* (1961) A.Pun. 383, 386 (Election case).
1 *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.* (1937) 2 K.B. 389, 395.
2 *Rookes* v. *Barnard* (1964) 2 W.L.R. 269; (1964) A.C. 1129; (1964) 1 All E.R. 367, 374.
3 *Ibid*, p. 374 (of All E.R.).
4 (1964) A.C. 1129; (1964) 1 All E.R. 367; (1964) 2 W.L.R. 269.

Rookes was employed as a draughtsman by BOAC which had a "closed shop" agreement with the employees that it would not employ any person who was not member of the union of the employees. Rookes resigned from the union and the union threatened that unless Rookes was dismissed from service, the employees would strike. Rookes was thereupon dismissed and he brought an action against union officials for damages.

It was held that the principle of law of tort if a person threatened to commit an unlawful act (and in this case the strike would have been a breach of contract—unlawful act because the employees had contracted not to strike) in order to injure a third party and that third party is injured, the third party would be entitled to damages. As Lord Reid put it in *Stratford's case*[5] "the defendants caused loss to the plaintiff by using unlawful means to induce a third party to inflict that loss on him." *Rookes' case* was distinguished in a later case, *Morgan* v. *Fry*.[6]

In that case, some 30 lochmen decided to leave their union and form their own union. The old union gave notice to the Port of London Authority that unless it dismissed those lochmen the union members would strike. The rebel lochmen then sued the union officials and succeeded in the Queen's Bench which held that the act done by the union officials was in the genuine belief that it was necessary to protect the legitimate interests of the union and was done in contemplation or furtherance of a trade dispute but the union officials could not be protected against an act of intimidation based on threat to induce breaches of lochmen's contracts of service and their conduct was unlawful and thus unjustified.

The plaintiff was entitled to recover damages for intimidation. On the matter being taken to the Court of Appeal, *Rookes case*[4] was distinguished on the ground that in *Morgan's case*[6] unlike in *Rookes case* there was no agreement not to go on strike and therefore the intimidation was not unlawful. Davies L.J. said that it would be a startling proposition in these days of collective bargaining that a concerted withdrawal of labour or threat of it could be held to be illegal.[7]

Carrying out the dictates of law is not coercion or undue influence.—Where under the requirements of the Factories Act and the rules thereunder a Company had to maintain a canteen for food and drink for the workers, it could not be said that carrying out the provisions of the law was compulsion giving rise to the plea of coercion or undue influence. The fear of penal consequences is not compulsion which would vitiate the contract of sale (a case under Sales Tax Act).[8]

Third Party—whether can avoid contract.—According to the Allahabad High Court a contract obtained by undue influence is voidable at the instance of the person so influenced and no other person has been given the power to avoid such a contract.[9]

Threat to prosecute a third person.—Undue influence in equity might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise was given.[10] No direct threat is necessary, it is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given. In such a case, one may imply a term in the contract that no prosecution should take place. The doctrine extends to any case where the person giving the undertaking was in substance influenced by the desire to prevent prosecution of the person implicated.[11] A debtor may secure his debt though the object may be to avoid a prosecution as in *Flower* v. *Saddler*,[12] because there is a further consideration. The question in every case of threat to prosecute is

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5 *Stratford & Sons Ltd.* v. *Lindley* (1964) 3 W.L.R. 541, 554; (1965) A.C. 269; (1964) 3 All E.R. 102.
6 (1967) 2 All E.R. 386 (Q.B.D.); revd. on appeal (1968) 3 All E.R. 452.
7 (1968) 3 All E.R. 452, 460 (C.A.); See (1968) 2 S.C.A. xiii. see also *Stratford & Son Ltd.* v. *Lindley* (1965) A.C. 269; (1964) 3 All E.R. 102; (1964) 3 W.L.R. 541.
8 *Hyderabad Asbestos Products Co.* v. *State of Andhra Pradesh* (1972) Tax.L.R. 1641.
9 *Mahendra Singh* v. *Achal Trust Agra* (1970) 2 All. 94, 104-5.
10 *Williams* v. *Bayley* (1866) 1 H.L. 200, 216 (threat to prosecute son); *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.* (1937) 2 K.B. 389, 395.
11 *Jones* v. *Merionetshire Permanent Benefit Building Society* (1892) 1 Ch. 173; *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.* (1937) 2 K.B. 389, 395 (threat to prosecute brother and father); *Kaufman* v. *Gerson* (1904)1 K.B. 591 (threat to prosecute son); *Seear* v. *Cohen*, 45 L.T.R. 589 (threat to prosecute son of one and nephew of the other); *Brook* v. *Hook* (1871) 6 Ex. 89 (threat to prosecute brother-in-law of the defendant.
12 (1882) 10 Q.B.D. 572.

what was the person giving the guarantee in substance doing and intending to do to the knowledge of the person to whom the guarantee was given?[13] The case of *Mutual Finance Ltd.* was this:

A guarantee was obtained from a family company under an implied threat to prosecute a member of the family who forged the signature of the company on a previous guarantee. The receiver of the guarantee knew that the guarantee was only given because the father of the alleged forger was in such a state of health that the shock of the son's prosecution would endanger his life.

The plaintiff's action on the guarantee was held voidable although common law duress was held not proved and the company was subject to undue influence up to the issue of the writ.[14] Any guarantee obtained by undue influence is voidable and not void and can be repudiated when undue influence has ceased to operate.[15] *Kaufman's case*[15] was this:

The defendant was induced by threats of criminal prosecution in France against her husband to give an undertaking to the plaintiff to pay him the money which her husband had misappropriated.

This contract was, by the law of France, not invalid and was enforceable there but the courts in England, it was held, will not enforce this contract, it having been obtained by coercion.

In a Madras case where the plaintiffs agreed to relinquish their right to a religious office in favour of the defendant in consideration of the latter withdrawing a charge of criminal trespass preferred against them, it was held that the agreement was voidable, the charge of trespass being false, and the sole cause for entering into the agreement being "the well-founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings".[16] Similarly where criminal proceedings were threatened against a *mookadam* for misappropriation of his master's moneys, and a bond was passed by an ignorant Hindu widow who had brought him up as her son to save him from the threatened prosecution, it was held that the agreement was not binding upon the widow, she having had no independent advice.[17] See s. 19A, ill. (a).

Proof of undue influence.—In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) whether it was a matter requiring a legal adviser; and (4) whether the intention of making the gift orginated with the donor.[18] All these are questions of fact.[19]

In *Raghunath Prasad* v. *Sarju Prasad & Others*[20] the Privy Council indicated the following three stages for consideration of a case of undue influence:

(i) whether the relations between the parties to each other are such that one is in a position to dominate the will of another;

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13 *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.* (1937) 2 K.B. 389, 397.

14 *Mutual Finance Ltd.* v. *John Wetton & Son Ltd.* (1937) 2 K.B. 389, 397; (1937) 2 All E.R. 657. 662-3; *Kaufman* v. *Gerson* (1904) 1 K.B. 591; (1904-7) All E.R. Rep. 896 refd. to.

15 Per Collins M.R. in *Kaufman* v. *Gerson* (1904) 1 K.B. 591, 596; (1904-7) All E.R. Rep. 396.

16 *Pudishary Krishnen* v. *Karampally* (1874) 7 M.H.C. 378.

17 *Kessowji* v. *Hurjivan* (1887) 11 Bom. 566. See also *Rangnath* v. *Govind* (1904) 28 Bom. 639.

18 Per Lord Macnaghten in *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, at pp. 698-700; 15 I.A. 81 at, pp. 92-93; *Thrasia* v. *Varkey Mathai,* 1951 A.T.C. 42; *Karunamayee Debi* v. *Maya Mayi Debi,* 1948 A.Cal. 84. These questions obviously do not arise where there is neither proof nor presumption of any one's influence, see *Venkatarama Aiyar* v. *Krishnammal* (1927) 52 Mad.L.J. 20; 99 I.C. 571; 1927 A.M. 255; *Narayana Bhatta* v. *Narasimha Bhatta* (1965) A.Ker. 189.

19 There is really no law in e.g. such a case as *Narayana Dass Balakrishna* v. *Buchraj Chordia Sowcar* (1927) 53 Mad.L.J. 842; 106 I.C. 315; 1928 A.M. 6, though the facts may call for a careful judgment; another such is *Parbhu* v. *Puttu* (1926) 1 Lück. 144; 95 I.C. 995: *Tirath Ram* v. *Harbhajan Singh,* 1935 A.L. 479; 158 I.C. 257; *Sattemma* v. *Subbi Reddy,* 1963 A.P. 72.

20 51 I.A. 101., *Afsar Shaikh* v. *Soleman Bibi* (1976) 2 S.C.R. 327; (1976) A.SC. 163, 168

(ii) whether the contract has been adduced by undue influence; and
(iii) *onus probandi.*

If the transaction appears to be unconscionable, then the burden of proving that the contract was not adduced by undue influence lies upon the person in a position to dominate the will of another.[21] The Privy Council in *Poosathurai* v. *Kappanna Chettiar and others*[22] observed and said and that was quoted with approval by the Supreme Court in *Subhas Chandra* v. *Ganga Prosad.*[23]

"It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'. It must be established that a person in a position of domination has used that position to obtain unfair advantage for himself."

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and, as a general rule, the same questions arise.[24] No single circumstance is conclusive. The character of the transaction is an important circumstance but unfairness of the transaction by itself is insufficient to invalidate the transaction.[25] Whether a transaction is vitiated on the ground of undue influence is primarily a question of fact.[26]

Transactions with parda-nishin women.—From a time before, though not long before, the passing of the Contract Act, some of the High Courts, with a certain amount of support from the Privy Council, have treated *parda-nishin* women (sometimes in terms only Hindu women, but in fact those concerned are not always Hindus) as a class of persons specially exposed to undue influence, and have gone near to laying it down as a rule of law that every one dealing with a *parda-nishin* woman is bound to show affirmatively that she understood the nature of the transaction, and that the terms were fair. The rule was stated by the late Sir W. Rattigan, in a paper where he forcibly criticised this policy,[27] to have been first announced in 1867 in a Calcutta case not regularly reported. "It does not necessarily follow," Sir W. Rattigan observed, "that a native woman simply because she sits behind the *parda,* is to be placed in the same category as the 'weak, ignorant, and infirm persons' whom the Court of Chancery, under a proper interpetation of its approved practice, is accustomed to protect. On the contrary, it is common experience to find in India *parda* ladies who are highly intelligent, strong minded, and who possess excellent business capacity, and contrive to manage large estates with great success. To adopt a sweeping generalisation, and to hold that every *parda-nishin* lady who enters into any commercial transactions, or who makes a disposition of her property, is presumably the victim of 'undue influence', is to make an assumption which is contrary to actual facts, and to cause the law to be abused for the purpose of avoiding *bona fide* engagements."

In the earliest Privy Council decision on the subject, where a Mahomedan lady sued to recover from her husband the value of Company's paper of a considerable amount alleged to have been endorsed and handed over to him to receive interest thereon, and the defence was that he had purchased the paper from his wife, it was held by their Lordships that, though the wife failed to prove affirmatively the precise case set up by her in the plaint, the burden of proof was upon the husband to show, the plaintiff being a *parda-nishin,* that the sale was a *bona fide* one for value, and that upon the evidence he had failed to satisfy the burden.[28] A few

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21 *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1, 3; 43 Mad. 546; (1920) A.P.C. 65; *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331; (1967) A.S.C. 878.
22 47 I.A. 1, 3; 43 Mad. 546; (1920) A.P.C. 65.
23 (1967) 1 S.C.R. 331, 334; (1967) A.S.C. 878, 881; *Bhola Ram* v. *Peari Devi* (1962) A.P. 168.
24 *Mahomed Buksh Khan* v. *Hussaini Bibi,* 15 I.A. 81, 92; 15 Cal. 684.
25 *Ahmad Saleh Mohammad* v. *Khanmull* (1959) A.Mys. 102.
26 *Satgur Parshad* v. *Har Narain Das,* 59 I.A. 147; (1932) A.P.C. 89; *Ladli Prasad* v. *Karnal Distillery Co.* (1963) A.S.C. 1279; (1964) 1 S.C.R. 270.
27 *Journ. Comp. Legisl.,* December, 1901, pp. 252, 257, 258.
28 *Moonshee Bazloor Ruheem* v. *Shumsoonissa Begum* (1867) 11 M.I.A. 551. A mortgage of property

years later it was declared by the same tribunal that, as regards deeds taken from *parda* women, the Courts have always been careful to see "that the party executing them has been a free agent, and duly informed of what she was about".[29] It is not sufficient to show that a document executed by a *parda-nishin* woman was read out to her; it must further be shown that it was explained to her or that she understood its conditions and effect;[30] and the explanation must include all material points as well as the general nature of the transaction.[31] The reason is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a *parda-nishin* woman.[32] Independent legal advice is not the only way to rebut the presumption of undue influence nor does the fact that independent legal advice was given rebut the presumption unless it be shown that the advice was taken. The obvious way to prove that the gift was the result of the free exercise of independent will is to prove that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person.[33]

The law as to the burden of proof is summarised in a decision of the Privy Council.[34]

"In the first place, the lady was a *parda-nishin* lady, and the laws throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to shew affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."

Subbarao J. has thus stated the law in *Kharbuja Koer* v. *Jangbahadur*[35]:

The burden shall always rest upon the person who seeks to sustain a transaction entered into with a *parda-nashin* lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not her physical act but also her mental act. The burden can be established not only by proving that the document was explained to her and that she understood it but also by other evidence, direct and circumstantial.

In the case of *Parda-nashin* women apart from other consideration applicable, if the document executed is not in the "mother tongue" of the executant the law requires further that she understood the document and not merely heard its contents.[36]

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belonging to male and female members of a Mahomedan family by the males does not operate as a transfer of the interest of the females, because the management of the properties is left in the hands of the males: *Azima Bibi* v. *Shamalanand* (1913) 40 Cal. 378 (P.C.).

29 *Geresh Chunder* v. *Bhuggobutty* (1870) 13 M.I.A. 419, 431; *Sudisht Lal* v. *Sheobarat Koer* (1881) 8 I.A. 39; 7 Cal. 245; *Behari Lal* v. *Habiba Bibi* (1886) 8 All. 267; *Annoda Mohun Rai* v. *Bhuban Mohini Debi* (1901) 28 I.A. 71; 28 Cal. 546; *Kali Baksh* v. *Ram Gopal,* 43 I.A. 23, 29.

30 *Shambati Koeri* v. *Jago Bibi* (1902) 29 I.A. 127; 29 Cal. 749; *Sham Koer* v. *Dah Koer* (1901) 29 I.A. 132; 29 Cal. 664; *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan* (1912) 39 I.A. 156; *Kali Baksh* v. *Ram Gopal* (1913) 41 I.A. 23, 29; 36 All. 81, 89; 21 I.C. 985; *Sri Kishan Lal* v. *Kashmiro* (1916) 14 All.L.J. 1236; 34 I.C. 37 (P.C.); *Sumsuddin* v. *Abdul* (1907) 31 Bom. 165.

31 *Farid-un-Nisa* v. *Mukhtar Ahmad* (1925) 52 I.A. 342; 89 I.C. 649; 1925 A.P.C. 204; cp. *Barkatunnissa Begum* v. *Debi Baksh,* also a P.C. appeal, (1927) 31 C.W.N. 693; 25 All.L.J. 314; 101 I.C. 29; 1927 A.P.C. 84; followed in *Ram Sundar Saha* v. *Raj Kumar Sen Choudhury* (1927) 55 Cal. 285; 104 I.C. 527; 1927 A.Cal. 889, in the case of a man said to be of weak intellect, who was held on the evidence to have been sufficiently informed and protected. *Abdul Manan* v. *Mutwalli of Janebali* (1956) A.Cal. 584; *Hem Chandra* v. *Suradhani Debya* (1940) A.P.C. 134; I.L.R. (1940) 2 Cal. 436; 67 I.A. 309.

32 *Ashgar Ali* v. *Delroos Banoo Begum* (1877) 3 Cal. 324; *Mariam Bibi* v. *Sakina* (1892) 14 All. 8; *Acchhan Kuar* v. *Thakur Das* (1895) 17 All. 125; *Hoti Lal* v. *Musammat* (1903) Punj. Rec. No. 77. In *Ashgar Ali's* case the Privy Council set aside a *tauliatnama* executed by a Mahomedan lady on the false representation that the effect of the document was what she desired. The case looks very like one of positive fraud.

33 *Inche Noriah* v. *Sheikh Alie bin Umar* (1929) A.C. 127; (1929) A.P.C. 3; *Mahboob Khan* v. *Abdul Rahim* (1964) A.Raj. 250; *Lakshmi Doss* v. *Roop Loll,* 30 Mad. 169.

34 *Kali Bakhsh* v. *Ram Gopal, supra* note 51: *Farid-un-Nisa* v. *Mukhtar Ahmad, supra,* note 52; *Muhammad Ibrahim* v. *Umatullah Jan* (1917) Punj. Rec. No. 90, p. 350; 39 I.C. 798; *Bibi Saleha* v. *Zakariya Khan,* 1950 A.P. 247.

35 (1963) A.S.C. 1203, 1206; (1963) 1 S.C.R. 456.

36 *Hussaina Bai* v. *Zohra Bai* (1960) A.M.P. 60. (It appears the executant's language was not Hindi in which the document was written.)

More lately, on an attempt to repudiate a *parda-nishin* woman's compromise of a litigated family dispute, Lord Buckmaster said[37]:

"It is not necessary—indeed, it is undesirable—to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities. It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed."

Some Indian decisions suggest that a deed of gift by a *parda-nishin* woman is invalid in the absence of proof that she had independent advice. But in *Kali Bakhsh* v. *Ram Gopal*[38] the Privy Council held that there is no rule of law of the absolute kind above indicated. "The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor, as well as the approximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand. The present, in their Lordships' judgment, appears to be a case of that kind... In short their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *parda-nishin* lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the judgment of Lord Macnaghten in *Mohamed Buksh Khan* v. *Hosseni Bibi*".[39] See under "Proof of undue influence," above.

It should be noted that "the undue influence which may affect a *parda-nashin* lady's understanding of a document may proceed from a third party." It was so held by Jenkins C.J. in a case where a mortgage of her property by a *parda-nishin* woman to a creditor of her husband was set aside, the undue influence having proceeded from the husband.[40]

It appears that most, if not all, of the decisions could have been arrived at without the aid of any general presumption, on such grounds as that the act was done under the influence of marital control, or actual fraud or misrepresentation, or even in total ignorance of its nature and effect. The only thing in English law that seems analogous to the treatment of a *parda-nishin* woman's dealings as presumably invalid is the treatment of dealings with "expectant heirs" by Courts of Equity, where fraud is said to be "presumed from the circumstances and condition of the parties contracting." But this equitable doctrine is peculiar, and depends, in party at any rate, on reasons not existing in India.[41]

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37 *Sunitabala Debi* v. *Dhara Sundari Debi* (1919) 46 I.A. 272, 278; *Pattu Kumari* v. *Nirmal Kumar*, 1939 A.Cal. 569; 43 C.W.N. 907; 185 I.C. 691.

38 *Supra*, note 51. (In this case the Privy Council upheld a gift by a *parda-nishin* woman of about one half of her estate to her paramour's son on the ground that there was no undue influence); *Keshub Lall* v. *Radha Raman* (1913) 17 C.W.N. 991; *Mahatur Prasad* v. *Taj Begum* (1915) 19 C.W.N. 162.

39 (1888) 15 I.A. 81; 15 Cal. 684. In this case the charge of undue influence was discredited by being made as an after thought and not by the lady herself who was the original plaintiff, but by her representative after her death. *Cp. Barkatunnissa Begum* v. *Debi Bakhsh*, 1927 A.P.C. 84; 31 C.W.N. 693; 101 I.C. 29; *Lala Kundan Lal* v. *Mst. Musharrafi* (1936) 63 I.A. 326; 11 Luck. 346; 163 I.C. 156; 1936 A.P.C. 207; *Kanchanlal* v. *Hariprasad*, (1951) A.N. 379.

40 *Badiatannessa Bibee* v. *Ambika Charan* (1914) 18 C.W.N. 1133. The Privy Council approved and followed this decision in *Tungabai* v. *Yeshwant* (1945) 71 I.A. 184, (1945) Bom. 189, 47 Bom. L.R. 242, 220 I.C. 362, 1945 A.P.C. 8. (It seems that *non est factum* might have been pleaded in this case). The doctrine is not confined to documents executed by *parda nishin* women: it is based upon the principle that a third party who benefits under the deed, and entrusts it to a husband to obtain his wife's signature, cannot escape the consequences of the husband's misrepresentation or durees exercised by him in securing his wife's signature: *Bank of Montreal* v. *Stuart* (1911) A.C. 120 (P.C.).

41 See Pollock, Principles of Contract, 13th Ed., 500 *sqq*. *O'Rorke* v. *Bolingbroke* (1877) 2 App. Ca. 814, marks the limit of its application.

A number of other cases relating to *parda-nishin* women are collected in footnote.[42] They do not lay down any rules differing in principle from those discussed above, but illustrate various aspects of the rules. With the gradual relaxation of the custom of *parda* and the spread of education, the cases on the subject will become of less and less importance.

Who is parda-nishin.—The expression *"parda-nishin"* connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a *parda-nishin* woman that she lives in some degree of seclusion.[43] Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda-nishin* woman.[44] In *Hodges* v. *The Delhi and London Bank,*[45] a Privy Council case, it was said: "It is abundantly clear that Mrs. Hodges was not a *parda-nishin*. The term *quasi-parda-nishin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *parda-nishin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *parda-nishins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned: outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute" [46]

Parda-nishin Women—extension of the rule.—The protection afforded to *parda-nashin* ladies can be extended to ladies of similar class who though not parda-nashin technically are similarly placed in that they are illiterate and sometimes old and sick and have lack of understanding and appreciation of the transaction without independent advice and are helpless and thus exposed to the danger of entering into unfair deals. The emphasis should be on the factual understanding of the transaction entered into and not the disability presumed in the case of parda-nashin ladies on the ground of mere status.[47] The protection of "Parda-nishin" extends to illiterate rustic village women.[48]

Sub-s.3: Rule of evidence.—The third paragraph of the present section does not lay down any rule of law, but throws the burden of proving freedom of consent on a party who, being in a dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities it "shocks the conscience." The sub-section is limited in its application. It lays down the conditions for raising a rebuttable presumption that a transaction is

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42 *Tara Kumari* v. *Chandra Mauleshwar* (1931) 58 I.A. 450; 34 Bom.L.R. 222; 134 I.C. 1076; 1931 A.P.C. 303; *Ramanamma* v. *Viranna,* 1931 A.P.C. 100; 35 C.W.N. 633; 33 Bom. L.R. 960; 131 I.C. 401 (Independent advice); *Nawab Sikander Begam* v. *Zulfikar Wali Khan,* 1938 A.P.C. 38; 40 Bom. L.R. 697; 172 I.C. 720 (Independent advice); *People's Bank of Northern India* v. *Ghulam Jan,* 1938 A.P.C. 276; (1938) 2 Mad. L.J. 902; 176 I.C. 773 (Independent explanation); *Lachmeshwar Sahai* v. *Moti Rani,* 1939 A.P.C. 157;41 Bom L.R. 1068; 43 C.W.N. 729; 181 I.C. 359 (Mistaken view of deed); *Hem Chandra Roy Choudhury* v. *Suradhani Debya Chaudhurani* (1940) 67 I.A. 309; (1940) 2 Cal. 436; 189 I.C. 509; 1940 A.P.C. 134 (Effect of whole document must be understood); *Bank of Khulna* v. *Jyoti Prokash Mitra* (1940) 67 I.A. 377; (1940) Kar. P.C. 341; 1891 I.C. 890; 1940 A.P.C. 147 (Execution of deed must be result of conscious act) *Karunamayee Debi* v. *Maya Mayi Debi,* 1948 A. Cal. 84; *Maiyan* v. *Mohan* (1945) All. 315, 1945 A.A. 409; *Mt. Sunder Kuer* v. *Shah Uday Ram,* 1944 A.N. 42, 212 I.C. 168; *Amir Alam* v. *Bibi Salma,* 1952 A.P. 19.

43 *Shaik Ismail* v. *Amirbibi* (1902) 4 Bom.L.R. 146, 148.

44 *Ismail Mussajee* v. *Hafiz Boo* (1906) 33 I.A. 86; 33 Cal. 773, 783; *Shaik Ismail* v. *Amirbibi* (1902) 4 Bom.L.R. 146.

45 (1901) 27 I.A. 168, at pp. 175-6; 23 All. 137 at p.145. If it is intended to challenge the assertion that a person is of the *parda-nishin* class, the matter must be pleaded and put in issue; *Bank of Khulna* v. *Jyoti Prokash Mitra, supra,* note 64.

46 Applied in *Sonia Parshini* v. *Moula Baksha,* 1955 A. Cal. 17.

47 *Kanwarani Madna Vati* v. *K. Raghunath Singh* (1976) A.HP. 41; 44; *Smt. Sonia Parshini* v. *Moula Baksha* (1955) A. Cal. 17,19 reld. on; *Koze* v. *Makkan Singh* (1973) A.M.P. 252, 254 (Gond women). But see: *Hodges and another* v. *Delhi and London Bank Ltd.,* 27 I.A. 168.

48 *Ashok Kumar* v. *Gaon Sabha* (1981) A.A. 222.

procured by the exercise of undue influence. The reason for this rule is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. The third sub-section becomes operative when two factors are proved, namely, that a person was in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift.[49] Money-lending cases are those chiefly contemplated (see illustration (c)). It must not be supposed, however, that there may not be other forms of unconscionable bargain within the mischief and the remedy of this enactment.[50]

In *Poosathurai's case*[51] Lord Shaw observed:

and "where the relation of influence,.... has been established, and the second thing is also made clear, viz., that the bargain is with the "influencer" and in itself unconscionable, then the person is in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent."

Wherever the relation between the parties to a contract is of a confidential or fiduciary nature the person in whom confidence is reposed and who thus possesses influence over the other cannot hold that such other to the contract unless he satisfies the Court that it is advantageous to the other party and that he has disclosed all material facts within his knowledge.[52] Where the relative position of the parties to a contract is such that it was incumbent on the creditor to establish affirmatively that the transaction was fair, just and reasonable, the transaction, in the absence of such proof, would not stand. This was a case of expectant heir.[53] When there is evidence of overpowering influence and the resulting transaction is immoderate and irrational proof of undue influence is complete.[54] The Australian High Court has put the position thus.[55]

When a man is occupying a position involving ascendency or influence over another or a dependence or trust on his part it is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequalities between them which must arise from his special position.

The burden will be heavy in the case of illiterate or weakminded person and heavier where the donor has given all or practically all his property to the donee.[56] A party pleading undue influence must show that the opposite party had influence over him because of close relationship or other circumstances and that by exercising that influence he took advantage at his cost. It will then be for the other side to establish the validity of the transaction. An overall view has to be taken of the matter.[57] The donee must show that the donor was emancipated or was equated to emancipation by the possession of independent advice.[58]

Third Parties.—If a third party is aware of the existence of the confidential or fiduciary relation, he is under the same disability as the party occupying the position of confidence.[59] It

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49 *Subhas Chandra* v. *Ganga Prosad* (1967) 1 S.C.R. 331, 334; (1967) A.S.C. 878; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co. Ltd.* (1964) 1 S.C.R. 270 at page 300; (1963) A.S.C. 1279 per Shah J.; *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1;43 Mad. 546; (1920) A.P.C. 65.

50 *E.g. Thakurji Maharaj* v. *Ram Dei* (1930) 123 I.C. 175; 1930 A.P.C. 139 (merely on facts).

51 *Poosathurai* v. *Kannappa Chettiar,* 47 I.A. 1,4; 43 Mad. 546; (1920) P.C. 65; *Bhola Ram* v. *Peari Devi* (1962) A.A.P. 168; *Moodi* v. *Cox & Halt* (1917) 2 Ch. 71, 88 (Relationship of a confidental or fiduciary nature and confidence is reposed).

52 *Moody* v. *Cox & Halt* (1917) 2 Ch. 71,88. Cheshire & Fifoot: Law of Contract (6th Edn.) page 244.

53 *Permanent Trustee Co.* v. *Bridgewater* (1937) A.P.C. 14.

54 *Bank of Montreal* v. *Stuart* (1911) A.C. 120. Quoted in *Ahmad Ibrahim* v. *Meyyappa* (1940) A.M. 285.

55 *Johnson* v. *Buttress* (1936) 56 C.L.R. 113, 135.

56 *Price* v. *Price,* 42 E.R. 571; *Inche Noriah* v. *Shaik Allie Bin Omar* (1929) A.C. 127; (1929) A.P.C. 3.

57 *Ahmad Seleh Mohammad* v. *Khanmull* (1959) A. My. 102 (A case of debtor and creditor); *Balls* v. *Paras Ram* (1972) A.HP. 33; *Guljan Bibi* v. *Naziruddin Mia* 1975 A. Gau. 30.

58 *Powell* v. *Powell* (1900) 1 Ch. 243.

59 *Ahmad Ibrahim* v. *Meyyappa* (1940) A.M. 285 (a case of guardian making his ward a partner in

is not necessary that the person in a position of domination must himself benefit. A benefit to a third party may be sufficient, e.g. undue influence by office bearers of a society benefiting the Society in which they are interested.[60]

"Unconscionable bargains."—Illustration (c) contemplates the case of a person already indebted to a money-lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable, but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is not of fraud, but of the unconscientious use of superior power. Inadequacy of consideration, though it will not of itself avoid a contract (s.25, expl. 2, below), has great weight in this class of cases as evidence that the contract was not freely made.

"Inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance were facts from which it would have been as permissible before the amendment of (this section) to infer the use of undue influence as it would be since that amendment."[61]

Relief in cases of unconscionable bargains is an old head of English equity. It was formerly associated in a special manner with sales of reversionary interests, which the Court was eager to restrain; and for some time it was the doctrine of the Court that a sale of any reversionary interest, if proved to have been made for only a little under the value, must be set aside without further inquiry. This rule was at last found so inconvenient that it was abolished by statute. But the general principles of equity in dealing with what are called "catching bargains" remain, and the third clause of the section now before us is apparently intended to embody them. In fact, the Indian High Courts had acted on these principles, both before and since the passing of the Contract Act, without any express authority of written law. Thus, where the interest was exorbitant, relief was granted by reducing, the rate of interest in cases where the loan was made to an illiterate peasant,[62] and to a Hindu sixteen years old[63] (but not a minor according to the Hindu law). And where an heir to an estate borrowed Rs. 3,700 to enable him to prosecute his claim at a time when he was without even the means of subsistence and gave the lender a bond for Rs.25,000 to be paid after receiving possession of the property, the Court held that the bargain was hard and unconscionable, and gave the lender a decree for Rs. 3,700, with interest at 20 per cent per annum.[64] Acting upon the same principles, the High Court of Bombay held that a covenant in a mortgage executed by illiterate peasants in favour of a money-lender to sell the mortgaged property to the mortgagee at a gross undervalue in default of payment of interest was inequitable and oppressive, and the mortgage was set aside to that extent.[65] After the amendment of the present section, the High Court of Allahabad disallowed compound interest payable at 2 per cent per mensem with monthly rests in the case of a bond executed by a spendthrift and a drunkard eighteen years old.[66] And where a person twenty eight years old, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to provide him with any money, executed a bond to secure a sum of Rs. 500 with interest at the rate of Rs. 37-8-0 per cent per annum with six-monthly rests, with a stipulation that the borrower should not be empowered to pay the money within

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business); *Narayan Doss* v. *Bucharaj* (1928) A.M. 6; (106) I.C. 315; *Lancashire Loans Ltd.* v. *Black* (1934) 1 K.B. 380; *Ram Patter* v. *Manikkam,* 58 Mad. 454; (1935) A.M.4. See S. 89, Trusts Act; see also *Turnball & Co.* v. *Duval* (1902) A.C. 299. See p. 141, *supra.*

60 *Smt. Chinnamma* v. *Devanga Sangha* (1973) A. Mys 338; *Sital Prasad* v. *Prabhu Lal.* 10 All. 535 reld. on.

61 *Bhimbhat* v. *Yeshwantrao* (1901) 25 Bom. 126, 128.

62 *Lalli* v. *Ram Prasad* (1886) 9 All. 74. See also the observations of the Privy Council in *Kamini* v. *Kaliprossunno Ghose* (1885) 12 I.A. 215, at pp. 225-6; 12 Cal. 225, 238, 239; where the loan was made to a *parda-nishin* lady.

63 *Mothoormohun Roy* v. *Soorendro Narian Deb* (1875) 1 Cal. 108. The Indian Majority Act, which fixes the age of majority at eighteen, was passed on 2nd March, 1875.

64 *Chunni Kuar* v. *Rup Singh* (1888) 11 All. 57, confirmed on appeal *sub nom. Raja Mohkam Singh* v. *Raja Rup Singh* (1893) 20 I.A. 127; 15 All. 352. See also *Hussain Bakhsh* v. *Rahmat Hussain* (1888) 11 All. 128.

65 *Kedari Bin Ranu* v. *Atmarambhat* (1866) 3 B.H.C.A.C. 11.

66 *Kirpa Ram* v. *Sami-ud-din* (1903) 25 All. 284.

three years, and if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate above mentioned, the same Court held that the bargain was unconscionable, and gave the lender a decree for Rs. 500 with simple interest at the rate of 24 per cent per annum.[67] Where a poor Hindu widow borrowed Rs. 1,500 from a money-lender at 100 per cent per annum for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent.[68] Similarly, where a talukdar, who had been declared a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act, 1876, and whose property was placed in the charge of the Court of Wards on the ground of his indebtedness and consequent inability to manage it, executed a bond for Rs. 10,000 repayable with interest at 18 per cent per annum, and compound interest in default of payment of instalments, the Privy Council disallowed compound interest on the ground that the position of the parties was such that the lender was "in a position to dominate the will" of the borrower, and that the charging of compound interest in the circumstances of the case was "unconscionable".[69] The relief, however, has not been confined to money-lending transactions, and so far back as the year 1874 the Privy Council set aside a bond obtained by a powerful and wealthy banker from a young *zamindar* who had just attained his majority, and had no independent advice, by threats of prolonging litigation commenced against him by other persons with the funds and assistance of the banker.[70] Three years later the same tribunal set aside an *ikrarnama* executed by a minor and another who had just come of age of half of their property in favour of the defendants, who had no title to the property, and who had taken possession thereof by show of force and with the assistance of a large body of retainers.[71] Similarly, where the plaintiff, an illiterate agriculturist heavily indebted to the defendant, who was a money-lender, passed a sale-deed to the defendant of his lands worth thrice the amount of the debt under pressure of payment, the High Court of Bombay ordered by its decree that the sale should be set aside on the plaintiff paying to the defendant the debt owed by him within a fixed period.[72] Again, where a person entirely under the influence of his manager, who managed his litigation and household expenses, executed a perpetual lease in favour of the manager for a wholly inadequate consideration and subject to terms onerous to the lessor, the transaction was set aside.[73] But the question whether a transaction should be set aside as being inequitable depends upon the circumstances existing at the time of the transaction, and not on subsequent events.[74]

Unconscionability—Canadian view.—Where there is no legal duress or undue influence (whether presumed or not rebutted) a contract can nevertheless, be set aside on the ground of its being unconscionable or was obtained by unconscionable conduct exercised by one party over the other. Traditionally unconscionable conducts are of two kinds. One type involves one of the parties being infirm in some way and the other the contract having been obtained by unconscionable conduct.[75] *Mundinger* v. *Mundinger* is an instance of the first type. In that case a

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67 *Balkishan Das* v. *Madan Lal* (1907) 29 All. 303. Doubted in *Kesavula* v. *Arithulai* (1913) 36 Mad. 533 at p. 537; 22 I.C. 769.

68 *Ranee Annapurni* v. *Swaminatha* (1910) 34 Mad. 7. See further as to the test of what is excessive: *Din Muhammad* v. *Badri Nath* (1929) 120 I.C. 417. Exact definition is not possible: *Ramkishun Ram* v. *Bansi Singh* (1929) 116 I.C. 43; 10 P.L.T. 322; 1929 A.P. 340.

69 *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1906) 28 All. 570; 33 I.A. 118; *Maneshar Baksh Singh* v. *Shadi Lal* (1909) 36 I.A. 96; 31 All. 386. The same principle has been applied where two persons who were under arrest for non-payment of Government revenue obtained from the *tahsildar* temporary release to go to a money-lender, and subsequently borrowed Rs. 99 from the money-lender and executed a mortgage-bond bearing compound interest at the rate of 37½ per cent per annum with half-yearly rests. In a suit by the money-lender to recover the amount the Court held that the bargain was unconscionable, and allowed 18 per cent compound interest: *Baldeo Singh* v. *Bulaki Das* (1910) 7 All. L.J. 591; *Abdul Majid* v. *Khirode Chandra Pal* (1915) 42 Cal. 690; 29 I.C. 843, is disapproved by the Privy Council, *Raghunath Prasad* v. *Sarju Prasad* (1924) 51 I.A. 101, 108, 82 I.C. 817; 1924 A.P.C. 60.

70 *Chedambara Chetty* v. *Renja Krishna Muthu* (1874) 1 I.A. 241; 13 B.L.R. 509.

71 *Prem Narain Singh* v. *Parasram Singh* (1877) 4 I.A. 101.

72 *Bhimbhat* v. *Yeshwantrao* (1901) 25 Bom. 126. For a case of gift by a person of weak intellect, see *Tribuvan Datt* v. *Someshwar Datt*, 1931 A.O. 34; 130 I.C. 119.

73 *Sant Bux Singh* v. *Ali Raza Khan* (1946) 21 Luck. 194, 1946 A.O. 129.

74 *Ganga Baksh* v. *Jagat Bahadur Singh* (1895) 22 I.A. 153; 23 Cal. 15; *Mt. Reshmi* v. *Ghungaria*, 1952 A.H.P. 16.

75 Contract: Cases & Commentaries by C. Boyle & D.E. Percy (1978) Ed. pp. 610, & 613; 44 Canadian

In cases under this section, English decisions are to be resorted to only so far as they illustrate the express terms. This warning was given by the Privy Council in *Dhanipal Das* v. *Maneshar Bakhsh Singh*.[91]

"The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. *He ought to have considered the terms of the amended section 16 only.* He also mistook the English law. Apart from a recent statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud.... In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case."

Drastic legislation in most parts of India with regard to money-lending transactions has to a great extent supplanted the provisions of the Contract Act for the protection of debtors. It is not possible in this book to enlarge on the details of this legislation and reference must be made to special works on the subject.

Lapse of time and limitation.—Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence, unless he knew that he had the right, or, being a free agent at the time, deliberately determined not to inquire what his rights were or to act upon them.[92] Lapse of time is not a bar in itself to such a relief. There must be conduct amounting to confirmation or ratification of the transaction.[93] In *Allcard's case* although the equitable title of the donee, the mother superior, was imperfect due to undue influence, the delay and conduct of the donor after her leaving the sisterhood were such as to disentitle her to recover.[94] In a Privy Council case a Hindu widow having a widow's estate entered into a lease which was neither prudent nor beneficial to the estate; but with full knowledge of the lease the widow, and after her, her reversioners, accepted rent under the lease. Their Lordships held that such conduct amounted to confirmation of the transaction by conduct both by the widow and her reversioners.[95] If there be no such conduct, it is open to the party, though he may not sue to set aside the transaction within the period of limitation, to plead undue influence as a defendant in a suit brought against him to enforce the transaction. "A defendant in a suit is entitled to resist a claim made against him by pleading fraud (or undue influence), and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging the plea by the (law of limitation)".[96] This statement was adopted in a Madras case where it was said: "We do not think it follows that because a party's remedy as plaintiff to have an instrument avoided is time-barred, his right to say by way of equitable defence, if sued, that the instrument ought not to be enforced is equally time-barred".[97] This is in entire accordance with the authorities familiar in English equity practice, to which it is needless to make further reference. A lease obtained by undue influence would "at the worst" be voidable at the option of the lessor. In Land Acquisition proceedings this question cannot be considered unless it is set aside by proper proceedings. The use of the word "possibly" in regard to the powers of Land Acquisition Courts considerably minimises the force of the observations.[98]

W.N. 167; *Hem Raj* v. *Khuda Bakhsh* (1905) Punj. Rec. No. 13; *Aziz Khan* v. *Duni Chand* (1918) Punj. Rec. No. 101, p.334; 48. I.C. 933; *Bhutt Nath Chatterjee* v. *Rama Nath Naskar* (1921) 48 Cal. 93; 57 I.C. 1004.

91 (1906) 33. I.A. 118; 28 All. 570. The relief granted below was substantially confirmed on the ground that the facts brought the case within the section. The borrower "was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards", and "the lender used his position to demand more onerous terms than were unreasonable."

92 *Lakshmi Doss* v. *Roop Loll* (1907) 30 Mad. 169; *Someshwar Dutt* v. *Tirbhawan Dutt* (1934) 61 I.A. 224, 9 Luck. 178, 149 I.C. 480, (1934) A.P.C. 130.

93 *Allcard* v. *Skinner* (1887) 36 Ch. D. 145, at pp. 181, 182, 186; (1886-90) All E.R. Rep. 90; *Wright* v. *Vanderplank* (1856) 8 D.M. & G. 133; 114 R.R. 60.

94 *Allcard* v. *Skinner* (1887) 36 Ch.D. 145; (1886-90) All E.R. Rep. 90.

95 *Jugal Kishore* v. *Charoo Chandra,* 1939 A.P.C. 159; 42 Bom.L.R. 1055; 181 I.C. 341.

96 *Rangnath Sakharam* v. *Govind Narasinv* (1904) 28 Bom. 639; per Jenkins C.J.

97 *Lakshmi Doss* v. *Roop Loll* (1907) 30 Mad. 169, 178; *Mst. Manbhari* v. *Sri Ram* (1936) All. L.J. 1215; 165 I.C. 240; 1936 A.A. 672.

98 *Santosh Kumar* v. *Nanda Kishore* (1958) A. Cal. 56, 64.

Right of legal representatives.-A sale-deed obtained by an uncle from his niece by the exercise of undue influence, the uncle standing in a fiduciary relation to the niece, may be set aside, after the death of the niece, by her legal representative.[99]

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

"Fraud" defined.

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound, *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound. *A* says nothing. Here *A*'s silence is equivalent to speech.

(d) *A* and *B* being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

Section 17 analysed.—When analysed S.17 (1) it shows the following ingredients:

(i) There should be a suggestion as to a fact;

(ii) The fact suggested should not be true;

(iii) the suggestion should have been made by a person who does not believe it to be true; and

(iv) the suggestion should be made with intent either to deceive or to induce the other party to enter into the contract.[1]

Fraud in general.-A mere false statement is not fraud.[2] Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. He need not have definite knowledge or belief that it is not true.[3] When fraud produces damage it is generally a wrong entitling the person defrauded to bring a civil action. Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as

99 *Govind* v. *Savitri* (1918) 20 Bom.L.R. 911; Indian Trusts Act, 1882, s. 88; *Shravan Goba* v. *Kashiram Devji* (1926) 51 Bom. 133; 29 Bom.L.R. 115; 100 I.C. 932; 1927 A.B. 384; *Rash Behari Naskar* v. *Haripada Naskar,* 1934 A. Cal. 762; 59 Cal.L.J. 387; 152 I.C. 561; *Mst. Manbhari* v. *Sri Ram* (1936) A.A. 672; (1936) All. L.J. 1215.

(1936) All. L.J. 1215.

1 *R.C. Thakkar* v. *Gujarat Housing Board* (1973) A. Guj. 34,44.

2 *Kamal Kant Paliwal* v. *Prakash Devi Paliwal* (1976) A. Raj. 79,81.

3 This is well settled in England: *Evans* v. *Edmonds* (1853) 13 C.B., 777; 93 R.R. 732; *R.C. Thakkar* v. *Gujarat Housing Board* (1973) A. Guj 34, 54.

to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where they occur, there is not a contract voidable on the ground of fraud, but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. But the fraudulent party is of course estopped from denying that there is a contract if the party deceived finds it to be to his interest to affirm the transaction, which is a conceivable though not probable case. In the same way the party deceived must be at liberty to treat the transaction as a voidable contract if he thinks fit. No doubt many transactions have in fact been so treated notwithstanding that under the law as settled in *Cundy* v. *Lindsay*[4] they might have been declared wholly void.

Falsity.—To constitute falsity of a statement it must be false in substance and in fact.[5] Where false statements are knowingly made it is unnecessary to probe into the motive which is irrelevant in that case.[6]

Where a public body issues a notice for a tender and also estimated costs of the project, it is binding on the public body even though it is not obligatory on it to mention any estimate. In this case the estimates were knowingly false.[7]

The plaintiff, an educated person, had signed a document which was a trust deed. It was attested by his father and by his Advocate. Its execution was also admitted by him before the Registrar. He cannot be allowed to turn round and say that he did not read it and he believed it to be a power of attorney. It was held that in the circumstances no fraud was practised on the plaintiff.[8]

Sub-ss. 3,4,5.—The language of the Act throws no light on the relation of fraud to misrepresentation. It might even be said to obscure it. That relation, however, may be very simply stated. Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is either fraudulent or not fraudulent. If fraudulent it is always a cause for rescinding a contract induced by it; if not, it is a cause of rescission only under certain conditions, which the definitions of s.18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub-ss. 3,4, and 5 are intended to cover these. With regard to a promise made without any intention of performing it (sub-s. 3), it may fairly be said that a promise, though it is not merely a representation of the promisor's intention to perform it, includes a representation to that effect. Some promises are given more readily and willingly than others; but we accept promises only because we believe them to be made in good faith, and no one would be content with a promise which he believed the promisor to have no intention of keeping. Similarly it is fraud to obtain property, or the use of it, under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose.[9] Our modern authorities have removed the difficulty which used to be felt in treating the statement of a man's intention as a representation of fact. "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purpose for which the money is wanted, even if there is nothing unlawful in the object for which the money is actually wanted and used.[10] In particular, it is well settled in England that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract.[11] On

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4 (1878) 3 App. Ca. 459; see under s. 13, above.
5 *R.C. Thakkar* v. *Gujarat Housing Board* (1973) A. Guj. 34,44.
6 *Ibid.* p. 32. *United Motor Finance Co.* v. *Addison & Co. Ltd.* (1937) A. PC. 26, 41 Cal. W.N. 347 reld. on.
7 *R.C. Thakkar* v. *Gujarat Housing Board* (1973) A. Guj. 34,44.
8 *Kamal Kant Paliwal* v. *Prakash Devi Paliwal* (1976) A. Raj. 78,81.
9 See *Feret* v. *Hill* (1854) 15 C.B. 207; 100 R.R. 318, which, admitting this, decided that the defrauded party, having given possession, is not entitled to resume it by force without process of law.
10 *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D. 459, 480, 483, per Bowen L.J.
11 *Clough* v. *L. & N.W.R. Co.* (1871) L.R. 7 Ex. 21, in Ex. Ch.; *Ex parte Whittaker* (1875) L.R. 10 Ch. 446, at p. 449.

the whole, then, sub-s. 3 of the present section did not introduce any novelty.[12]

The mention of "any other act fitted to deceive" in sub-s. 4 appears to be inserted merely for the sake of abundant caution.

Acts and omissions specially declared to be fraudulent.—Sub-s. (5) applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non-compliance with the law is expressly declared to be fraud. Thus by s. 55 of the Transfer of Property Act, 1882, the seller of immovable property is required to disclose to the buyer "any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover," and the buyer to disclose to the seller "any fact as to the nature of extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest," and "omission to make such disclosures... is fraudulent," and this, it seems, even if the omission be due merely to oversight.[13] In England a similar duty of disclosure exists, and failure to fulfil it is a misrepresentation creating a right to rescind the contract, but, if not shown to be wilful, the omission would not be called fraudulent. Various dealings with property are made voidable as being fraudulent, or declared to be fraudulent as against the transferor's creditors or assignees, by other enactments. But, as these transfers of property cannot well be employed as inducements to any other party to enter into any contract beyond such agreement as is involved in the fraudulent transfer itself. they do not come within the scope of the Contract Act, and we have no occasion to dwell upon them here.[14]

Mere non-disclosure.—There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts,[15] but there is no general duty to disclose facts which are or might be equally within the means of knowledge of both parties.[16] Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There is a well-known American case on this point arising out of the conclusion of peace between Great Britain and the United States after the war commonly known as the war of 1812. The contract was for the sale of tobacco: the buyer knew, but the seller did not, that peace had been made; and on the seller asking if there was any news affecting the market price, the buyer gave no answer. The Supreme Court of the United States held that there was nothing fraudulent in his silence.[17] But there are at least two practical qualifications of this rule. First, the suppression of part of the known facts may make the statement of the rest, though literally true so far as it goes, as misleading as an actual falsehood. In such a case the statement is really false in substance, and the wilful suppression which makes it so is fraudulent.[18] Secondly, a duty to disclose particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist.[19]

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12 Borrowing money with no intention of repaying it is cheating under the Penal Code: s. 415, illustration (f).

13 Note that an agreement between vendor and purchaser that the vendor is not to be liable for defective title will not excuse active concealment: *Akhtar Jahan Begam* v. *Hazari Lal* (1927) 25 All. L.J. 708; 103 I.C. 310; 1927 A.A. 693.

14 See Transfer of Property Act, s. 53 (transfers in fraud of other transferees or of creditors); Presidency Towns Insolvency Act, 1909, s. 56; Provincial Insolvency Act, 1920 s. 54; *Manmohandas* v. *Macleod* (1902) 26 Bom. 765.

15 E.g., Contract of fire insurance: *Imperial Pressing Co.* v. *British Crown Assurance Corporation* (1913) 41 Cal. 581; 21 I.C. 836. See also s. 143 below.

16 An important English case is *Bell* v. *Lever Bros. (supra).* The company agreed to pay large compensation to two employees, subsidiary company directors, whose services were being dispensed with. After paying the money, the company discovered that the directors had committed breaches of duty, which would have justified their dismissal without compensation. The House of Lords held that the directors had not these breaches in mind, and were under no duty to disclose them.

17 *Laidlaw* v. *Organ* (1817) 2 Wheat. 178.

18 *Peek* v. *Gurney* (1873) L.R. 6 H.L. 392, 403; *Rex* v. *Kylsant* (1932) I K.B. 442; *Subramanian Chetty* v. *Official Assignee,* 1931 A.M. 603; 133 I.C. 372; *Jewson* v. *Arcos* (1933) 39 Com. Cas. 59, C.A.

19 *Jones* v. *Bowden* (1813) 4 Taunt. 847; 14 R.R. 683.

Where the vendor did not disclose to the purchaser of a material defect in the title, in that the property agreed to be sold was the subject matter of a pending litigation and attachment, the non-disclosure was held to be a fraudulent act and the purchaser was entitled to rescind the contract and claim the earnest money back.[20]

We are not aware of any English authorities corresponding to illustrations (b) and (c). When a special condition restricting enquiries into title is inserted in a contract of sale, a purchaser has the right to assume that there has been a full and fair representation as to the title on the part of the vendor.[21]

Hindu Marriage Act—Fraud meaning of.—Fraud as used in s. 12(1)(c) of Hindu Marriage Act, 1955, is not used in the sense as defined in section 17 Contract Act. Concealment of fact by the wife that she was suffering from a venereal disease does not amount to fraud. (Special Marriage Act Compared).[22]

Fraud—Insolvency—Third Party.—Mere delay in payment of money due on a building contract or withholding of money is not fraud and therefore no principle for payment of interest becomes operative.[23] An owner of property cannot by contract or otherwise qualify his own interest in property by a condition determining or controlling it in the event of his insolvency to the prejudice of his creditors.[24] A condition in the rules of provident fund of a company that on insolvency of a member, the amount standing to his credit shall be liable to forfeiture to the Fund is invalid as a fraud on the law of insolvency.[24] A third party cannot plead that a deed of gift was obtained by fraud or misrepresentation and should, therefore, not be given effect to.[25]

Party pleading fraud—Onus.—The party pleading fraud has to prove it by cogent evidence. Where a party was able to manage his own affairs and had started a jewellery shop; in the absence of suspicious circumstances it could not be said that a simple mortgage was obtained by fraud.[26]

Where the plaintiff was aware of the contents of the will of the father, the partition of property on the death of the father & the mother was not set aside on the ground of fraud of not disclosing the contents of the will and no fresh partition was ordered.[27]

Art. 226 and fraud.—Where an objection to an order of resale of the property smacked of collusion and fraud the Court refused to give any relief under Art. 226 of the Constitution.[28]

18. "Misrepresentation" means and includes—

"Misrepresentation" defined.

(1) the positive assertion, in a manner not warranted by the information of the person, making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

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20 *Jaswant Rai* v. *Abnash Kaur* (1974) 1 Del. 689, 705.

21 *Becker* v. *Patridge* (1966) 2 W.L.R. 803, 813; *In re Haedicke & Lipski's Contract* (1901) 2 Ch. 666; *Bousfield* v. *Hodges* (1863) 33 Beav. 90, 94.

22 *Madhusudan* v. *Smt. Chandrika* (1975) A.MP. 174; *Harbhajan Singh* v. *Smt. Brij Ballabh* (1961) A. Pun. 351; *Rani Bala Debnath* v. *R.K. Debnath,* 73 Cal. W.N. 751, *Raghunath* v. *Vijaya* (1972) A.B. 132; *Raja Ram* v. *Deepabai* (1974) A.MP. 52 reld. on *Yand Kishore* v. *Munnibai* (1979) A.MP. 45, 48.

23 *Kapila Textiles* v. *Madhava & Co.* (1963) A. My. 39. 47; Hudson: Building Contract (8th Ed.) 312 refd. to.

24 *Muktilal* v. *Trustees of Provident Fund* (1956) S.C.R. 100; (1956) A.SC. 336.

25 *Venkatasubbaiah* v. *Subbamma* (1956) A. Andh. 195.

26 *Govinda Naik* v. *Guru Rao* (1971) A. My. 330, 332.

27 *Janakiammal* v. *Ravendra Menon* (1981) A. Ker. 205.

28 *Smt. Maina Devi* v. *State of U.P.* (1971) A.A. 241,244.

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Language of the section.—This is one of the sections taken wholly or in part from the draft Civil Code of New York, and it is one of the least satisfactory in point of form. In sub-s. 1 the use of the word "warranted" in a sense (whatever that sense may precisely be) unknown to the law, and in a subject-matter where the words "warranty" and "condition" have already caused quite enough trouble, is an elementary fault. Nor is the intention of the qualifying clause, to which we shall return, altogether clear. However, the Contract Act has at least made some improvement on the classification of the New York draft, where the original of this clause stands under the head of Fraud. Sub-s. 2 is obscure and apparently useless. Sub-s. 3 (which does not occur in the New York draft Code seems to involve confusion between contracts voidable because consent was obtained by misrepresentation and transactions which can have no legal effect, except possibly by way of estoppel, because there was no real consent.

Difference between fraud and misrepresentation.—The principal difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true though in both cases it is a misstatement of fact which misleads.[29]

Principles of English law as to misrepresentation.—The common Law recognises a general duty not to make statements which are in fact untrue, with the intent that a person to whom they are made shall act upon them to the damage of a person so acting, and without any belief that they are true. The breach of this duty is the civil wrong known as fraud or deceit. But, if belief is there, it is not required by any general rule of law to be founded on any reasonable ground, though want of any reasonable ground may be evidence of want of belief.[30] Nor is there any universal duty to give correct information, except so far as a partial statement of the truth may be rendered substantially false by omission of known facts (see notes on s. 17, "mere non-disclosure," above), or to give any information at all. With regard to contracts, the general principle is that if one party has induced the other to enter into a contract by misrepresenting, though innocently, any material fact specially within his own knowledge, the party misled can avoid the contract. We do not know of any positive authority for extending such a rule, even in equity, to matters of fact equally within the means of knowledge of both parties; but reliance on the other party's statement in such matters is not common or easily proved, and it is certainly convenient to state the law in the broad form that

"a false representation by one party in regard to a material fact made for the purpose of inducing the other party to enter into a contract, and actually inducing the latter to enter into the contract, renders the contract voidable".[31]

If this can be accepted as the rule of the modern Common Law, the Contract Act does not go beyond it, if indeed it goes so far. The qualifying words of the Act will be considered below. In certain classes of contracts, where the facts are specially within one party's knowledge, a positive duty of disclosure is added, and the contract is made voidable by mere passive failure to communicate a material fact. The principal examples of this special duty are to be found in the several branches of the contract of insurance, and in sales of immovable property (*cp.* notes on s.17, above). But there is no positive duty of disclosure between contracting parties where the facts are not by their nature more accessible to one than to the other, though one party may have acquired information which he knows that the other has not.[32] But see the next paragraph.

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29 *Niaz Ahmad Khan* v. *Parshottam Chandra* (1931) 53 All. 374; (1931) A.A. 154, 156; *R.C. Thukkar* v. *Gujarat Housing Board* (1973) A. Guj. 34, 43.

30 *Derry* v. *Peek* (1889) 14 App. Ca. 337. Such is the law settled for England by the House of Lords. It is by no means clear that the common law is generally so understood in other jurisdictions.

31 Harriman, s. 426; *cp.* Anson, 20th ed., 169 *sqq.*; 22nd Ed., 207 *sqq.*

32 *Laidlaw* v. *Organ*, 2 Wheat. 98 (see on s. 17 "mere non-disclosure", above). "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The Court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not

An assured died within 3 years and 9 months & 3 years and 6 months of the first and last insurance policies. The Insurance Corporation having discovered information that the assured had given false information on certain vital questions about his health, stopped payment of the cheque issued by it. In a suit by the trustee of the assured it was contended that fraudulent representations were irrelevant in view of Explanation to s. 19. It was held that s. 19 Contract Act could not be invoked in such contracts.[33]

But it is not each and every misrepresentation which would render a contract of insurance liable to be avoided. A misdescription of the tea dust is not such a material fact. It was described as Pekoe tea dust whereas it was ordinary tea dust and there was no column in the proposal form for marking the brand or quality of tea. The mere mention of tea would have been sufficient. Similarly, when there was no column for giving the value of tea, overvaluing will not avoid a policy. But where material facts are not disclosed the policy of insurance will be void and on that will depend a reinsurance policy which will also be rendered void.[34]

Allahabad High Court has held that where the Insurance Corporation made an allegation of misrepresentation by the deceased insured about his having suffered from carbuncle and diabetes but the officer accepting the policy was not produced and the person produced by the corporation made no enquiries about the deceased's family and the person to be insured was 56 years of age, it was held that in the circumstances the corporation must be deemed to have accepted the deceased for insurance with knowledge of diseases that go with that age and the claim was decreed.[35]

Silence not misrepresentation.—A commercial traveller employed by the defendants had to use a car for his work. He was convicted of a driving offence and his driving licence cancelled. The employers dismissed him and he sued for wrongful dismissal. He succeeded as he was under no duty to disclose his previous convictions and he could engage some one else to drive his car.[36]

Misrepresentation—half truths.—Half truth and careless advice of a Solicitor may be pleaded as a misrepresentation.[37]

Uberrima fides—Contracts of Insurance.—Apart from fiduciary relationships contracts of partnership, contracts of insurance are the leading instances of contracts expressed by the law to be contracts of the utmost faith where material facts must be disclosed; if not the contract is voidable.[38] Contracts such as contracts of marine, fire and life are examples where *uberrima fides* is to be shown by persons obtaining them. In each of them the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. Ordinary contracts of guarantee are not amongst those requiring *uberrima fides* on the part of the creditor towards the surety.[39] According to the Patna High Court, sections 1, 2(g) and s. 10 of Contract Act read together lead to the conclusion that the incidents of insurance contracts in India are "on the same footing" as in England and the agreement is not enforceable if the basis of the agreement is broken.[40] In a contract of in-

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to say or do anything tending to impose upon the other": per Marshall C.J. For a later example see *Turner* v. *Green* (1895) 2 Ch. 205.

33 *Life Insurance Corporation* v. *Canara Bank Ltd.* (1973) Knt. 1292,1303; *Mithoo Lal Nayak* v. *Life Insurance Corporation* (1962) A.SC. 814,819.

34 *Hindustan General Insurance Society* v. *Punam Chand* (1974) 2 Cal. 496; (1971) A. Cal. 285,287; *The Vanguard Investments Ltd. Madras* v. *The Indian Mutual General Insurance Society Ltd.* (1973) A.M. 147, 148, 149; *Australian Widows Fund Life Assurance Society Ltd.* v. *National Mutual Life Assurance of Australia Ltd.* (1914) A.C. 634; (1914) A. PC. 220 disting.

35 *Smt. Kamala Wanti* v. *Life Insurance Corporation* (1981) A.A. 366, 372.

36 *Hands* v. *Simpson Fawcett & Co. Ltd.* (1928) 44 T.L.R. 295.

37 *Tapp* v. *Lee* (1803) 3 Bos & P. 367 (Half truth not disclosing Bankruptcy in a reference; *Nottingham Patent Brick & Tile Co.* v. *Butler* (1866) 16 Q.B.D. 778 (Solicitor's negligence in not noticing restrictive covenant.

38 *Bell* v. *Lever Brothers Ltd.* (1932) A.C. 161; (1931) All E.R. Rep. I, 32; *S. Subramuniam* v. *Hindustan General Insurance Society,* (1972) A.M. 196; *Life Insurance Corporation of India* v. *Chandravatlamma* (1971) A.AP. 41, 43, 45

39 *Scaton* v. *Heath* (1899) 1 Q.B. 782, 792-3; *Hindustan General Insurance Society* v. *Punam Chand,* (1971) A. Cal. 285 (Facts not material do not avoid contract). (Quality of insured and its real value not material facts)

40 *Balkrishna* v. *New India Insurance Co.* (1959) A.P. 102.

surance, any fact which materially influences the making or not making a contract or determining whether to accept or not to accept the risk at ordinary rates of premia is a material fact which has to be correctly stated.[41] But withdrawal of a proposal with another insurer is not such a fact.[42] A proposer is not only required to state all matters within his knowledge which he believes to be material to the question of insurance but also all which in point of fact are so.[43] Suppression of material facts when making a proposal for insurance by one having knowledge or belief of the fact would fall under section 17 of the Contract Act and the policy issued would be vitiated thereby;[44] e.g. case of suppression of the fact that the policy holder applying for revival was treated for a serious disease.

The following facts have been held to be material facts and the non-disclosure makes the contract voidable:

(1) that goods were insured upon a voyage for an amount in excess of their value;
(2) that in relation to an insurance comparable to that sought previous claims had been made. A circumstance that is material for one type of insurance is not necessarily material for another; for example that the risk has been refused by another Company is material in life, fire, accident and burglary insurance but not in marine insurance. Whether a particular circumstance is material is a question of fact, and the opinion of the assured on its materiality is irrelevant.[45]

Misrepresentation—Insurance.—Non disclosure in the case of insurance does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect, to avoid or to affirm the contract. A 'foreign jurisdiction' clause is therefore not abrogated in such case. A dispute as to non-disclosure is "a dispute arising under" the policy and remains within the clause.[46] Declaration in an application for life insurance amounts to a warranty.[47] It is an implied condition of the contract that non-disclosure would entitle the insurer to avoid the contract.[48] It is the duty of a person, wishing to take an insurance policy of any kind, marine, fire, life, guarantee, to make full disclosure to the insurer, without being asked, of all material circumstances.[49] A contract of marine insurance appears to be based on

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41 *Docker & Woolf Ltd.* v. *Western Australia Insurance Co.* (1906) 1 K.B. 408, 415; *Hindustan General Insurance Society* v. *Subramaniam* (1975) A.M. 162; (1972) A.M. 196 revd. (case of misstatement about carrying capacity); *Hindustan General Assurance Society* v. *Punam Chand Chhajjar* (1974) 2 Cal. 496; (1971) A. Cal. 285. *New India Assurance Co. Ltd.* v. *Sulochana Chaudhurani* (1962) A. Asm. 651; & *Rohini Nandan Cooswami* v. *Ocean A. & G. Corpn. Ltd.* (1960) A. Cal. 696, 700 reld on.

42 *Benarsidebi* v. *New India Insurance Co.* (1959) A.P. 540.

43 *Daglish* v. *Jarvie,* 20 L.J. Ch. 475; (1850) 2 Mac. & G. 231, 243; *B. A. S. Chopra* v. *New Zealand Insurance Co.* (1967) A. Cal. 35; *Brownlie* v. *Campbell* (1880) 5 A.C. 925, 954 *Joel* v. *Law Union & Crown Insurance Co.* (1908) 2 K.B. 863, 883; *Srinivasa Pillai* v. *Life Insurance Corporation* (1977) A.M. 381, 383. (policy of a husband & wife who delivered a child within 6 months of the proposal).

44 *Mithoolal* v. *Life Insurance Corporation of India* (1962) A.SC. 814; (1962) Supp. 2 S.C.R. 571; *Life Insurance Corporation of India* v. *Chandravathamma* (1971) A.A.P. 41, 45; *Life Insurance Corporation* v. *Canara Bank Ltd.* (1974) A. My. 51, 56; *Life Insurance Corporation* v. *Baidyanath Singh* (1978) A.P. 334; 336; *All India Life Insurance Co. Ltd* v. *S.P. Maheshwari* (1960) A.M. 484.

45 Chitty on Contracts: 24th Ed. paragraph 412 and see cases therein.

46 *Mackender* v. *Feldia A.G.* (1966) 3 All E.R. 847, 850; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) 1 All E.R. 337.

47 *Brahm Dutt* v. *Life Insurance Corporation* (1966) A.A. 474; *A.I.G. Insurance Co.* v. *Maheshwari* (1960) A.M. 484; *Mithoo Lal* v. *Life Insurance Corporation* (1962) Supp. 2. S.C.R. 571; (1962) A.SC. 814; *B.A.S. Chopra* v. *New Zealand Insurance Co.* (1967) A. Cal. 35 (motor car insurance).

48 *Blackburn Low & Co.* v. *Vigors* (1886) 12 App. Cas. 531, 537; *B.A. S. Chopra* v. *New Zealand Assurance Co.* (1967) A. Cal. 35; *Dawson Ltd.* v. *Bonnin* (1922) 2 A.C. 413; (1922) All E.R. Rep. 88 (H.L.).

49 *Ionides* v. *Pender* (1874) 9 Q.B. 531 (Marine insurance for a sum exceeding the value of goods); *Hood* v. *West End Motor Car Packing Co.* (1917) 2 K.B. 38 (Marine goods carried on deck where it is unusual to carry them); *London Assurance* v. *Mausel* (1879) 11 Ch.D. 363 (Life, previous proposals rejected); *Lindenau* v. *Desborough* (1828) 8 B. & C. (Life, doubt about health); Treitel: Law of Contract (5th Ed.) p. 299 (2nd Ed.) pp. 252-3; *Rozanes* v. *Bowen* (1928) 32 L.1.L.R. 98, 102 refd. to *Joel* v. *Law Union & Crown Insurance Co.* (1908) 2 K.B. 863 (Material facts in non-marine insurance); *B.A.S. Chopra* v. *New Zealand Insurance Co. Ltd.* (1967) A. Cal. 35 (Motor insurance).

an implied condition that there is no misrepresentation or concealment.[50] Any statement can be made on the basis of the contract of insurance and if any statement is inaccurate its materiality is immaterial. Whether there is a warranty as to the correctness of statements contained in an application for insurance and insurance policy is a question of construction;[51] and an enquiry into the issue of materiality is precluded. The falsity may be by inadvertence or without fraud;[52] because representation is a part of the contract.[53] The insured cannot turn round and say "it would have made no difference if you had known the truth" about his state of health.[54] In cases of breach of warranty of the truth of statements in an insurance proposal by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract and neither s. 64 nor s. 65 has any application.[54] A policy of insurance is effective on the completion of all formalities even without "the personal statement duly completed by the doctor" as that is a mere formality.[55] In motor-car insurance, the truth of the answers to question by the assured is a warranty which is a basis of the liability[56] But there need be no disclosure of facts which the insurer himself ought to know or the knowledge of which he waives.[56] And disclosure to the insurer's agent by the assured is disclosure or representation to the insurer.[57] Age admitted by the insurer can be questioned later if it is shown that the admission was obtained by fraud or fraudulent misrepresentation.[58]

Convictions.—In a building insurance also an insured is bound to disclose all facts which prudent or reasonable insurer might want to know as material facts and moral character of an insured is one of them. And therefore where criminal convictions including one of robbery must be disclosed. And even if there is no proposal by the insured because of a package insurance by a building Society will not make any difference. And the insurance company—the insurer—can repudiate the policy.[59]

Uncustomed Goods.—The plaintiff had insured his goods against loss with the defendant company. Some of the goods were lost, among them were some uncustomed articles. The plaintiffs claimed damages for the loss of goods. The defendant pleaded that the agreement was illegal and also relied on public policy as a defence. The Court held that although the policy of insurance were not tainted with illegality it would be contrary to public policy for the court to assist the plaintiff by enforcing them to the extent of granting him an indemnity against the loss of uncustomed articles; for by doing it the Court would be assisting the plaintiff to derive a profit from deliberate breach of law.[60]

Misrepresentation—Warranty.—The Esso Petroleum Company using its expert knowledge induced a dealer to take a petrol pump on lease. The estimate was exaggerated and the dealer was awarded damages for breach of warranty.[61]

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50 *Blackburn, Low & Co.* v. *Vigors* (1886) 17 Q.B.D. 552, 561-562

51 *Provincial Insurance Co. Ltd.* v. *Morgan & Foxon,* 1933 A.C. 240, 246; *Oriental Government Security Life Insurance Co. Ltd.* v. *Narasimha Chari,* 25 Mad. 183; *Dawsons Ltd.* v. *Bonnin* (1922) 2 A.C. 413, 421; *Srinivasa* v. *Premier Life & General Insurance Co.* (1958) A. My. 53; *Balkrishna* v. *New India Insurance Co.* (1959) A.P. 102; *Benarsidebi* v. *New India Insurance Co.* (1959) A.P. 540.

52 *Condogianis* v. *Guardian Insurance Co.* (1921) A.PC. 195 (per Lord Shaw).

53 *Condogianis* v. *Guardian Insurance Co.* (1921) A.PC. 195; *Anderson* v. *Fitzgerald* (1853) 4 H.L.Cas. 484, 10 E.R. 551); See also *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853.

54 *Mithoolal* v. *Life Insurance Corporation* (1962) Supp. 2 S.C.R. 571; (1962) A.S.C. 814 (A case of life insurance); *Hindustan General Insurance Society* v. *Punam Chand,* (1971) A. Cal. 285 (Facts not material do not avoid contract).

55 *Ramdev Moolchand* v. *Lakshmi Insurance Co. Ltd.* (1962) A. Punj. 125; MacGillivary on Insurance (4th Ed.) s. 649.

56 *B. A. S. Chopra* v. *New Zealand Insurance Co. Ltd.* (1967) A. Cal. 35.

57 *Ayrev* v. *British Legal & United Provident Assurance Co. Ltd.* (1918) 1 K.B. 136. MacGillivary on Insurance Law (5th Ed.) Art. 999; *B.A.S. Chopra* v. *New Zealand Insurance Co.* (1967) A.Cal. 35, 38.

58 *Life Insurance Corporation of India* v. *Baidyanath Singh* (1978) A.P. 334; *Alliance and Stuttgarter Ltd.* v. *Hemanta Kumar Das* (1938) A. Cal. 641; *Maneklal Kalidas Shah* v. *Yorkshire Insurance Co. Ltd.* (1939) A.B. 161; referred to.

59 *Woodcott* v. *Sun Alliance & London Insurance Ltd* (1978) 1 All E.R. 1253; *General Accident Fire and Life Assurance Corpn. Ltd.* v. *Midland Bank Ltd* (1940) 3 All E.R. at pp. 257,258; *Lambert* v. *Cooperative Insurance Society Ltd* (1975) Lloyds Rep. at p. 487 applied.

60 *Geisman* v. *Sun Alliance and London Insurance Ltd.* (1977) 3 All E.R. 570,580-1 (Q.B.D); *Parkin* v. *Dick* (1809) 11 East 502; *Mackender* v. *Feldia* AG (1916) 3 All E.R. at p. 850 applied.

61 *Esso Petroleum Co. Ltd.* v. *Marden* (1976) Q.B. 801; (1976) 2 W.L.R. 583; (1976) 2 All E.R. 5.

The plaintiff purchased a Benlay car which was sold to him with the representation that it had done 20,000 miles after its reconditioning whereas it had done over 100,000 miles and was unsatisfactory. The plaintiff succeeded in getting damages for breach of what was intended to be a warranty.[62]

The plaintiff looking for a stallion was examining a horse in the stable when the defendant told him that the horse was sound. The plaintiff purchased the horse a few days later. The horse was found utterly unfit for the purpose of the stud. This was held to be a warranty by the House of Lords.[63]

Relying on one's own fraud, no action will lie.—Where contract is vitiated on the ground of fraud, the party guilty of fraud or a person deriving title from him cannot ask for refund of money paid. The courts will not entertain an action for money had and received where in order to succeed a person has to prove his own fraud.[64] If parties give a transaction a particular form they must take the consequences thereof. A party to a fraud cannot be allowed to plead his own fraud, e.g. splitting up advance rent in two parts in order to defraud income-tax.[65]

In the same way parties are not bound to remove mistakes to which they have not contributed.[66] It must be remembered that the parties can always decide before hand for themselves, if they choose, what facts shall be deemed material and to what extent. On the one hand, they can make the existence of any specified state of facts, or the truth of any affirmation, an essential term or condition of the contract, so that without it there is no contract at all;[67] on the other hand, they can make any fact or affirmation the subject-matter of a warranty or collateral agreement, so that failure to make it good shall not avoid the principal contract, but only give a right to damages. This is exemplified by the ordinary warranties expressed or implied, on a sale of specific chattels.[68] In every case the question is what the parties really intended. Much perplexity would have been avoided if this principle, explicitly recognised only in the second half of the nineteenth century,[69] had been understood earlier.

Sub-s. 1.—What is meant by "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true"? Many persons would say that, in any ordinary use of the English language, the assertion of that which is not true, though it may be innocent and even free from negligence, cannot be "warranted" in any manner. Now the framers of the New York Civil Code put this clause under the head of Fraud. Probably what they meant was that a misrepresentation made with reasonable and probable cause for believing it true should in no case be treated as fraud, but that a reckless or grossly negligent misrepresentation should be. The result would be to lay down a more stringent rule as to fraud than is sanctioned by English decisions—in fact, some such rule as the Court of Appeal laid down in England, but the House of Lords refused to adopt, in *Derry* v. *Peek*.[70] When this clause is transferred to the head of misrepresentation, it would seem to mean that innocent misrepresentation does not give cause for avoiding a contract unless the representation is made without any reasonable ground. The High Court of Calcutta has held that an assertion cannot be said to be "warranted" for the purpose where it is based upon mere hearsay. Thus if *A* makes a positive statement to *B* that *C* would be a director of a company about to be formed, and *B* applies for shares on the faith of that statement, the statement would be a misrepresentation if *A* did not derive the information from *C* direct, but from a third party, *D*.[71] In the

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62 *Dick Benlay Production Ltd.* v. *Harold Smith (Motors) Ltd.* (1965) 1 W.L.R 623.

63 *Sehawel* v. *Reade* (1913) 2 I. R. 81 (H.L); Contra: *Hopkins* v. *Tanqueray* (1854) 15 C.B. 130. See *Couchman* v. *Hill* (1947) K.B. 544 (guarranty of the heifer being unserved which was wrong); *Harling* v. *Eddy* (1951) 2 K.B. 739 (sale of heifer who died of tuberculosis.

64 *Mithoo Lal* v. *Life Insurance Corporation* (1962) A.SC. 814; (1962) Supp. 2 S.C.R. 571.

65 *Abdul Razzak* v. *Mohammad Shafi PLD* (1962) 1 S.C. 134, 137 (Pak.).

66 *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.

67 *Behn* v. *Burness* (1863) 3 B. & S. 751 (ship described in charter-party as "now in the port of Amsterdam"), *Bannerman* v. *White* (1861) 10 C.B.N.S. 844 (hops bought on terms of being free from treatment with sulphur).

68 See the sections on Warranty in the Sale of Goods Act, 1930.

69 See note 52 *supra*.

70 (1889) 14 App. Ca. 337, reversing judgment of C.A. 37 Ch.D. 541.

71 *Mohan Lall* v. *Sri Gungaji Cotton Mills Co.* (1899) 4 C.W.N. 369.

course of the judgment Maclean C.J. said: "I need scarcely say that we must deal with this case according to the law of India and not of England, and if we find the term 'misrepresentation' defined by statute in this country, we must do our best to ascertain whether the case is brought within that statutory definition... *(A)* says that *(D)* told him that he *(D)* had authority from *(C)* to use his name in the prospectus as a director, in other words, that he *(A)* obtained his information not from *(C)* direct, but only through *(D)* I am not disposed to think that if *(A)* had relied on the secondhand information he derived from *(D)*, he was 'warranted' in making the positive assertion that *(C)* would be a director".[72] This appears to require, on the part of the person making the representation, a belief not merely having some reasonable ground—for it is often quite reasonable to act upon second-hand information, even when it is not unavoidable—but founded on the best information that is available. There is no reason to be dissatisfied with this judgment, though it may be matter of historical doubt whether the framers of the Act intended to go so far. The qualification does not, of course, apply to the classes of contracts where there is a special duty to disclose all material facts within a party's knowledge. Outside these contracts of "abundant good faith" the rule of the High Court of Calcutta sets up a standard of diligence which may well be thought adequate; though it would not satisfy those learned writers in England and America who take the view that "innocent misrepresentation which brings about a contract is now a ground for setting the contract aside"[73] in all cases. Misrepresentation as to title made by vendors recklessly or with gross negligence cannot escape the charge of fraudulent misrepresentation.[74]

Statement of opinion & intention.—According to a learned writer "A representation is a statement of fact, past or present or as distinct from a statement of opinion, or of intention or of law".[75] A mere statement of opinion proved to be unfounded is not misrepresentation nor a mere statement of intention which has not been put into effect. But the statement of opinion or of intention may, in certain circumstances, be regarded as a statement of fact. Thus if the person expressing the opinion did not hold it or no reasonable man could have held it on the known facts, the statement may be regarded as a statement of fact. Similarly where a vendor's solicitor honestly but without any reasonable ground believed that estate duty would be payable on the death of an annuitant "who is believed to have no aggregable estate", the purchaser of an absolute reversion in a trust fund was held entitled to rescind the sale because the vendor was in a stronger position to ascertain the facts.[76] On the other hand "puffs and commendatory statements" do not amount to representation.[77] But statements made in good faith are not misrepresentation if they turn out to be wrong.[78] Statements of opinion published as if they were a fact may be regarded as a statement of fact.[79] Statement of intention may be misrepresentation of existing fact if at the time it was made there was not the intention or the ability to put it into effect.[80] For example where a man orders goods which he had no intention to pay for, this was fraudulent misrepresentation.[81]

Opinion and fact.—A statement by an estate agent that some flats would bring not less than 6 guineas a week and others not less than 5 gms a week was a mere matter of opinion and not a statement of fact.[82]

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72 Ibid, at p. 388.

73 Anson, Law of Contract (22nd Ed.) p. 210; Harriman, s. 426, see *supra*, note 30.

74 *Sayu Mohammad Abdulla* v. *Neelakantan* (1958) A. Ker 322; *Mohan Lal* v. *Sri Gangaji Cotton Mills*, 4 C.W.N. 369; *Derry* v. *Peek*, 14 App. Cas. 337 (1889); *Ganpat* v. *Mangilal* (1962) A.MP. 144; *Cf. Hedley Bryne & Co. Ltd.* v. *Hellers & Partners Ltd.* (1964) A.C. 465 (Careless misstatement); and *Brown* v. *Raphael* (1958) 2 W.L.R. 647 (without reasonable grounds).

75 Chitty: On Contract (24th Ed.) Para 354.

76 *Brown* v. *Raphael* (1958) Ch. 636; (1958) 2 All E.R. 79; (1958) 2 W.L.R. 647.

77 *Dimmock* v. *Hallett* (1866) L.R. 2 Ch. App. 21, 27.

78 *New Brunswick and Canada Ry. & Land Co.* v. *Conybeare* (1862) 9 H.L. Cas. 711; *Bisset* v. *Wilinson* (1927) A.C. 177, *Anderson* v. *Pacific Insurance Co.* (1872) 7 C.P. 65.

79 *Reese River Silver Mining Co. Ltd.* v. *Smith* (1869) L.R. 4 H.L. 64.

80 See *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D. 459; *Angus* v. *Clifford* (1891) 2 Ch. 449, 470. (449, 470).

81 Re: Shackleton, exp. Whittaker (1875) L.R. 10 Ch. App 446; *Ray* v. *Sempers* (1974) A.C. 370.

82 *Fitzpatrick* v. *Michell* (1928) 28 S.R. (N.S.W.) 285.

Non-disclosure.—The general rule is that mere non-disclosure does not constitute misrepresentation, for there is no duty on the parties to disclose material facts to each other howsoever dishonest such non-disclosure may be in the particular circumstances.[83] For example a Company director who had inside information that the value of shares is likely to go up was held to be under no duty to disclose this fact to a shareholder whose shares he purchased.[84] Thus tacit acquiescence in another's self deception does not in itself amount to misrepresentation provided it is not previously caused by a positive misrepresentation.[85]

Representee.—Representees are of three classes:[86]

(1) Persons to whom the representation is directly made and their principals;
(2) persons to whom the representator intended the representation to be passed on;
(3) members of a class at which the representation was directed. The representee may be the general public but it does not follow that a legal remedy exists for it. But if the representation is directed at a particular class a representative must bring himself within that class. *Peek* v. *Gurney*[87] is an instance illustrating this point. There, the promoters of a Company issued a false prospectus and the plaintiff purchased shares of the Company in the open market relying on the prospectus. The House of Lords held that the plaintiff was not of that class it was meant for inviting the public to subscribe and not buy in the market and hence he could not recover.

So also in *Gross* v. *Lewis Hillman Ltd.*[88] it was held that the right of the purchaser of certain land to rescind the contract for misrepresentation did not run with the land and a purchaser from the original purchaser could not avail of it. But where a false statement is made in a bill of lading any person who relies on it will be a representee.[89]

Two remedies to a representee.—A representee, who was induced by misrepresentation into a contract, has two remedies open to him:

(1) to elect to rescind the contract and to demand from the representor a complete restoration if that is possible; or
(2) to affirm the contract and sue for damages.[90]

Misrepresentation need not be direct.—To succeed on the basis of innocent misrepresentation, the plaintiff must show that

(1) the language relied upon does import or contain a representation of some material facts;
(2) the representation is untrue; and
(3) the plaintiff in entering into the contract was induced so to do in reliance upon it.[91]

In order to constitute misrepresentation there must be some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false.[92] Mere silence is not misrepresentation; but where so many things are unsaid and reduces the little that is said into half truths and silence distorts a positive representation, such silence amounts to misrepresentation and avoids the rest of the terms of the contract.[93] A wrong statement to become

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83 Chitty: On Contract (24th Ed.) Para 358 relying on *Ward* v. *Hobbs* (1878) 4 App. Cas. 13.
84 *Percival* v. *Wright* (1902) 2 Ch. 421.
85 Chitty: On Contract (24th Ed.) Para 358.
86 Chitty on Contract 24th Ed. Para 363 relying on *Swift* v. *Winterbotham* (1873) 8 Q.B. 244,253.
87 (1873) 6 H.L. 377.
88 (1970) Ch. 445; (1969) 3 All E.R. 1476.
89 *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.* (1957) 2 Q.B. 621; (1957) 2 All E.R. 844; (1957) 3 W. L.R. 403.
90 *S. Gormley & Co. Pty. Ltd.* v. *Cubit* (1964-65) N.S.W.R. 557, 560.
91 *Brown* v. *Raphael* (1958) 2 W.L.R. 647, 650; *Smith* v. *Land & House Property Corporation* (1884) 28 Ch.D. 7.
92 Lord Cairns in *Peek* v. *Gurney* (1873) 6 H.L. Cas. 377, 403.
93 *Tirathraj Pandey* v. *Amar Credit Corporation*, 72 C.W.N. 243; *Macher* v. *Foundling Hospital*, I.V. & B 188; 35 E.R. 74 (Silent acquiescence about a prohibited trade no inference of consent).

misrepresentation need not be directly made to the plaintiff. It is enough if it is made to a third person in a manner that the plaintiff will become aware of it.[94]

After learning from a talk between her father and another that the proposed bridegroom was a young man in a comfortable position, a statement which was false, a girl, who was *sui juris* gave her consent to her marriage. Such consent is vitiated by fraud and misrepresentation.

S. 12(1)C of Hindu Marriage Act applies.[94]

Commendatory expressions such as advertisements to the effect that a soap powder "washes whiter than white" or that certain brand of cigarettes gives "lasting satisfaction" are not considered as serious misrepresentations of fact. "Puffs and commendatory statements" do not amount to representation.[95] In a private contract, a similar latitude is allowed when a person wants to seek a customer although the borderline of permissible assertion is not always discernible. At an auction sale, land was stated to be "fertile and improveable" whereas it was partly "abandoned and useless." This was held to be "a mere flourishing description by an auctioneer". But in the *Carbolic Smoke Balls case* a manufacturer making a precise claim that his carbolic smoke balls gave immunity from influenza was held liable.[96] In the case of a sale of a hotel, where the tenant was described as "a most desirable tenant" whereas his rent could be recovered under pressure and he was currently much in arrear, such statement was held to entitle the purchaser to rescind the contract.[97] But in a misrepresentation as to the status of a lessee[98] to prospective purchaser the maker is not guilty unless he intended to give a false impression. It is a question of fact in each case whether it is a statement of mere praise or an assertion of "verifiable facts".

Acquiescence, tacit consent and connivance.—To consent means to acquiesce, i.e. consent indicated otherwise than words.

In an election case, the Rajasthan High Court held that tacit consent which may be used in connection with unlawful and immoral matters as also with matters not immoral or unlawful is 'consent' and so is connivance which can only be used for matters unlawful and immoral. And therefore the word consent is not stronger than the word connivance.[99] But it was held in an English case that mere silent acquiescence by a lessor respecting a trade forbidden by the lease raises no inference that he has given consent to the lessee's carrying on any forbidden trade.[1]

We may refer to a Punjab case to illustrate the meaning of the expression "positive assertion." *A* sells a mare to *B*. Before the sale *A* writes to *B* as follows, in answer to inquiries from *B*: "I think your queries would be satisfactorily answered by a friend if you have one in the station, and I shall feel more satisfied. All I can say is that the mare is thoroughly sound." The letter is a "positive assertion" of soundness coupled with a recommendation to *B* to satisfy himself before purchasing; but it does not amount to a warranty.[2]

A second hand motor car dealer sold an old car to the plaintiff representing it to be in excellent condition but when the plaintiff purchased and ran it for three weeks he discovered that the engine was in a very bad condition and had to be replaced. The motor car dealer was held to be liable in damages for misrepresentation and breach of the implied warranty.[3]

Inducement may not be the sole inducement.—Thus where a plaintiff was induced to take debentures partly on the inducement of the prospectus but also because of a mistaken belief of his own, he was held to be entitled to have the contract rescinded. Said Cotton L.J. "It is not

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94 *Babui Panmato Kuer* v. *Ram Agya Singh* (1968) A.P. 190.
95 *Dimmock* v. *Hallett* (1866) 2 Ch. Ap. 21, 27.
96 *Dimmock* v. *Hallett* (1866) 2 Ch. Ap. 21; Anson: On Contract (22nd Ed.) 210; *Carlill* v. *Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256; (1891-94) All E.R. Rep. 127; Chitty: On Contract (24th Ed.) para 354.
97 *Smith* v. *Land & House Property Corporation* (1884) 28 Ch.D.7;51 L.T. 718.
98 *Gross* v. *Lewis Hillman*, (1969) 3 W.L.R. 787.
99 *Sheopatsingh* v. *Harishchandra* (1958) A. Rai. 324.
1 *Macher* v. *Foundling Hospital*, I.V. & B. 188; 35 E.R. 74.
2 *Currie* v. *Rennick* (1886) Punj. Rec. No. 41.
3 *Crowther* v. *Shannon Motor Co.* (1975) 1 All.E.R. 139, 141. (C.A.); *Bartlett* v. *Sidney Marcus Ltd.* (1965) 2 All.E.R. 753 disting.

necessary to show that the statement was sole cause of his acting as he did."[4]

Sub-s. 2.—This sub-section is, as already stated, obscure.[5] It was considered in a Bombay case[6] by Sargent J.: "The second clause of s.18 is probably intended to meet all those cases which are called in the Courts of Equity, perhaps unfortunately so, cases of 'constructive fraud',[7] in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud or deceit." In that case the plaintiffs, who were creditors of the defendants, sued to set aside a composition deed executed by their agents, alleging that their signature was obtained by a representation made by one of the defendants that the deed was nothing more than an assignment to trustees for the benefit of creditors, as agreed to in a previous meeting of the creditors. It was further alleged that the deed contained a release of which no mention was made at the meeting, and of which the plaintiffs' agents had no knowledge. Under those circumstances the High Court of Bombay declared the release absolutely void, on the ground that the deed as it was signed was essentially different from that which the plaintiffs' agent intended to execute, or thought they were executing, when they affixed their signature to the deed. The Court went further, and said that there was another ground on which the plaintiffs were entitled to relief, namely, that there was a duty on the part of the defendants within the meaning of the present sub-section to communicate to the plaintiffs' agents the fact of the existence of the release and that the breach thereof entitled the plaintiffs to avoid the transaction under s. 19 of the Act. But it is submitted that the first sub-section was more applicable, as there was a "positive assertion" by one of the defendants that the document was nothing more than a mere assignment of the creditors' property to trustees.

This sub-section would also cover the position where a true statement is made, but it becomes false to the knowledge of the maker before it has been acted upon. In *Incledon* v. *Watson*[8] *A*, in negotiating for the sale of the goodwill of a school to *B*, told him that there were twenty-two boarders with perfect truth. But before the bargain was concluded, the number had dropped to seventeen to *A*'s knowledge, and he said nothing. Wightman J. held that this amounted to fraud. In *With* v. *O'Flanagan*,[9] the plaintiff was allowed to rescind a contract to buy the defendant's medical practice. The defendant had, before the signing of the contract, correctly stated that the practice was worth £2,000/- a year, but before the plaintiff went into possession on completion four months later, the practice had dwindled to a mere £5/- per week to the defendants' knowledge, and he kept silent. The Court of Appeal based their decision on the defendant's duty to communicate the change of circumstances. Similarly this non-disclosure would appear to be a breach of duty within sub-section 2.

Misrepresentation, though innocent.—A contract of guarantee like any other contract is liable to be avoided if induced by innocent misrepresentation or undue influence.[10]

Innocent misrepresentation are a separate class from that of negligent or fraudulent misrepresentations and no action for damages lies for a mere innocent representation in this sense *Heibut Symonds & Co.* v. *Buckleton; Gilchester*[11] *Properties Ltd.* v. *Gomm.*[12] But a claim will lie for damages if it ends in a contract. Thus where the parties enter into a contract and the misrepresentation becomes a term of the contract an action will lie for damages whether the representation is innocent, negligent or fraudulent. Similarly where the

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4 Chitty: On Contract (24th Ed.) Para 365. *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D.459.

5 The framers of the New York draft Code seem to have extracted this rule from *Bulkley* v. *Wilford* (1834) 2 Cl. & F. 102; 37 R.R. 39, which really proceeded on the much more intelligible principle that an agent who is bound to be skilled shall not profit by his own incompetence.

6 *Oriental Bank Corporation* v. *Fleming* (1879) 3 Bom. 242, 267; see this case cited in the commentary on s. 13. "As to the nature of transaction", above.

7 This term has been obsolete for many years in English practice.

8 (1862) 2 F. & F. 841.

9 (1936) Ch. 575.

10 *Mackenzie* v. *Royal Bank of Canada*, 1934 A.C. (P.C.) 475 (per Lord Atkin); *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904; (1963) 2 W.L.R. 87; *Governor of Orissa* v. *Shiv Prasad* (1963) A. Or. 217; *Kaufman* v. *Gerson* (1904) 1 K.B. 591, 596.

11 (1913) A.C. 30.

12 (1948) 1 All E.R. 493.

representee enters into a contract with a third party relying on the misrepresentation.[13] In the case of an innocent misrepresentation being passed on to a sub-buyer, thus bringing about a sub-contract, the sub-buyer may rescind the sub-contract.[14] In that case the original contract can be rescinded by the original buyer.

The principle stated by Lord Atkin in *Mackenzie's* case[15] where the plaintiff was held entitled to set aside a guarantee into which she had entered and to recover her securities was that "A contract of guarantee like any other contract is liable to be avoided if induced by misrepresentation of an existing fact even if made innocently..... that it was.... That it was material..... the plaintiff was at all times, on ascertaining true position entitled to avoid the contract and recover her securities." Of the guarantee there were renewals before the plaintiff was advised of true facts. There was no difficulty as to *restitutio in integrum*.

The Privy Council[16] applying these cases gave the relief of rescission in case where a partner sold his portion of stockbrokers business to the plaintiff who after she took over as managing partner found that she had been induced to buy the partnership business on a false though not fraudulent representation brought an action for the return of her money. The defendant *inter alia* pleaded that the plaintiff was not entitled to rescind the contract on the ground of innocent misrepresentation because it was executed and relied on *Seddon* v. *North Eastern Salt Co. Ltd.* Lord Morris referred to *Seddon Case* and other cases but thought it unnecessary to discuss them and held that "the mere fact that the party making the representation has treated the contract as binding and has acted on it does not preclude relief. Nor can it be said that the plaintiff received anything which she is unable to restore" and decreed the plaintiff's claim.

A motor dealer made a statement to the buyer that a car had done 20,000 miles since it was fitted with a new engine. This was a conclusion by looking at the log book and was a wrong statement. The dealer also gave a year's guarantee. The car was found to be unsatisfactory and the buyer brought an action for breach of warranty. The Court held the statement made by the seller to have made a wrong statement but innocent representation not dishonestly made. He had jumped to a conclusion and stated it as a fact that the buyer would act on it. Consequently damages were awarded.[17]

The plaintiff prayed for rescission of the contract of sale on the ground of false representation as to the age of the car and as to its original cost. The finding of the jury was that the representation was false though not fraudulent and that each of them formed part of the inducement. To this the Court applied common law rules and held that innocent misrepresentation is not a ground for rescission of a contract for sale of goods. This decision really is based on the Sale of Goods Act.[18]

Misrepresentation leading to committing an offence.—Fraud and false representation injurious to an innocent person cannot be committed with impunity and such injured person unwittingly made to commit an offence is entitled to compensation for any loss suffered by him but not if he has knowledge that a particular act is an offence.[19] A misrepresentation, even

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13 *Bentley (Dick) Productions Ltd.* v. *Herald Smith (Motors) Ltd.* (1965) 1 W.L.R. 623; (1965) 3 All E.R. 65.

14 *Abram S.S. Co.* v. *Westville Shipping Co.* (1923) A.C. 773.

15 *Mackenzie* v. *Royal Bank of Canada* (1934) A.C. 468, 475. *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904; (1963) 2 W.L.R. 87; *Governor of Orissa* v. *Shiv Prasad* (1963) A. Or. 217; *Kaufman* v. *Gerson* (1904) 1 K.B. 591,596.

16 *Senanayake* v. *Cheng* (1966) A.C.63; (1965) 3 All E.R. 926; (1965) 3 W.L.R. 715; *Mackenzie* v. *Royal Bank of Canada* (1934) A.C. 468,475; *Adam* v. *Newbigging* (1888) 13 App. Cas. 308, 317; applied. *Seddon* v. *North Eastern Salt Co. Ltd.* (1905) 1 Ch. 326; *Solle* v. *Butcher,* (1950) 1 K.B. 671; *Leaf* v. *International Galleries* (1950) 2 K.B. 86; *Curtis* v. *Chemical Cleaning & Dyeing Co.* (1951) 1 K.B. 805; *Long* v. *Lloyd* (1958) 1 W.L.R. 753 disting.

17 *Dick Bentley Productions Ltd.* v. *Smith (Motors) Ltd.* (1965) 2 All E.R. 65 (C.A.); *Heibut, Symons & Co.* v. *Buckleton* (1913) A.C. 30. (An affirmation at the time of sale is warranty provided it appears on the evidence to be so intended.)

18 *Watt* v. *Westhoven* (1933) V.L.R. 458; *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572; *Kennedy* v. *Panama, New Zealand & Australian Royal Mail Co.* (1867) 2 Q.B. 580 appld.

19 *Burrows* v. *Rhodes & Jameson* (1899) 1 Q.B. 816; *Janu Sait* v. *Ramaswamy Naidu* (1923) A.M. 626; *Muneyya* v. *Venkayya* (1957) A.AP. 781. (No representation was proved.)

though innocent and not wilful, will avoid a contract, if it is made without reasonable grounds.[20] Merely marking the trees of a forest from external appearance by a Forest Officer as sound and sold to a forest contractor is not misrepresentation if the trees turn out to be unsound. A contract is not voidable under s.22 if it is caused by one of the parties being under a mistake of fact.[21]

In a Canadian case[22] showing misrepresentation and undue influence the facts were:

A married woman stood guarantee (with pledge of securities) given by her for the indebtedness of a company in which her husband was a principal shareholder. Before she stood guarantee she was assured by her husband and the bank manager that her shares were bound to the bank and that they had gone anyhow and the only chance of getting them back was if she signed the guarantee. There were subsequent renewals of the guarantee before the plaintiff was advised of the true facts.

The contract of guarantee was held liable to be avoided as induced by material misrepresentation even if innocently made. The mere fact that the party making the representation had treated the contract as binding and had acted on it did not preclude relief nor could it be said that the plaintiff received anything under the contract which she was unable to restore. Lord Atkin pointed out in that case.[23]

"...Independent advice to be of any value must be given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances, with a different position presented to the minds both of the adviser and his client."

A lorry purchased on the representation of being "in first class condition" was found to have some defects when driven on business purposes. The seller agreed to pay half the price for removing those defects. It was again taken for business purposes and broke down.

In an action for rescission for innocent misrepresentation the court held that even if the plaintiff had a right of rescission he lost it in the circumstances of the case.[24]

Innocent misrepresentation and executed contracts.—An executed contract cannot be rescinded on the ground of innocent misrepresentation; but this rule does not apply to cases of fraud or breach of fiduciary relations.[25] This rule applies to disposition of interests in land,[26] e.g. vendor's title. The extension of this rule to executed conveyances has been criticised by Denning L.J.[27] and by Scrutton L.J. in *Lever Bros.* v. *Bell.*[28] In *MacKenzie* v. *Royal Bank of Canada*[29] an executed agreement of guarantee was set aside by the Privy Council. The rule has also been applied to sale of shares.[30] In *Curtis* v. *Chemical Cleaning & Dyeing Co.*[31]

the plaintiff signed a receipt which was represented to the plaintiff as exemption of the defendants from certain risks, e.g. damage to the beads and sequins on the wedding dress but actually it exempted defendants from "any damage howsoever caused".

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20 *Governor of Orissa* v. *Shivprasad* (1963) A. Or. 217.
21 Ibid.
22 *MacKenzie* v. *Royal Bank of Canada,* (1934) A.C. 468 at page 476.
23 Ibid, 474-475; See *Bireswar Sen* v. *Ashalata Ghose* (1969) A. Cal. 111 (a case of gift to the lawyer's wife upheld).
24 *Long* v. *Lloyd* (1958) 1 W.L.R. 753; (1958) 2 All E.R. 402; *Seddon* v. *North Eastern Salt Co. Ltd.* (1905) 1 Ch. 326; *Angel* v. *Jay* (1911) I K.B. 666; (1908-10) All E.R. Rep. 470 (An executed contract cannot be rescinded on the ground of innocent misrepresentation).
25 *Angel* v. *Jay* (1911) I K.B. 666; (1908-10) All E.R. Rep. 470. (A case of lease; could not be rescinded on ground of representation of conditions of drains.) Criticised by Denning L.J. in *Solle* v. *Butcher* (1950) I K.B. 671, 695; (1949) 2 All E.R. 1107, 1121; *Long* v. *Lloyd* (1958) 1 W.L.R. 753; (1958) 2 All E.R. 402.
26 *Wilde* v. *Gibson* (1848) I H.L. Cas. 605; *Brownlie* v. *Campbell* (1880) 5 App. Cas. 925, 937.
27 *Solle* v. *Butcher* (1950) I K.B. 671, 695; (1949) 2 All E.R. 1107 (C.A.); *Leaf* v. *International Galleries* (1950) 2 K.B. 86, 90; (1950) 1 All E.R. 693; (C.A.); *Cf. Curtis* v. *Chemical Cleaning & Dyeing Co.* (1951) 1 K.B. 805, 810; (1951) 1 All E.R. 631. (It cannot be said that *Angel* v. *Jay* (1911) 1 K.B. 666. has been overruled).
28 (1931) 1 K.B. 488.
29 (1934) A.C. 468.
30 *Seddon* v. *North Eastern Salt Co. Ltd.* (1905) 1 Ch. 326 criticised by Hammelman 55 L.Q.R. 90 and by Treitel: The Law of Contract (5th Ed.) p. 282 (as based on false analogies).
31 (1951) 1 K.B. 805; (1951) 1 All E.R. 631.

The Court of Appeal held it to be not available to the defendant as there was misrepresentation howsoever innocent. If an estate agent misrepresents, even though innocently, the effect of the printed form of contract by saying that the commission would be payable only if the sale went through but the printed form of contract contains different terms contrary to the misrepresentation, then the contract with the estate agent is not binding and the contract would be avoided on the ground of misrepresentation.[32]

In Seddon's case the absence of fraud and the absence of any allegation of fraud was held to be a bar to an action for rescission in the case of an executed contract for the sale of shares from the persons who really owned the shares.[33] This case had lost all force since Scrutton L.J. had thrown doubts on it in *Lever Brothers Ltd.* v. *Bell*[34] and the Privy Council actually set aside an executed agreement in *Mackenzie* v. *Royal Bank of Canada*[35] *Angel* v. *Jay*[36] was wrongly decided. It was so held in *Solle* v. *Butcher*[37] and *Leaf* v. *International Galleries.*[38]

A contract of sale will be rescinded where the solicitor for the vendors makes an honest statement, but without reasonable ground for so believing, if the statement vitally affects the subject-matter of sale. There must be imported into the representation the further representation that the vendor had reasonable ground for supporting that belief.[39] There can be liability in negligence in respect of an innocent though careless misstatement which causes financial loss but where there is specific disclaimer of responsibility there is no liability. The responsibility exists even where there is no fiduciary relationship between the parties.[40]

Negligent misrepresentation.—Negligent misrepresentation is one made carelessly or without reasonable grounds for believing it to be true; but it cannot be so regarded unless the representor owes a duty to the representee to be careful, since the decision in *Derry* v. *Peak*[42] it has undergone a change in its concept. The House of Lords in *Nocton* v. *Ashburton*[43] and in *Hadley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.*[44] have in the former case decided that the duty to take care arises in cases of fiduciary relationship and in the latter it was held that it could arise in many other relationships. In the former case a Solicitor was sued by his client for giving wrong advice whereby he was induced to release a part of the security and thereby the security became insufficient and it was also alleged that the advice was given to benefit himself (the Solicitor) and that the Solicitor knew that security will become insufficient. The House of Lords held that the mortgagee was entitled to relief for the breach of duty by the Solicitor towards his clients. The latter case has widened the scope of the law. Although the House made it clear that advice given in the course of social relationship would not be a ground of liability, they also made it clear that many special relationships will suffice. In case of professional relationships even where there is no contract between the parties it will give rise to a duty of care whenever the representor knew that the representee was likely to act on the representation. So if a Company's auditor gives negligent advice to a person and the latter invests money in the Company & loses, an action for negligent misrepresentation will lie against the auditor if it can be shown that the auditor knew that representee would act on the advice—

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32 *Jaques.* v. *Lloyd D. George & Partners Ltd.* (1968) 1 W.L.R. 625; Dictum of Scrutton L.J. in *L'Estrange* v. *F. Graucob Ltd.* (1934) 2 K.B. 394, 403, and *Curtis* v. *Chemical Cleaning & Dyeing Co.* (1951) 1 K.B. 805; (1951) 1 T.L.R. 452; (1951) 1 All E.R. 631, C.A. applied.

33 *Seddon* v. *North Eastern Salt Co. Ltd.* (1905) 1 Ch. 326. This rule in England has been abrogated by s.l (b) of the Misrepresentation Act and this performance of the contract is no bar to an action thereon.

34 (1931) 1 K.B. 557, 588.

35 (1934) A.C. 408.

36 (1911) 1 K.B. 666.

37 (1950) 1 K.B. 671.

38 (1950) 2 K.B. 86.

39 *Brown* v. *Raphael* (1958) 2 W.L.R. 647. (Sale of an absolute reversion in a trust fund on the death of an annuitant); See also *Hedley Bryne & Co. Ltd.* v. *Hellers & Partners Ltd.* (1964) A.C. 465 (careless misstatement); and *Sayu Mohammad Abdulla* v. *Neelakantan* (1958) A. Ker. 322.

40 *Hedley Bryne & Co. Ltd.* v. *Hellers & Partners Ltd.* (1964) A.C. 465; Stevens: 27 M.L.R. 121. *Cf.* *Sayu Mohammad Abdulla* v. *Neelakantan* (1958) A. Ker. 322.

41 Chitty: On Contracts (24th ed) para 376.

42 (1889) 14 App. Cas. 337.

43 (1914) A.C. 1129.

44 (1964) A.C. 465.

Candler v. *Crane, Christmas & Co.*[45] the majority decision was overruled in *Hedley Byrne's case*. Even where an advisor is not acting in his professional capacity, advice given by him "in a business capacity" may give rise to a duty of care provided he has some financial interest in the transaction. *W.B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.*[46] But see *Mutual Life & Citizens Assurance Co. Ltd.* v. *Evatt*[47] noted in (1971) 87 L.Q.R. 147 where the principle of *Hedley Byrne's case* was somewhat limited by a majority view of the Privy Council that in general there is no duty unless the maker has held himself out as having some special skill on competence in the matter. But the minority view was adopted in *Esso Petroleum Co.Ltd.* v. *Mardon.*[48] In this case a petroleum Company negotiating for a lease of a filling station negligently gave the prospective tenant over optimistic estimates of the sales potential of the filling station which was based on detailed evaluation by the petroleum Company and the tenant was not in as good a position as the Company to make estimates. It was held to be liable to the tenant for negligent misrepresentation.

A contractor who had to dump excavated soil into the sea entered into a contract of hire of barges. The marine manager of the barge owners made a representation as to their capacity of the barges which was incorrect, though he acted negligently in not consulting his papers but relied on his memory of what was contained in Lloyds register. On discovering the error in the statement of capacity of the barges the contractor refused to pay the hire for work done and also claimed damages by way of counter claim.

The Court of Appeal held that the counter claim would succeed on the ground that the statement of the marine manager was made so that it be acted upon and it was acted upon and therefore the barge owners were liable unless it was proved that the marine manager had reasonable cause to believe that the statement about the capacity was true. Moreover it was a specific fact and not expert advice which the contractor was seeking and this was within the particular knowledge of the barge owners.[49]

Reckless statement.—Representation made by one of the two defendants, by an agent of the other defendant and by another agent who was the agent of both the defendants, induced the plaintiff to enter into the purchase of a fruit business for £700 the representation being that the average takings of the business were £100 a week. The statement was found to be false in fact and made either knowing it to be false or recklessly. Plaintiff brought an action for rescission on the ground of misrepresentation and his claim succeeded and was confirmed by the High Court.[50]

Plaintiff made a representation with regard to the leased premises which was not only as to their physical State but also as to the availability of planning permission for them to be used for the full term of 15 years for which they were leased to the defendant for the intended purpose of offices. The plaintiffs were negligent in making that representation for the planning permission was for two years which the plaintiffs did not check which they could have done and the lease was rescinded.[51]

Specific Performance refused.—The plaintiff, the owner of two shops and the floors above applied for permission to use them as offices but permission was granted for the ground floor and a part of the first floor. He however gave the premises for office use forgetting about the restricted permission. He was held guilty of misrepresentation and his action for specific performance failed.[52]

Sub-s. 3—This sub-section was applied in a Bombay case,[53] where it was held that though a company was not liable as drawer on a bill of exchange signed by two of the directors and the

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45 (1951) 2 K.B. 164; (1951) 1 All E.R. 426.
46 (1967) 2 All E.R. 850.
47 (1971) A.C. 793; (1971) 1 All E.R. 150 (P.C.).
48 (1975) Q.B. 819 reversed in part in (1976) Q.B. 801; (1976) 2 All E.R. 5(C.A.) (1976) 2 W.L.R. 583.
49 *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons* (1978) 2 All E.R. 1134, 1148 (C.A.); *Hedley Byrne & Co. Ltd.* v. *Heller & Partners* (1963) 2 All E.R. 574 at pp. 617-8 (H.L.); *Mutual Life & Citizens Assurance Co. Ltd.* v. *Evatt* (1971) 1 All E.R. 150, 163. applied.
50 *Alati* v. *Kruger* (1955) 94 C.L.R. 216.
51 *Laurence* v. *Lexcourt Holdings Ltd.* (1973) 2 All E.R. 810, 818, 821; *Re: Davis & Cavey* (1888) 40 Ch. D. 601; and *Charles Hunt Ltd.* v. *Palmer* (1931) 2 Ch. 287 appld.
52 *Laurence* v. *Lexcourt Holdings Ltd.* (1978) 2 All E.R. 810,818,820; *Re Davis & Cavey* (1888) 40 Ch. D. 601 & *Charles Hunt Ltd.* v. *Palmer* (1931) 2 Ch. 287 applied.
53 *In re Nursey Spinning and Weaving Co.* (1880) 5 Bom. 92.

secretary, treasurer, and agent of the company, yet it was liable to the bank to which the bill was sold as for money received by the company to the use of the bank. The decision proceeded on the ground that the directors, while acting within the scope of their authority, had sold the bill as one on which the company was liable, but upon which, having regard to the form in which it was drawn, the company could not be rendered liable, and the directors were, therefore, guilty of misrepresentation within the meaning of the present subsection. The case was no doubt within the terms of the Act, but it might have been decided on the broader ground that a buyer "is entitled to have an article answering the description of that which he bought," and that here the document which the bank had bought had not the force or value which it purported and was supposed to have. Thus it might be regarded as a case of common mistake under s. 20 of the Act, entitling the party who had paid money to recover it under s. 72. In *The Oceanic Steam Navigation Co.* v. *Soonderdas Dhurumsey*[54] the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs, which was described in the charter-party, and was represented to them, as being not more than 2,800 tonnage register. It turned out that the registered tonnage was 3,045 tons. The defendants refused to accept the ship in fulfilment of the charter-party, and it was held that they were entitled to avoid the charter-party by reason of the erroneous statement as to tonnage. It is difficult to see how the Court, having regard to the terms of the Act and to the evidence of the usage of Bombay and the understanding of the parties in the particular case, could have decided otherwise. But this case does not necessarily lay down any rule that an error in stating the amount of tonnage will in general render a charter-party voidable. In England such a statement does not, in the absence of special circumstances, amount even to a warranty.[55] As further illustrating the rule laid down in the present sub-section we might cite an earlier case, where it was held by the Allahabad Court that an agreement by the defendant to sell and deliver a boiler to the plaintiff at Rijghat was voidable at the option of the defendant, the plaintiff having represented (though innocently) to the defendant that there was a practicable road all the way, while, as a matter of fact, there was at one point a suspension bridge not capable of bearing the weight of the boiler.[56]

Non est factum.—This doctrine is a category of mistakes which is based on a few cases of a comparatively recent origin although the doctrine is an old one. Ordinarily, a man is bound by the document he executes provided he is a party of full age and understanding. But, if he has been misled into executing the deed or signing it and the document is different from what he intended to execute or sign, it is completely void. In some cases the mistake may have been induced by fraud, but according to some authorities the presence of fraud is not a necessary factor. Byles J. said in *Foster* v. *Mackinnon:*[57]

> "It is invalid not merely on the ground of fraud where fraud exists but on the ground that the mind of the signor did not accompany the signature: in other words, that he never intended or contemplated to sign, and, therefore, in contemplation of law never did sign the contract to which his name is appended."

The doctrine of *non est factum* does not apply unless there is a misrepresentation inducing a mistaken belief as to the class and character of the supposed document and not a misrepresentation simply as to its contents, so that a guarantee for £1000 would not be enforceable if the executant believed it to be a promissory note, but a promissory note for £10,000 would be binding even if the maker believed it to be for £100.[58] The distinction may not be easy to define because the character and class of a document may be said in one sense to depend on its contents, so that misrepresentation as to its contents involves misrepresentation

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54 (1890) 14 Bom. 241. *Mare de Lanto Compagnia* v. *Bergbau Handel,* (1970) 3 All E.R. 125 (False assurance by owners as to availability of vessel).

55 *Barker* v. *Windle* (1856) 6 E. & B. 675; 106 R.R. 762.

56 *Johnson* v. *Crowe* (1874) 6 N.-W.P. 350. In fact the agreement was made several months before the Contract Act came into operation, but the case was treated at every stage as if it fell within the Act. The same result might have been arrrived at on the ground that the existence of a practicable road all the way was an essential term or condition of the contract. *Cp.* Pollock, Law of Fraud in British India, p. 101.

57 (1869) 4 C.P. 704, 711.

58 Treital: The Outlines of the Law of Contract (2nd Ed.) p.124.

of the character and class. But cases do illustrate distinctions.[59] Thus, where the defendant signed a document which in reality was an indemnity but which he was told was a release note, he would not be bound by his signature because it was wholly different in its class and character from the supposed release note through the actual and supposed document related to the same article e.g. a car.[60] The distinction may seem a somewhat narrow and artificial one to draw and perhaps it is. The justification for it lies in the practical necessity to keep the plea of *non est factum* within manageable bounds.[61]

In *Mercantile Credit Co.* v. *Hamblin*[62] there was no real misrepresentation as the party signing the document had no positive belief that the documents which she was signing were mortgage documents and these documents were of the class and character which she had in mind being documents capable of being used for raising money on the security of the car.[63] The doctrine of *non est factum* was therefore not applicable. But if the issue is whether there was a contract at all (e.g. on a plea of *non est factum* then the foreign jurisdiction clause (in that case the exclusive jurisdiction of Belgium Courts) would not apply as the contract is wholly unenforceable, accurately put void.[64]

Document signed in blank.—The plea of *non est factum* applies[65] where a party signs a document and hands it over to the other party in order to enable him to fill in the details and complete the transaction[66] and the document is not in accordance with the instructions of the executant. Even in that case he will be bound if it is not essentially different in substance or in kind from the intended transaction.[67] The burden of proof is on the executant that he acted carefully[68] and if he fails to show it he will be bound. But negligence on the part of the executant will be a bar to the plea of *non est factum*. At one time the negligence was held to apply to negotiable instruments only (*Carlisle and Cumberland Banking Co.* v. *Bragg*).[69] But this and other similar cases were criticised in Courts[70] and were overruled by House of Lords[71] and it was held to apply to all documents where negligence was found.

Doctrine reviewed.—This doctrine came to be reviewed in *Gallie* v. *Lee*,[72] where a seventy-eight years old widow executed a deed assigning her leasehold interest in a house to

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59 *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904; (1963) 2 W.L.R. 87 (1963) All E.R. 81; (Donovan L.J.); *Howatson* v. *Webb* (1907) 1 Ch. 537; affd, (1908) 1 Ch.1 (C.A.) the character and class of the document was that of a conveyance of property and Webb knew this. What he did not know was that the contents made it a conveyance by way of mortgage. His mistake was as to contents only. *Carlisle & Cumberland Banking Co.* v. *Bragg* (1911) 1 K.B. 489 (C.A.). The character and class of the document was that of a guarantee of another's debt and Brogg did not know this. He was deceived into believing that he was dealing with some insurance matter. *Tirathraj Pandey* v. *Amar Credit Corpn.*, 72 C.W.N. 253, 263; (There must be misrepresentation as to the nature of the document). *L 'Estrange* v. *F. Graucob Ltd.* (1934) All E.R. Rep. 16. (Contract signed contained exclusion of implied warranty, held binding although the buyer did not read it); *Abdul Hasoan* v. *Mt. Wajibul Nissa* (1948) A.P. 186; and *Appanna* v. *Jami Venkattappadu* (1953) A.M. 611 disting.

60 *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904; (1963) 2 W.L.R. 87. But see *Mackenzie* v. *Royal Bank of Canada* (1954) A.C. 468,475 (P.C.) (Case of innocent misrepresentation.)

61 *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904, 912; (1963) 2 W.L.R. 87, 91 (per Donovan L.-J.); referring to *Howatson* v. *Webb* (1970) 1 Ch. 537; affd. (1980) 1 Ch. 1 (C.A.) and *Carlisle and Cumberland Banking Co.* v. *Bragg* (1911) 1 K.B. 489 (C.A.)

62 (1965) 2 Q.B. 242; (1964) 3 All E.R. 591; (1964) 3 W.L.R. 798.

63 *Mercantile Credit Co. Ltd.* v. *Hamblin* (1964) 3 W.L.R. 798, 808; (1964) 3 All E.R. 591; (1965) 2 Q.B. 242

64 *Mackender* v. *Feldia A.G.* (1966) 3 All E.R. 847, 849, 851.

65 Chitty: On Contract (24th Ed.) Paras 303, 304

66 *United Dominion Trust* v. *Western* (1976) Q.B. 513; (1975) 3 All E.R. 1017: (1976) 2 W.L.R. 64.

67 *United Dominion Trust* v. *Western* (1976) Q.B. 513 disapproving *Campbell Discount Finance Ltd.* v. *Gall* (1961) 1 Q.B. 431; (1961) 2 All E.R. 104; (1961) 2 W.L.R. 514.

68 *British Railway Traffic & Electric Co. Ltd.* v. *Roper* (1939) 162 L.T. 217; *Eastern Distributors Ltd.* v. *Goldring* (1957) 2 Q.B. 600; (1957) 2 All E.R. 525; (1957) 3 W.L.R. (23).

69 (1911) 1 K.B. 489.

70 *Muskham Finance Ltd.* v. *Howard* (1963) 1 Q.B. 904, 913; *Mercantile Credit Co.* v. *Hamblin* (1965) 2 Q.B. 242; (1964) 3 W.L.R. 790; (1964) 3 All E.R. 562.

71 *Saunders* v. *Anglia Building Society* (1971) A.C. 1004, 1019, 1038; (1970) 3 All E.R. 961; (1970) 3 W.L.R. 1078.

72 (1969) 2 W.L.R. 901; (1969) 1 All E.R. 1062 reversing 1 W.L.R. 1190 (Stamp J.) Appd. an appeal, Subnominee *Saunders* v. *Anglia Building Society* (Braggs case overruled *Carlisle & Banking Co.* v. *Bragg* (1911) 1 K.B. 489 overruled.

one Lee who mortgaged the property gifted to him to a Building Society. The assignor did at all times intend to make a gift of the property to her nephew. On discovering the truth the widow brought an action against both Lee and the Building Society that the assignment was void. This plea succeeded before Stamp J., but the Court of Appeal reversed the judgment and the Master of Rolls pointed out that the mistake as to contents might be just as fundamental as a mistake as to class and character. It was not really a distinction at all. He said "a document takes its class and character from its contents and a mistake as to one is often also a mistake as to the other". The Master of Rolls did not accept the distinction that if a man is mistaken as to the person in whose favour the deed is made, he can rely on *non est factum*. He said, "...but whatever may be the merits of the rule in contract, I am clear that.....a man cannot plead *non est factum* simply because he has made a mistake as to the person in whose favour the document was made".

The plaintiff's case was that despite her carelessness in allowing herself to be misled as to the character of the document she signed she was not estopped from maintaining *non est factum* against the Building Society; *Carlisle and Cumberland Banking Co.* v. *Bragg* relied upon as establishing the rule. The principle was thus stated by the Court of Appeal: "Whenever a man of full age and understanding who can read and write signs a legal document put before him for signature which on its face is intended to have legal consequences, then, if he does not take the trouble to read it, but signs it as it is, relying on the words of another as to its character or contents or effect, he cannot be heard to say that it is not his document when it goes into the hands of one who has in all innocence advanced money on the faith of it being his document". Therefore the plaintiff was held not entitled to succeed on the plea of *non est factum*. *Carlisle's* case[73] was held to be wrongly decided. On the case going to the House of Lords this was upheld subnominee *Saunders* v. *Anglia Building Society*.[74]

In *Saunders* v. *Anglia Building Society*[75] the House of Lords reviewed and restated the law on the subject and the distinction between the character and nature of a document and the contents of the document was rejected as unsatisfactory. It was stressed that the defence of *non est factum* was not lightly to be allowed where a person of full age and capacity had signed a written document embodying the contract, but allowable so long as the person signing the document had made a fundamental mistake as to the character of effect of the document. The House of Lords concentrated on and emphasised the disparity between the effect of the document actually signed and the document as it was believed to be (rather than on the nature of the mistake stressing that the disparity must be "radical", "sensational", "fundamental" or "very substantial".

Lord Reid said—[76] "The plea of *non est factum* could not be available to anyone who signed without taking the trouble to find out at least the general effect of the document. Nor could it be available to a person whose mistake was really a mistake as to the legal effect of the document. There must be a radical or fundamental difference between what he signed and what he thought he was signing (pp. 1016,1017).

Said Lord Hodson: "The difference to support a plea of *non est factum* must be in particular which goes to the substance of the whole consideration or to the root of the matter". (pp. 1018, 1019).

Lord Dilhorne: It is not enough that the signer of the document thought that the document would have a different legal effect from what it has; nor will it suffice if in some respects it departs from what he thought it would contain. The difference must be such that the document signed is entirely or fundamentally different from that which it was thought to be, so that it was never the signer's intention to execute the document (1022).

Per Lord Wilberforce:

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73 (1911) 1 K. B. 489 (held wrongly decided in (1969) 1 All E.R. 1062).

74 (1971) A.C. 1004; (1970) 3 All E.R. 961.

75 (1971) A.C. 1004. 1017, 1022, 1026; (1970) 3 All E.R. 961. See also Chitty's Law of Contract (24th Ed.) Para 302.

76 *Saunders* v. *Anglia Building Society*, 1971 A.C. 1004, 1035; (1970) 3 All E.R. 961; *Carlisle and Cumberland Banking Co.* v. *Bragg* (1911) 1 K.B. 489, overruled; *Howatson* v. *Webb* (1908) 1 Ch. (C.A.) considered. Decision of the Court of Appeal in (1969) 2 Ch. 17; (1969) 2 W.L.R. 901; (1969) 1 All E.R. 1062 affd.

"A document should be held to be void only when the element of consent to it is totally lacking i.e., when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended (1026)".

But these various terms were not defined, the question being treated as one of degree. The House of Lords also held that the essential features of the doctrine as expressed by Byles J., in *Foster* v. *Mackinnon* (1869) 4 C.P. 704, 711, have been correctly expressed.

Carelessness.—The House of Lords also held[77] that the essential features of the doctrine as expressed by Byles J., in *Foster* v. *Mackinnon* (1869) 4 C.P. 704, 711 have been correctly expressed.

Carelessness.—A ground for decision in *Gallie* v. *Lee*[78] was that the plea of *non est factum* can only succeed if the person raising it was not careless in signing it. The standard of care seems to be a subjective one depending upon the actual capacity of the signer; but even an elderly widow of moderate education should not sign a document without making sure that the transfer is in favour of the right person.

Mistake.—*W.* bought a car from a dealer and gave him a signed agreement with blanks for figures to be filled in by the dealer believing the documents to be a hire purchase agreement. The dealer instead of filling in the agreed figures filled in wrong figures. Later *'W'* received a copy of the document but did not complain; nor did he make any payment. He was held liable for the whole sum as he failed to discharge the burden of proving that, as he acted carelessly. His plea of *non est factum* failed.[79]

The plaintiff signed an agreement believing it to be a hire-purchase agreement for the purchase of a caravan which was really a simple hire agreement. But the defendants were in no way responsible for the mistake. On the plaintiff falling into arrears the defendants took possession of the caravan and also kept the initial payment. The plaintiff's action for the recovery of initial payment failed because the plaintiff's signatures was not the result of a fraud of the defendant and therefore he was bound by his signature.[80]

If a contract entered into through fraud is not avoided before a third party intervenes and gets an interest in the subject-matter of the contract, a claim to rescind will not lie.[81]

Misrepresentation of title.—Where a husband misrepresented that a house belonged to him, it belonged to him and his wife, and he sold it but the wife refused to give consent to the sale. The purchaser brought an action for damages and the husband pleaded that in the absence of fraud the plaintiff was entitled to loss of costs he had incurred, the court held the defendant liable for damages for misrepresentation.[82]

Misrepresentation of fact or law.—It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance—especially if it came from a person better qualified to know—that the law is so and so. It seems probable in England, and there is no doubt here, that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a *kabuliyat* (counterpart of a lease) was represented by a *zamindar's* agent as a mere penalty clause, the Privy Council held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed.[83]

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77 *Saunders* v. *Anglia Building Society,* 1971 A.C. 1004, 1035 (1970) 3 All E.R, 961; *Carlisle and Cumberland Banking Company* v. *Bragg* (1911) 1 K.B. 489, overruled; *Howatson* v. *Webb* (1908) 1 Ch. 1 (C.A.) considered. Decision of the Court of Appeal in (1969) 2 Ch. 17; (1969) 2 W.L.R. 901; (1969) 1 All E.R. 1062 affd.

78 (1971) A. C. 1004; (1970) 3 All E.R. 961

79 *United Dominion Trust Ltd.* v. *Western* (1976) Q.B. 513; (1976) 2 W.L.R. 64; (1975) 2 All E.R. 1017; *Saunders* v. *Anglia Building Society* (1971) A.C. 1004 folld. This case overruled *Carlisle & Banking Co.* v. *Bragg* (1911) K.B. 489

80 *Galbraith* v. *Mitchemall Estate* (1965) 2 Q.B. 473 (Q.B.)

81 *White* v. *Garden* (1851) 10 C.B. 919; *Balacock* v. *Lawson* (1880)5 Q.B.D. 284; *Re: L.G. Clarke* (1967) Ch. 1121.

82 *Watt* v. *Spence* (1975) 2 All E.R. 528, 536.

83 *Pertap Chunder* v. *Mohendranath Purkhait* (1889) 16 I.A. 233; 17 Cal. 291.

Misrepresentation as to a question of law.—If a person states his opinion as to the legal position which in fact is not his real opinion, that is a misrepresentation of fact and even an innocent statement of law may do so where it carries an implication of fact which itself is untrue.[84] Therefore a statement by a tenant to his vendee that War regulations applied to the case although he knew that they did not apply was held to be a material representation entitling the vendee to rescind the sale.[85] When a purchaser chooses to rely upon his own judgment or upon that of his agent he cannot afterwards say that he relied upon a previous representation made by the vendor.[86] Onus is on the person alleging misrepresentation to establish it.[87]

Misrepresentation and marriages.—The Bombay High Court in *Bai Appibai* v. *Khimji Cooverji*[88] has held that fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties had given consent with knowledge of its nature and with the clear and distinct intention of entering into a marriage unless there are threats or duress or an erroneous belief as to the nature of the ceremony and without real consent. The test of validity is whether there was real consent to the marriage.

False representation—Marriage contract.—A statement by a person that the

bridegroom was his son, whereas, he was, in fact, an illegitimate son, is a false representation which amounts to a fraud sufficient to make the marriage voidable. A half truth or a partial statement may be as false a statement in effect as if the fact had been misstated altogether.[89]

This was the law before passing of the Hindu Marriage Act and as the Madhya Pradesh case was one under that law, the decision, it is submitted, is erroneous. Even after the Hindu Marriage Act, on the analogy of Christian Marriages a marriage is not an ordinary contract as contemplated in the Contract Act which is voidable at the instance of one of the parties on the grounds mentioned in that Act. The High Court of the Punjab has held that a statement by the bride's father that the bride was a virgin, whereas she had an illegitimate child, is not 'fraud' within s. 12(1)(c) of the Hindu Marriage Act as the word 'fraud' there does not connote the same thing as in s. 17 of the Contract Act, because Hindu marriage is a sacrament and not a contract and s. 12(1) (d) of the latter Act specifically mentions pregnancy at the time of marriage as a ground for avoidance of marriage and fraud is equivalent to "deception".[90]

A Hindu marriage under Hindu Law is not a mere contract in which a consenting mind is indispensable. A minor and even a person of unsound mind can be duly married if the rites are duly performed.[91] The grounds of nullity of marriage under s.12 of Hindu Marriage Act of 1956 are the same as those of the Indian Divorce Act, s. 19. A marriage amongst Christians is a contract but not an ordinary contract which is voidable at the instance of one party on the grounds mentioned in the Contract Act.[92] Under English law, if a person is induced to go through a ceremony of marriage without any real consent to the marriage, it is invalid. In all such cases, the test of validity is whether there was any real consent to the marriage.[93] Unless the party imposed upon has been deceived as to the person and thus had given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.[94]

Fraud as a ground for avoiding a marriage is limited to such fraud as procures the ap-

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84 Chitty: On Contract (24th Ed.), para 356.

85 *Qudaille* v. *Lawson* (1922) N.Z.L.R. 259. See also *West London Commercial Bank* v. *Kitson* (1884) 13 Q.B.D. 360; *Mackenzie* v. *Royal Bank of Canada* (1943) A.C. 468. (Representation that *A*'s shares are pledged to *B*.)

86 *Holmes* v. *Jones* (1907) 4 C.L.R. 1692, 1702, 1709, 1711; *Lysney* v. *Selby*, 2 Raym. (1d) 1118; *Redgrave* v. *Hurd*, 20 Ch. D. 1, 15.

87 *Kuppuswami* v. *Arumugam* (1967) A.SC. 1395.

88 60 Bom. 455; 1936 A.B. 138, 144.

89 *Bimla Bai* v. *Shankar Lal* (1959) A.MP. 8. (A case of pre-Hindu Marriage Act); *Peek* v. *Gurney* (1873) 6 H.L. Cas. 377 reld. on.

90 *Harbhajan Singh* v. *Smt. Brij Ballabh* (1964) A. Punj. 361; *Kshatish Chandra* v. *Emp.* (1937) A. Cal. 214 reld. on. *Raghunath* v. *Vijaya*, (1972) A.P. 132 (misrepresentation about health of a girl).

91 *Venkatacharyulu* v. *Rangacharyulu*, 14 Mad. 316.

92 *Mt. Titli* v. *Alfred Robert Jones* (1934) A.A. 273; *Harbhajan Singh* v. *Smt. Brij Ballabh* (1964) A. Punj. 359.

93 Halsbury's Laws of England (3rd Ed.) Vol. 19, p. 776.

94 *Swift* v. *Kelly* (1835) 3 Kn. 257; 12 E.R. 648.

pearance without the reality of consent.[95] It must be inconsistent with the idea of there having been a real or intelligent consent by one of the parties. It must be such as has procured the form without the substance of agreement.[96] A false representation by a Hindu that he had been converted to Christianity and was a bachelor would amount to fraud entitling the innocent party to sue for divorce even if a nullity of marriage was denied to her.[97] In Hindu Law, if the marriage rites are duly performed and there is no impediment to the marriage, the doctrine of *factum valet* applies and makes the marriage indissoluble in the absence of proof of any force or fraud.[98] The reason for the exception is that where a girl is abducted by force or fraud and married, there is neither any gift nor the performance of religious rites.[99]

Difference Between claim for Damages and for Rescission.—The difference between a claim for damages and suit for rescission is this. In the former case the contract is left in tact and the suit is to enforce it and substitutes money damages for performance. In the latter case the object is to avoid performance of the contract. Hence any order made on rescission should have as its object the restoration of the parties to their original position. The idea is *restitutio in integrum* and the parties to be restored to *status quo ante.*[1]

Award of damages in place of rescission.—Where a person has entered into a contract after a misrepresentation otherwise than fraudulently made to him as a result of which he suffers loss, and the claim is for rescission of the contract, the Court may declare the contract subsisting and award damages in lieu of rescission if rescission would cause undue loss to the other side.[2]

Estoppel.—A statement made by a person with the intention that it should be acted upon and which is acted upon is estopped from contesting its truth even though it is not fraudulently made.[3]

Right to rescind when lost.—A right to rescind for misrepresentation can be lost in a variety of ways, some depending on the right of election. A representee on discovering the truth loses his right to rescind if once he has elected not to rescind. But he may lose even before he has made any election[4] where by reason of his conduct or other circumstances it would be unjust or inequitable that he retains the right. For instance where third parties have acquired rights under the contract; again where it would be unjust to the representor because it is impossible to restore him to his original position. *Restitutio in integrum* is not only a consequence of rescission, its possibility is indispensable to the right to rescind. Again delay in election may make it unjust to others that the right to elect should continue. For this reason the right to rescission for misrepresentation in general must be promptly exercised particularly in transactions regarding company shares. But no question of affirmation arises unless the representee knows of his right to elect to avoid or affirm.

A claim for rescission can be lost by failure to act promptly.[5]

If third party rights intervene by acquiring interest in the subject matter of the contract rescission will not lie provided the third party acted in good faith and gave consideration. This rule operates in all classes of misrepresentations unless the effect of the misrepresentation is to make it void for mistake.[6]

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95 *Moss* v. *Moss* (1897) p. 263.
96 *Consterdine* v. *Smaine* (1918) L. Bur. 83; 47 I.C. 544.
97 *Vermani* v. *Vermani* (1943) Lah. 51; (1943) A.L. 51.
98 *Brindaban* v. *Chandra Kurmokar,* 12 Cal. 140.
99 *Kshatish Chandra* v. *Emperor* (1937) A. Cal. 214 (F.B.) quoted with approval in *Harbhajan Singh* v. *Smt. Brij Ballab* (1964) A. Punj. 359, 362.
1 Contract Cases & Commentaries by Christine Boyle & D.R. Percy (1978) Ed.) p. 281.
2 Cheshire & Fifoot: Cases on the Law of Contract (7th Ed.) page 209.
3 *Low* v. *Bouverie* (1891) 3 Ch. 82.
4 *Coastal Estates Pty. Ltd.* v. *Melevende* (1965) V.R. 433, 451.
5 *Leaf* v. *International Galleries (a firm)* (1950) 2 K.B. 86; (1950) 1 All E.R. 693.
6 *White* v. *Garden* (1851) 10 C.B. 919 Babcock v. *Lawson* (1880) 5 Q.B.D. 284.

Voidability of agreement without free consent.

19. When consent to an agreement is caused by coercion[7] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed,[8] and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.[9]

Explanation.—A fraud of misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) *A*, intending to deceive *B*, falsely represents that 500 maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that 500 maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out, and the mortgaged-debt redeemed.[10]

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*; *B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

Scope of the section.—The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable;[11] the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark, though hardly with practical completeness, the limits within which the rule is applied. Before considering them we have to pause on the second paragraph of the body of the section. It reads plainly enough at first sight, but the thought does not seem to be really

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7 In s. 19, the words "undue influence" have here been omitted, being repealed by the Indian Contract Act (Amendment Act) 1899 (VI of 1899), s.3.

8 The same contract; he cannot set up a different one in the same suit: *Mahmad* v. *Ramappa* (1929) 119 I.C. 684; 1929 A,N. 254 (a mortgage case, connection with general contract law remote).

9 This question is rather frequent in disputes arising from a defect of title on the sale of immovable property, e.g., *Harilal Dalsukhram* v. *Mulchand* (1928) 52 Bom. 883; 113 I.C. 27; 1928 A.B. 427.

10 Under the Transfer of Property Act, 1882, s. 55 (*g*), the seller, not having sold subject to encumbrances, is bound to discharge the encumbrance, independently of any question of fraud.

11 Fraud in the *performance* of a contract is no ground for rescission: *Jamsetji* v. *Hirjibhai* (1913) 17 Bom. L.R. 158, 169; *Fazal* v. *Mangaldas* (1921) 46 Bom. 489, 508; 66 I.C. 726. The principle is obvious; when a man is once bound to perform an enforceable promise, any further inducement or encouragement to do so is gratuitous and immaterial, and he cannot complain if any expectation raised in this manner is disappointed. On the other side, a promisor either performs his promise or not; if not, the breach of contract is the same whether his conduct has been honest or fraudulent (though fraud may have other consequences outside the contract in criminal or bankruptcy jurisdiction). It must be remembered that an act done as the consideration for an offered promise is not the performance of a contract, for there is no contract until it is done, and the foregoing observation does not apply to it. The option which characterises a voidable contract is an option either to say "it shall not be enforceable at all" or to leave it as a good contract enforceable by any party on the usual conditions: *Murlidhar* v. *International Film Co.*, 1943 A.P.C. 34 at p. 39.

clear. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof, damages for non-performance (subject to special causes of excuse, if any, which we are not now considering). If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly.[12] Is anything more than this meant by the declaration of the affirming party's right to "be put in the position in which he would have been if the representations made had been true"?[13] A voidable contract is one in which by making an election one or more parties have the power to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.[14] "...In English law, contracts may be voidable, e.g., for misrepresentation, duress, undue influence, infancy, lunacy or drunkenness. If the contract is wholly executory, the party entitled to avoid the contract need do nothing: he can wait until he is sued and then plead the voidability of the contract. But if the contract has been partly executed, the right to avoid it must usually be exercised promptly, in the interests of the other party and of third parties; and until the right is exercised, the contract is valid, and things done under it cannot afterwards be undone. Thus if a contract for the sale of goods is voidable for fraud (without being void for mistake), the fraudulent party may acquire a valid title to the goods which he can transfer to an innocent purchaser for value."[15]

There are obviously many cases in which such restitution is not literally possible. Thus, if the owner of an estate subject to a lease for an unexpired term contracts to sell it to a purchaser who requires immediate possession, and conceals the existence of the lease,[16] the purchaser cannot be put in the same position as if the representation that there was no tenancy, or only such a tenancy as could be determined at will, had been true. Cases may occur, on the other hand, where a seller of land has held out, though not in express terms or wilfully, an element of attractiveness or security in the property offered for sale which it is in his power to realise by some act or undertaking on or with regard to adjoining property of his own. In such a case there is English authority for saying that he can enforce the contract only on the terms of making good what he has represented.[17] But it is dangerous to formulate general propositions in the law of contract from decisions in suits for the specific performance of contracts relating to land, and it is not clear that the facts of the decision in question are not reducible to misrepresentation or an ambiguous offer. Nor is it certain that the present enactment can always be literally relied on. *A* sells a house to *B*, and by some blunder of *A*'s agent the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, *B*, may insist on completing the contract and on having the difference between the actual and the stated value paid to him and his successors in title by *A* and *A*'s successors in title for all time. Nothing short of that will put him "in the position in which he would have been if the representations made had been true." This is obviously not the intention of the enactment.

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12 See the Specific Relief Act, 1963, s. 13. *Quaere* whether this clause can usefully be applied as a measure of money compensation, see *Sorabshah Pestinji* v. *Secy. of State* (1927) 109 I.C. 141; 29 Bom. L.R. 1535; 1928 A.B. 17, but this seems a simple case of the party having lost his claim, if any, to rescind the contract by delay.

13 The Indian Law Commissioners' draft was curiously worded (cl. 6): "A person who, either knowingly, or ignorantly, makes a false representation whereby he induces another to enter into a contract with him, is bound to place the other in the same position as if the representation had been true, and in default of his doing so the contract is voidable at the option of the person who has been misled." This, literally read, says that the contract is voidable only if the representation, besides having been untrue when made, cannot be subsequently made good. Such a restriction of the misled party's rights is, we believe, unknown to the law.

14 Restatement of contracts, para 13. Chitty on Contract, Vol. 1, para 16 (24th Ed.).

15 Chitty: on Contracts (24th Edn.). para 16. But see s. 11 for infancy, lunacy or drunkenness.

16 *Morgan* v. *Government of Haidarabad* (1888) 11 Mad. 419.

17 *Baskcomb* v. *Beckwith* (1869) L.R. 8 Eq. 100. See s. 13 of Specific Relief Act of 1963 below.

Restitutio in integrum.—If a fraudulent misrepresentation is made the innocent party is entitled to rescinding of the contract and damages. Thus where an ironmonger's business was purchased by the plaintiff[18] at an exaggerated price in consequence of false representation, the Court allowed the rescission of the contract and damages for deceit based on tort and not on breach of contract, the proper measure being compensation for loss upto the final disposal of the business less any benefit received.

Misrepresentation.—But where a buyer on obtaining the earning capacity of the mines to be purchased from the owners had it checked and after the contractor found the figures to be wrong, his action of rescinding the contract failed as he had not relied on the sellers figures.[19]

A promised his fiancee that after marriage he will give an allowance of half of what his father gave him annually i.e., half of £1000/-. The father died after the marriage leaving *'A'* £30,000 a year but *'A'* misrepresented an income of £1000 a year. *'A'* and his wife separated and wife's maintenance remained on husband's misrepresentation. They by agreement destroyed their letters to each other. The wife on discovering the true income sought to have the agreement rescinded. The husband resisted pleading that the wife had spent the money. The Court of Appeal rescinded the agreement holding that a Court of Equity will do what is practically just even though it cannot restore the parties to the position they were in.[20]

In *Newbigging* v. *Adam*[21] it was said by Cotton L.J. that "there ought to be a giving back and a taking back on both sides. "Thus the remedy will not lie if the parties are unable to make *restitutio in integrum*. Crompton J. explained the principle thus: when a party "exercises his option to rescind the contract, he must be in a state to rescind; that is he must be in such a situation as to be able to put the parties into their original state before the contract.[22] Thus rescission restores *status quo ante* and the House of Lords upheld the judgment. The House of Lords in appeal in *Adam's case*[23] said that because Col. Newbigging entered into a *bona fide* concern solvent and profitable and continued in that delusion till he finds out that he was deluded he cannot be without a remedy.

In *Adam* v. *Newbigging*[24] even though the business was insolvent and no longer going, it was held that *restitutio in integrum* had not become impossible and the contract was rescinded although the plaintiff entered the concern and continued in it till he found out.

The House of Lords in the case[25] of a lease of mines refused to set aside the lease on the ground of misrepresentation of the owner as the mines had been substantially worked and it was impossible to restore the parties to their original positions. So the owner was entitled to receive the balance of the money due from the lessee.

What further relief is to be granted after the rescission of a sale on the ground of misrepresentation was considered in *Brown* v. *Smit*.[26] Ordinarily rescission is granted when the parties can be restored to substantially the same position as they were in before the contract was made,[27] but as Lord Blackburn said in *Erlanger* v. *New Sombrero Phosphate Co*.[28]

> "...the practice has always been for a Court of Equity to give this relief by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

and this was done in *Cooper* v. *Phibbs*.[29]

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18 *Doyle* v. *Olby (Ironmongers) Ltd.* (1969) 2 Q.B. 158.
19 *Allwood* v. *Small* (1838) 6 Ch. & Fin 232; 49 R.R. 115.
20 *Hulton* v. *Hulton* (1917) 1 K.B. 813.
21 (1886) 34 Ch. D. 582, 595, on app. (1888) 13 App. Cas. 308, 317.
22 *Clarke* v. *Dickson* (1858) 27 L.J.Q.B. 223; 113 R.R. 483.
23 *Adam* v. *Newbigging* (1888) 12 App. Cas. 308. 317.
24 Ibid.
25 *Vigeors* v. *Pike* (1840-42) 8 Ch. & F 562. (See also Chitty (24th ed) Para 401).
26 (1924) 34 C.L.R. 160.
27 *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1119.
28 (1878) App. Cas. 1218; *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Paget* v. *Marshall* (1884) 28 Ch.D. 255.
29 (1867) 2 H.L. 149

It was held that on the parties being relieved of contractual obligations each must give back what he obtained under the contract. Where restitution is not possible there can be no rescission. But where there is improvement or deterioration equity adjusts the rights of parties by awarding money compensation to bring about *status quo* but subject to all just allowances. It means putting them back in the position they were before the contract, not in all respects but only in respect of the rights and obligations created by the contract which is rescinded.[30] A party exercising his option to rescind is entitled to be restored as far as possible to his former position.[31] This doctrine would not justify "improving the vendor out of his estate" or rendering it impossible for him to recover it. Again allowance for improvements which were matters of taste or personal enjoyment could not be justified.[32] But limitation of *restitutio in integrum* must not be strictly construed and mere deterioration does not destroy the right.[33]

The principle of *restitutio in integrum* does not require that a person must be placed in the same position as before; it means he must be placed in as good a position as before. The Courts are more inclined to give restitution in cases of fraud than in cases of innocent misrepresentation.[34] In *Hulton* v. *Hulton* the Court rescinded a separation—deed obtained by the husband fraudulently and refused to order the wife to repay sums already received and because husband had received benefits under the deed—freedom from molestation and from proceedings is of restitution of conjugal rights.[35]

Rescission of a contract of partnership—misrepresentation.—Where after the plaintiff a newly made partner in a firm had an opportunity to discover the falsity of the representation and did not affirm the contract but elected to rescind it within a short time, he would not be debarred from seeking the rescission of the contract and for recovery of the money paid for his share of the contract. It would be manifestly unfair if in those circumstances, the mere fact of becoming a partner would debar the plaintiff from relief of rescission and recovery of money. It would be so even if he had made a wrong statement in a document of having seen the books and accounts and the balance sheet of the firm.[35a] The more important question in cases such as these is not whether contract is executed or executory but whether *restitutio in integrum* is to be restored to original position is substantially possible and whether rescission is timely and just and fair.[35b]

There is an important class of cases in which, although there is no such misrepresentation as to make the contract voidable, complete performance is, by reason of misdescription or otherwise, unattainable, and specific performance will be decreed subject to compensation for the defect. It was originally proposed to deal with such cases in the Contract Act. The enactment governing them is now to be found in the Specific Relief Act, of 1963 s. 12(2); see the comments thereon below.

Suit by representatives.—The option of avoiding a contract procured in any of the ways mentioned in ss. 19, 19A, is exercisable by the party's representatives unless at the date of his death he had lost it by acquiescence or otherwise. It is rather surprising that the High Court of Bombay should have been called upon to reject an apparently serious argument to the contrary.[36]

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30 *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1278; *Brown* v. *Smit* (1924) 34 C.L.R. 160, 164; *Senanayake* v. *Cheng* (1965) 3 W.L.R. 715, 729 (P.C.); *Satgur Prasad* v. *Har Narain* 59 I.A. 147; (1932) A.PC. 89.

31 Kerr on Fraud & Mistake (6th ED.) 469 quoted with approval by Privy Council in *Satgur Prasad* v. *Har Narain,* 59 I.A. 147; (1932) A.PC. 89.

32 *Brown* v. *Smit* (1924) 34 C.L.R. 160, 165; *Mill* v. *Hill* (1852) 3 H.L.C. 328; Kerr on Fraud and Mistake (4th Ed.) 372.

33 *Armstrong* v. *Jackson* (1917) 2 K.B. 822, 829; *Alati* v. *Kruger* (1955) 94 C.L.R. 216; *Brown* v. *Smit* (1924) 34 C.L.R. 160.

34 Chitty: On Contracts (24th Ed.) para 401; *Spence* v. *Crawford* (1939) 3 All E.R. 271.

35 (1917) 1 K.B. 81.

35a *Senanayake* v. *Cheng* (1965) 3 W.L.R. 715 at page 729 (P.C.); *Mangi Lal* v. *Appellate Tribunal of State Transport* (1957) A. Raj. 167 (Consent by fraud or misrepresentation).

35b *Senanayake* v. *Cheng* (1965) 3 W.L.R. 715 at page 729 (P.C.). See *Satgur Prasad* v. *Har Narain Das,* 59 I.A. 147; (1932) A.PC. 89.

36 *Sharvan Goba* v. *Kashiram Devji* (1926) 51 Bom. 133; 100 I.C. 932. The head-note has the effect of

Exception: Means of discovering truth.—The exception is wider—we must suppose deliberately so—than the corresponding English authorities.[37] In England the principle is that if a man makes a positive statement to another, intending it to be relied on, he must not complain that the other need not have relied upon it. "The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe".[38] The test is not whether the party might have inquired for himself but whether he did inquire and trust his own inquiries rather than the representation,[39] and so far is this doctrine from being confined to cases of actual fraud that there is no decisive or recent authority for not applying it even to cases where the misrepresentation consists only in failing to disclose some fact which ought to be disclosed. When a purchaser chooses to rely upon his own judgment or of his agent he cannot afterwards say that he relied upon a previous representation made by the vendor.[40] No doubt there may be a question whether the party alleged to have misrepresented a fact really said, "I tell you it is so," or only "I think you will find it so." This question will, according to the circumstances, be of the construction of particular words, or of the inferences to be drawn from words and conduct. Again, the possession of obvious means of knowledge may lead, in some cases, to a fair inference that those means were used and relied on. But still the real point to be considered is whether the party misled did put his trust in the representation made to him of which he complains, or in other information of his own. In the latter case the misrepresentation did not really cause his consent. In other words, the present Exception, so far as allowed by English law, is logically nothing but a branch of the following Explanation. However, the words of the Exception are perfectly clear. If, as seems not altogether improbable,[41] they were not intended to alter the English rule, they were chosen with singular infelicity. It will be observed that the Exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent.[42] The words "fraudulent within the meaning of s. 17" go with the word "silence" and not "misrepresentation".[43] Exception to s. 19 applies to active misrepresentation or silence amounting to fraud within s. 17 but does not cover a case of fraud under s. 17(3).[44] It has been held that if a person desirous of selling property causes letters to be written to him in which fictitious offers at high prices are made with the sole purpose of showing it to an intending purchaser, the making and exhibiting of such letters to the purchaser and thus inducing him to purchase the property amounts to fraud within the meaning of s.17, and the case does not fall within the Exception to s. 19.[45] A vendor of a house and land knew that the purchaser wanted immediate possession, and, while admitting that the property was occupied by a tenant, first concealed the fact that the tenant had a lease, and then pretended that the lease was forfeited; the purchaser was entitled to rescind the contract, although he might have ascertained by independent inquiry what the tenant's interest really was.[46] Where the vendor not only failed to disclose his having leased the land, which was being

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suggesting, quite wrongly, that the Court had some doubt on this point: it did, for abundant caution, add other reasons. And see notes to s. 16, "Rights of legal representatives", above; *Rash Behari Naskar* v. *Haripada Naskar,* 1934 A. Cal. 762; 59 Cal. L.J. 387; 152 I.C. 561; *Mst. Manbhari* v. *Sri Ram* (1936) All. L.J. 1215; 165 I.C. 240; 1936 A.A. 672.

37 See *John Minas Apcar* v. *Louis Caird Malchus* (1939) 1 Cal. 389, at p. 398; 184 I.C. 321; A.I.R. 1939 Cal. 473, per Lort-Williams J.

38 *Dyer* v. *Hargrave* (1805) 10 Ves. 505, 510; 8 R.R. 35, 39.

39 *Redgrave* v. *Hurd* (1881) 20 Ch.D. 1.

40 *Holmes* v. *Jones* (1907) 4 C.L.R. 1692, 1702, 1709, 1711; *Lysney* v. *Selby,* 2 Raym (1d) 1118; *Redgrave* v. *Hurd,* 20 Ch.D. 1, 15.

41 At least the reading out of conditions of sale in English does not constitute means of discovering the truth for a buyer who does not understand English, and such a buyer at a sale under the direction of the Court is entitled to rely on statements made by the auctioneer in the presence and hearing of the chief clerk in charge: *Mahomed Kala Mea* v. *Harperink* (1908) 36 I.A. 32; 36 Cal. 323. See also *Rustomji* v. *Vinayak* (1910) 35 Bom. 29, at p. 34.

42 See *Abdulla Khan* v. *Girdhari Lal* (1904) Punj. Rec. No. 49.

43 *Niaz Ahmad Khan* v. *Parshotam Chandra* (1930) 53 All. 374; 129 I.C. 545; 1931 A.A. 154; *John Minas Apcar* v. *Louis Caird Malchus, supra,* note, 39.

44 *Niranjan* v. *Tirilochan Kuar* (1956) A. Or. 81; *Niaz Ahmad Khan* v. *Parshotam Chandra,* 53 All. 374; 1931 A.A. 154; *Venkataratnam* v. *Sivaramudu,* 1940 A.M. 560; *J.M. Apcar* v. *L.C. Malchus* (1939) 1 Cal. 389; (1939) A. Cal. 473.

45 *John Minas Apcar* v. *Louis Caird Malchus, supra.*

46 *Morgan* v. *Government of Haidarabad* (1888) 11 Mad. 419, 439. See also *Jogendra Nath* v. *Chandra Kumar* (1915) 42 Cal. 28, at p. 34; 24 I.C. 193.

sold, but stated that immediate possession would be delivered, the sale is voidable and the defence of the absence of due diligence under exception to s. 19 by the vendee is not open to the vendor.[47] A person purchased a decree obtained in favour of an insolvent from the Official Assignee for 20 per cent of its face value by representing that the decree was practically unrealisable although he knew that satisfactory security had been given for the full amount of the decree. The Official Assignee was held entitled to rescind the contract.[48] A false statement that the property to be sold was free from mortgage does not fall under Exception to s. 19 and the contract is voidable at the instance of the vendee on account of fraud.[49] One agent cannot be said to have knowledge of fraud because the principal has vicarious knowledge of fraud on account of the knowledge of another agent.[50] Therefore a Tahsildar conducting a court sale cannot be said to have knowledge of fraud because of the knowledge of the Government Pleader.[51]

The ordinary diligence of which the Exception speaks may be taken to be such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its results. A possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject-matter would not, it is conceived, be "means of discovering the truth with ordinary diligence." In *Re Nursery Spinning and Weaving Co.*,[52] (see notes on s. 18, sub-s. 3, above), it was contended on behalf of the company that the exception to s.19 was applicable to that case, and that the bank could have discovered with ordinary diligence that the company was not liable on a bill drawn by its secretary, treasurer, and agent. Sargent J. said: "No ordinary diligence would have enabled the bank to discover that the company was not liable on this bill. The form of the bill would naturally lead the bank, as it admittedly did lead the bank to suppose that it was the company's bill as represented, and the discovery could only be made by persons trained in the law and after a careful examination of legal authorities." But where a purchaser of rice stored up at a place to which he had an easy access refused to take delivery on the ground that the rice was of an inferior quality to that contracted for, it was held that he could not rescind the contract, for he could have discovered the inferiority of the quality by using "ordinary diligence".[53]

Explanation: as to "causing consent."—The principle of the caution given here is obvious. A false representation, whether fraudulent or innocent, is merely irrelevant if it has not induced the party to whom it was made to act upon it by entering into a contract or otherwise.[54] He cannot complain of having been misled by a statement which did not lead him at all. In the common phrase of English textbooks, the representation must be definable as *dans locum contractui,* bringing about the contract. Hence an attempt to deceive which has not in fact deceived the party can have no legal effect on the contract, not because it is not wrong in the eye of the law, but because there is no damage. This rule is applicable where a seller of specific goods purposely conceals a fault by some contrivance, in order that the buyer may not discover it if he inspects the goods, but the buyer does not in fact make any inspection.[55] "Misrepresentation which does not affect conduct cannot create liabilities".[56] In particular cases it may be hard to determine whether a certain representation was in fact relied upon so that it can be said to have caused consent to the contract. In English law if the representation was one of the inducing causes, it is immaterial that it was not the sole inducing cause.[57] This

47 *Venkataratnam* v. *Sivaramudu* (1940) A.M. 560. Contra *Harilal Dilsukhram* v. *Mulchand,* 52 Bom. 883; 1928 A.B. 427 dist.; *Governor of Orissa* v. *Shiv Prasad* (1963) A. Or. 217 (a case of innocent representation).

48 *Subramanian Chetti* v. *Official Assignee,* 1931 A.M. 603; 133 I.C. 372.

49 *Ganpat* v. *Mangilal* (1962) A.MP. 144.

50 *Bappu Rowther* v. *State of Kerala* (1964) A. Ker. 109; See also *Gordon Hill Trust Ltd* v. *Segall* (1941) 2 All E.R. 379; *Armstrong* v. *Strain* (1952) 1 K.B. 232.

51 *Bappu Rowther* v. *State of Kerala* (1964) A. Ker. 109.

52 (1880) 5 Bom. 92.

53 *Shoshi Mohan Pal* v. *Nobo Kristo* (1878) 4 Cal. 801.

54 *Mithoolal* v. *Life Insurance Corporation* (1962) A.SC. 814; (1962) Supp. 2 S.C.R. 571; *Hindustan General Insurance Society Ltd.* v. *Punam Chand* (1974) 2 Cal. 496, (1971) A. Cal. 285, 289.

55 *Horsfall* v. *Thomas* (1862) 1.H. & C. 90; 130 R.R. 394.

56 Anson, Law of Contract, 18th ed., p. 195; 22nd Ed., p. 212.

57 *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D. 459. *P* was induced to take debentures in a company partly because of a misstatement in a prospectus issued by *D.* and partly because of his own mistaken belief

question, where it arises, is a question not of law, but of fact,[58] on which the character of the statement made and the probability that it would influence a reasonable man's determination may be taken into account. "If it is proved that the defendants with a view to induce the plaintiff[59] to enter into a contract made a statement to the plaintiff to such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter in to the contract, it is a fair inference of fact that he was induced to do so by the statement.... Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act".[60] There is no rule of law that any particular kind of statement is necessarily material in some cases and immaterial in others. In general one man's money is as good as another's, and in a contract of loan the lender's personality is different to the borrower; but where a money-lender who has acquired an evil repute for hard dealing in his own name advertises and lends money in assumed names, it is a permissible inference of fact that the concealment of his identity was a fraud inducing the borrower to contract with him.[61] The fact that a person has taken pains to falsify or conceal a fact is cogent evidence that to him at any rate that fact appeared material, and the falsification or concealment an important condition of obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say, "It could have made no difference if you had known the truth." A special condition restricting enquiries into title of the vendor (like that under s. 44(2) of the Law of Property Act, 1925) is no bar to a claim for rescission where the purchaser discovers from other sources defects, liable to render the title worthless, unless the vendor discloses to the purchaser defects which he knows or ought to have known. A purchaser ought to have known defects, like an authorised subletting and alterations, which make forfeiture a possibility.[62]

Illustrations.—There is nothing calling for particular comment in the illustrations to this section, except that the case put in illustration (c) would now be more simply disposed of under the specific provisions of the Transfer of Property Act; see the note on it above.

Avoidance of a voidable contract.—When a voidable contract is said to be avoided it does not mean that the contract never existed, but that it ceased to exist from the moment of avoidance. By innocent misrepresentation, or in the case of insurance, non-disclosure, it is not that there is no consent at all, but that the party would not have consented if he had the facts before him.[63] A voidable transfer until avoided is valid and therefore a third party acquires a good title in the meantime if he takes without notice (transaction induced by fraud). If the defrauded party by express words or unequivocal contract affirms the contract his election is determined for ever.[64] There is a clear distinction between fraudulent misrepresentation as to character of a document and as to its contents. The former is void and the latter is merely voidable.[65]

By purchasing a railway ticket, a contract to carry the buyer's luggage comes into existence. The buying of a half ticket by misrepresentation make the contract voidable and not void *ab initio*. Therefore, the liability of the railway in regard to the luggage received for car-

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that debenture holders would have a charge upon the property of the company. *D* pleaded that one of the inducements operating on *P*'s mind was his own mistake, but *P* was allowed to rescind.

58 *Currie* v. *Rennick* (1886) Punj. Rec. No. 41.

59 Of course the positions of the party having made the statement and the party to whom it was made, as plaintiff and defendant, will depend on the form in which each case comes before the Court: the suit may be to enforce or to rescind the contract, or (as in the case now cited) to recover damages for the wrong of deceit.

60 *Smith* v. *Chadwick* (1884) 9 App. Ca. 187, at p. 196 (Lord Blackburn).

61 *Gordon* v. *Street* (1899) 2 Q.B. 641, C.A.

62 *Becker* v. *Patridge* (1966) 2 W.L.R. 803. *In re Haedicke & Lipski's Contract* (1901) 2 Ch. 666; *Bousfield* v. *Hodges* (1863) 33 Beav. 90, 94.

63 *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853. *Cf. Sundara Rao* v. *C.I.T.* (1957) I.T.R. 449; (1957) A.M. 451. See also discussion of this topic, *infra*.

64 *Ningawwa* v. *Byrappa* (1968) A. SC. 956, 958; *Clough* v. *L.N.W. Ry.* (1871) 7 Ex. 26, 34, refd. to; *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853.

65 *Ningawwa* v. *Byrappa* (1968) A.SC. 956; *Foster* v. *Machinon* (1869) 4 C.P. 704 refd. to; This case was followed in *Sanni Bibi* v. *Siddik Hossain* (1919) A. Cal. 728; and in *Brindaban* v. *Dhurba* (1929) A Cal. 606; *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853.

riage of such a passenger is a liability as a bailee which arises under s. 74 of the Railways Act.[66]

The Madras High Court has held that a voidable contract when avoided at the instance of a party affected thereby takes effect from the date of the transaction and not when it is avoided. In law, it is as if the transaction had never taken place. It cannot be regarded as an alienation which is perfect till it is set aside.[67] But a transfer which is valid remains valid till avoided, but a transaction which is void *ab initio* must be deemed to have never taken place. It is not to be regarded as valid till it is set aside. There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to its contents. Where the misrepresentation is both the transaction is wholly void.[68]

Where a document which was intended to be in favour of a particular person but was as a result of fraud of the defendant, conveyed to some one else the transaction would be voidable under s.19.[69]

The Supreme Court in licensing a case under the Export & Import (Control) Act held that a licence obtained by misrepresentation does not make it *non est* so that goods imported are deemed to be without a licence in contravention of s. 3 of the Act inviting the application of cl. (8) of s. 167 of the Sea Customs Act.[70] Assuming that the principles of the law of contract apply to licences under the Import & Export (Control) Act, s. 3, a licence obtained by fraud is only voidable. It is good till avoided in the manner prescribed by law.[71] It is submitted that the Madras, *Sundara Rao's case*[72] was not a case of contract and the rights of third parties were not involved. The question was one under the Income-tax Act as to whether tax was exigible from the date when the transaction was avoided by a decree of court or from the date when the transaction was effected and it was held from the latter date. The transaction in *Satgur's case* was not regarded merely as a contract voidable at the option of the plaintiff but it was in effect a conveyance under which title had passed to the defendant and the matter was viewed both as a contract and as one under s. 88 of the Trusts Act. Both the courts in India had found that the defendant stood in a fiduciary relation to the plaintiff. And finally the doctrine of *restitutio in integrum* was applied.[73] The pronouncement of the Supreme Court in the *East India Commercial Company* v. *Collector of Customs*[74] accepts the principle that misrepresentation does not make a contract *non est* but is only voidable. That was also the Court's view in *Ningawwa* v. *Byrappa*.[75]

This pronouncement of the Supreme Court, it is submitted, is in consonance with the decision of cases decided in England that if the contract has been partly executed, it must be avoided promptly and until the right is exercised, the contract is valid and things done under it cannot afterwards be undone.[76]

Plea of fraudulent representation in written Statement.—If a suit is brought by a party to enforce a contract the defrauded party can pray for avoiding the contract in his written statement being well within the period of limitation and it is not necessary for him to bring a suit to avoid the contract.[77]

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66 *Union of India* v. *Benode Kumar* (1962) A. Cal. 48; 64 C.W.N. 878.

67 *Sundara Rao* v. *C.I.T.* (1957) 31 I.T.R. 449; 1957 A.M. 451; *Vishwara Rao* v. *Suryarao*, 59 Mad. 666; (1936) A.M. 440 refd. to (an alienation is perfect till set aside) doubted in Maynes H.L. 508 (11th Ed.); *Satgur Prasad* v. *Harnarain Das*, 59 I.A. 147; 1932 A.P.C. 89; 7 Luck. 64 (Case of fraud—restoration to the former position). Contra *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853. See post.

68 *Pratap* v. *Puniya Bai* (1977) A.MP. 108, 110. *Ningawwa* v. *Byrappa Shidappa* (1968) A.SC. 956 folld: (1968) 2 SCR 797.

69 *Havildar Singh* v. *Aditya Singh* (1978) A.P. 266.

70 *East India Commercial Co.* v. *Collector of Customs* (1962) A.SC. 1893 (Sarkar J. contra). See *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853.

71 *East India Commercial Co.* v. *Collector of Customs* (1962) A. SC. 1893.

72 *Sundara Rao* v. *C.I.T.* (1957) 31 I.T.R. 449; (1957) A.M. 451.

73 *Satgur Prashad* v. *Harnaraindas*, 59 I.A. 147; 1932 P.C. 89.

74 (1962) A.SC. 1893.

75 (1968) A.SC. 956, 958; *Partap* v. *Puniyabai* (1977) A.MP. 108, 110.

76 Chitty on Contract (24th Ed.) para. 16; see *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 853.

77 *Gosto Behari Roy* v. *Ramesh Chandra Das* (1978) A. Cal. 235, 238.

Gift right to revoke survives to Legal Representatives.—Where a gift is induced by fraud, misrepresentation or undue influence the right to have it rescinded survives to the legal representations and does not die with the death of the donor.[78]

Rescission of voidable contracts.—As to the consequences of the rescission of voidable contracts, see s.64.

Specific performance.—As to the effect of fraud and misrepresentation on the rights of a party to claim or resist specific performance, see Specific Relief Act, 1963, ss. 18(a), 26 and 27(1)(a).

A person who alters a contract—a deed of sale—can neither get specific performance nor damages in lieu thereof because the court will not accept and act upon such a document.[79]

Right of third party cannot be set up.—It is no defence to an apparently regular claim to property to suggest, without showing any title of one's own, that the original transaction from which the claimant's title is derived may have been voidable under this or the following section.[80]

Admission by misrepresentation.—Admission obtained by misrepresentation has no legal effect. Such implied admission being gratuitous made in ignorance of real facts may be withdrawn unless barred by estoppel for example.[81]

A person whose consent is obtained by fraud or misrepresentation is entitled to avoid the contract at his option as fraud vitiates the contract and he can withdraw any advantage that the other party has obtained as a result of the fraud.[82]

Exception.—The exception to s. 19 does not apply to cases where there is a positive case of an active fraudulent representation which has brought about the contract between the parties.[83]

Insurance policy.—When a repudiation of a policy is for undisclosed hydrocele suffered by the assured but the insurer's Medical Officer had given a secret report on the illiterate assured which was not shown to be false even the fact of suffering from hydrocele suppressed by the assured will not affect the validity of the insurance policy as Exception to s.19 will apply.[84] Fraudulent in Exception to s. 19 qualified silence and not misrepresentation.[85]

Power to set aside contract induced by undue influence.

19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court[86] may seem just.

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78 *Pardhana* v. *Amin Chand* (1977) A.HP. 94; *Mitchell* v. *Homfray* (1881) 8 Q.B.D. 587.

79 *Kameshwar Rao.* v. *Hemalathamma Rao* (1959) A.AP. 596.

80 *Trimbak Bhikaji* v. *Shankar Shamrav* (1911) 36 Bom. 37. This would be too elementary to call for decision or report in England.

81 *Hyderabad State Bank* v. *Raghunath* (1958) A.AP 605; *Mt. Jzhar Fatima Bibi* v. *Mt. Ansar Fatima Bibi* (1939) A.A. 348 refd. to. *Mohammad Imam Ali Khan* v. *Hussain Khan,* 25 I.A. 161, 26 Cal. 81, refd. to.

82 *Mangilal* v. *Appellate Tribunal of State Transport* (1957) A. Raj. 167.

83 *R.C. Thakkar* v. *Gujarat Housing Board* (1973) A. Guj. 34, 43. *Venkataratnam* v. *Palleti Sivaramudu* (1940) A.M. 560 refd. to.

84 *Life Insurance Corporation of India* v. *Smt. Manjula Mohanlal* 1975 A. Mys. 116, 120.

85 *Life Insurance Corporation of India* v. *Baidyanath Singh* (1978) A.P. 334, 337; *Niaz Ahmed Khan* v. *Parsottam Chandra* (1931) A.A. 154 & *Venkataratnam* v. *Sivaramudu* (1940) A.M. 560 reld. on.

86 The refusal of terms suggested by the Court leaves this discretion free: *Sundar Rai* v. *Suraj Bali Rai* (1925) 47 All. 932; 88 I.C. 1013.

Illustrations

(a) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son, obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the Court may set the bond aside.

(b) *A*, a money-lender advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.

This section, inserted by the Indian Contract Act (Amendment Act), 1899, s.3, appears to be intended to give express sanction to the constant practice of Indian as well as English Courts in cases of unconscionable money-lending, namely, to relieve the borrower against the oppressive terms of his contract, but subject to the repayment to the lender of the money actually advanced with reasonable interest.[87] (See the illustrations.) The rate of interest allowed by the High Courts as reasonable has varied, according to circumstances, from 6 and 12 per cent in Bengal to 24 per cent in Bombay and the United Provinces.[88] See notes to s. 16, "unconscionable bargains," above. It has already been pointed that this branch of the law is now mainly governed by the money-lending legislation of a drastic kind in most parts of India.[89]

The second paragraph is the only portion of the section that is new. However, as it stands it is virtually a reproduction of ss. 35 and 38 of the Specific Relief Act. The combined effect of those two sections is that a contract in writing may be rescinded at the suit of a party when (amongst other causes) it is voidable, but that the Court may require the party rescinding to make any compensation to the other which justice may require. It may be noted that under the present section the contract need not be in writing. See also s. 64 below, which leaves no discretion to the Court in the matter of restitution.

S. 19A is applicable to Mahomedans and the heirs of a Mahomedan donor have the right to avoid a gift under that section.[90] But it is not applicable to the defence in a suit for possession by the donee against even trespassers.

The Select Committee gave the following reason for adding this section to the Act:—

"We have recast the language of the new s. 19A of the Act of 1872 proposed by cl. 3 of the Bill, so as to bring it more closely into accord with the language of s.19. A contract obtained by undue influence is on a different footing from a contract obtained by fraud. In the case of the latter a party who, with knowledge of the fraud, has taken any benefit under the contract, is held to have elected to affirm it; but where a contract has been obtained through the exercise of undue influence it is necessary that the Court should have power to relieve the party who acted under the undue influence, even although he may have received some benefit under the contract. On the other hand where such benefit has been received the Court ought to have full power to impose such conditions as may be just upon the party seeking relief."

Agreement void where both parties are under a mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.[91]

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87 Cited with approval in *Poma Dongra* v. *William Gillespie* (1907) 31 Bom. 348, at p. 352.

88 *Mothoormohun Roy* v. *Soorendro Narain Deb* (1875) 1 Cal. 108; *Mackintosh* v. *Hunt* (1877) 2 Cal. 202; *Chunni Kaur* v. *Rup Singh* (1888) 11 All. 57; affirmed in appeal *sub. nom. Raja Mohkam Singh* v. *Raja Rup Singh* (1893) 20 I.A. 127; 15 All. 352 (where 20 per cent was allowed): *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1906) 33 I.A. 118; 28 All. 570; *Maneshar Bakhsh Singh* v. *Shadi Lal* (1909) 36 I.A. 96; 31 All. 386 (where 18 per cent was allowed); *Balkishan Das* v. *Madan Lal* (1907) 29 All. 303 (where 24 per cent was allowed); *Poma Dongra* v. *William Gillespie* (1907) 31 Bom. 348 (where 24 per cent was allowed); *Ranee Annapurni* v. *Swaminatha* (1910) 34 Mad. 7 (where 24 per cent was allowed.

89 See commentary on s. 16, "unconscionable bargains ', above.

90 *Mahboob Khan* v. *Abdul Rahim* (1964) A. Raj. 250.

91 This may cover, if required, *Harilal Dalsukhram* v. *Mulchand* (1928) 52 Bom. 883; 113 I.C. 27; 1928

Illustrations

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void. *(Couturier* v. *Hastie* (1856) 5 H.L.C. 673; 101 R.R. 329.)

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. (Pothier, Contract de Vente, cited 5 H.L.C. 678; so in modern French Law, Code Civ. 1601. For Roman example see Pollock on Contract, 13th ed., 402.)

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void. *(Strickland* v. *Turner* (1852) 7 Ex. 208; 86 R.R. 619; *Cochrane* v. *Willis* (1865) L.R. 1 Ch. 58.

Scope of the section.—The practical scope of this section is shown (though not completely) by the illustrations. No doubt is possible as to the actual solution, in any civilised system of jurisprudence, of the cases put. But the wording of the section (which follows the Indian Law Commissioners' original draft) tends to obscure the principle which governs them. It is not that the mistake has any special operation because it is a mistake, but that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement. Where the contract was for the sale of an object not existing, or which had ceased to exist according to the description by which it was contracted for, the result is still more easily apprehended if we say that there was nothing to buy and sell. In England partial destruction or loss of goods contracted for has the same effect.[92]

Indian decisions have furnished a few more illustrations. The section will no doubt continue to be interpreted, as occasion arises, largely and beneficially.

Mistake is of three kinds.—There are four kinds of mistakes—(1) unilateral mistake where one party is mistaken which will make the contract void if the other party knows or must be taken to know of the mistake of the first party, e.g., a picture believed to be a Constable but is really a copy. The buyer believes it to be so and the seller knows of it. It will be mutual if the seller is ignorant of the buyer's belief. Mere unilateral mistake of the lessor where the lessee had in no way contributed to the mistake is no ground for rescission of the lease either with or without the option to the lessee to accept rectification to cure the mistake.[93]

(2) Mutual mistake where the parties misunderstand each other and are at cross purposes. There is no real correspondence offer and acceptance. The parties are not really *consensus ad idem*. There is thus no agreement at all; and this contract is also void, e.g. *A* intends to offer his 8 h.p. car but *B* believes it to be 10 h.p. (3) Common mistake where both parties are mistaken about the same vital fact although both parties are *ad idem*, e.g., the subject-matter of the contract has already perished. This is also void. Section 20 is concerned with common mistake of fact and not mutual mistake.[94] There is yet a fourth kind of mistake—*non est factum*. But it really falls under Sec. 18 and has been appropriately dealt with there.

Common mistake.—Common is defined as "possessed or shared alike by both or all the persons or things in question" and mutual means "possessed or entertained by each of two persons towards or with regard to each other".[95] Two decisions of the House of Lords,

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A.B. 427; but the Court rightly held that a defect in title of property known to both vendor and purchaser raises no question of mistake at all. Cp. *Secy. of State* v. *Yellepeddi Janakiranyya Pantulu*, 1925 A.M. 859; 87 I.C. 644 (assessment paid for *patta* of land resumed by Government, with knowledge that the resumption was disputed, but also held that the transaction was not contract at all). As to a deficiency in quantity specified only as reported, *Soorath Nath Banerjee* v. *Bhabasankar Goswami* (1928) 33 C.W.N. 626; 119 I.C. 205; 1929 A. Cal. 547; *Kochuvareed* v. *Mariappa*, 1954 A.T.C. 10, 24.

92 *Barrow Lane & Ballard* v. *Philip Philips & Co.* (1929) 1 K.B. 574.

93 *Riverlate Properties Ltd.* v. *Paul* (1974) 2 All E.R. 656, 661 (C.A.)

94 *U.P. Government* v. *Nanhoo Mal* (1960) A.A. 420; Cheshire & Fifoot: Law of Contract (6th Ed.), pp. 188-9.

95 Cheshire & Fifoot: Law of Contract (6th Ed.), 188, n2.

Cooper v. *Phibbs*[96] and *Bell* v. *Lever Brothers Ltd.*[97] are the main sources from which flows the, stream of the law relating to "mistake" in English Law. There is yet a third case[98]—a case from Kenya decided by the Privy Council. It is of importance as to the law of "mistake" in India, as it deals with the structure of the Act and with ss. 10 and 20 of the Indian Contract Act and points out the distinction between ss. 20 and 56 of the Act. In *Cooper* v. *Phibbs,*[99]

A agreed to take a lease of a fishery from *B*, though contrary to the belief of both parties at the time, *A* was tenant for life of the fishery and *B* had no title at all.

Lord Westbury applied the principle that

"if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake"

The transfer of ownership being impossible, the stipulation was *naturali ratione inunitilis.* Lord Atkin in *Bell* v. *Lever Bros. Ltd.*[1] described the statement of Lord Westbury too wide and said that the correct view was that there was a contract which the vendor was either incapable of performing or had committed a breach of a stipulation as to title; the contract was unenforceable but not void. The principle of *Cooper* v. *Phibbs*[96] has been repeatedly acted on; see for instance *Earl Beauchamp* v. *Winn*[2] and *Huddersfield Banking Co.* v. *Henry Lister & Sons.*[3] It is in no way impaired by *Bell* v. *Lever Bros. Ltd.*[97]which was treated in the House of Lords as a case at law depending on whether the contract was nullity or not. According to Denning L.J., if *Lever Bros.'s case*[97]had been considered on equitable grounds the result might have been different.[4] In *Bell* v. *Lever Bros. Ltd.,*[97]

an agreement of service between a company and two of the directors of its subsidiary company was terminated on payment of compensation. The parties proceeded on the assumption that the service agreements were not liable to immediate termination by reason of misconduct of the directors which assumption proved to be mistaken. Fraud was however negatived.

In an action by the company for rescission of contract and repayment of moneys paid the agreement was set aside by Wright J. and the Court of Appeal on the ground of mutual mistake. But the House of Lords by a majority reversed the judgment on the ground that the mutual mistake related not to the subject-matter but to the quality of the service contract and was not of such a fundamental character.[97] Sir John Simon in his arguments formulated for the assistance of the House the following proposition:[5]

"Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void *ab initio* if the assumption is of present fact and it ceases to bind if the assumption is of future fact."

This was accepted by the House with the additional rider that the assumption must have been fundamental to the continued validity of the contract or a foundation essential to its existence. The House was divided as to the assumption being sufficiently fundamental but not as to the principle.[6]

In the words of Lord Atkin:[6]

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96 (1867) 2 H.L. 149.
97 1932 A.C. 161; (1931) All E.R. Rep. 1 (H.L.).
98 *Sheikh Brothers Ltd.* v. *Ochsner* (1957) A.C. 136; (P.C.).
99 (1867) 2 H.L. 149, 170; see *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 218; (1931) All E.R. Rep. 1, 27 per Lord Atkin).
1 (1932) A.C. 161, 218; (1931) All E.R. Rep. 1, 27; *Kennedy* v. *Panama Royal Mail Co.* (1867) 2 Q.B. 580 and *Smith* v. *Hughes* (1871) 6 Q.B. 597 appd.
2 (1873) 6 H.L. 223.
3 (1895) 2 Ch. 273; (1895-99) All E.R. Rep. 868.
4 *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1120 (per Denning L.J.); see also *Grist* v. *Bailey* (1966) 2 All E.R. 875; (1966) 3 W.L.R. 618 (per Goff J.).
5 *Bell* v. *Lever Bros. Ltd.,* 1932 A.C. 161, as recorded by Lord Atkin, p. 225. (For arguments see p. 167); (1931) All E.R. Rep. 1, 31.
6 Ibid, pp. 218 & 28 (All E.R. Rep.); at p. 226 & p. 32 (All E.R. Rep.).

"Does the state of new facts destroy the identity of the subject-matter as it was in the original state of facts?" This is a common standard for mutual mistake and implied condition as to existing or as to future facts.

Or in the words of Lord Thankerton the error must be such that

"it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract or was an inevitable inference from the nature of the contract that all parties so regarded it".[7]

The range of authorities relating to some alteration in circumstances subsequent to the date of the contract do not... raise a question of mutual error or mistake: in them the formation of the contract is complete and binding, but subsequent events arise which critically affect the contract but whose occurrence has not been provided for in the contract.[8] *(per* Lord Thankerton).

Effect of mistake at law and its effect in equity.—According to Denning L.J. the correct interpretation of *Bell* v. *Lever Bros. Ltd.*[97] is that once a contract has been made then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say that it was a nullity from the very beginning, no matter that it was a mistake which to his mind was fundamental and no matter that the other party knew he was under a mistake; *a fortiori,* if the other party did not know of the mistake but shared it.[9] A distinction was drawn by Denning L.J. between (i) the effect of a mistake at law and (ii) its effect in equity. At law, mistake, if effective at all, makes the contract void. In equity, mistake is a common ground for rescission or for refusing specific performance and is wider than the jurisdiction at law.[10] In *Solle* v. *Butcher,*[11]

the parties entered into a lease under the mutual mistake that the alterations made had so altered the identity of the leased premises as to make it a new dwelling house outside the Rent Acts. The tenant sued for the return of rent overpaid and the landlord applied for rescission of the lease.

The Court of Appeal held that the landlord was entitled to have the lease set aside in equity on *such* terms as the Court thought fit. The defendants took the premises of the plaintiffs on lease for 15 years for the purpose of offices when the planning permission was only for two years. This was held to be common mistake of the parties because (a) the belief of the parties that planning permission was available without restriction for use of the premises for offices was a fundamental mistake; and (b) the defendants were not at fault in entering into possession without making the usual searches as they were under no duty of care to the plaintiffs to make these searches and they did not bring about the plaintiffs forgetfulness.[12] In *Sheikh Brothers Ltd.* v. *Ochsner,*[13]

the appellant granted a licence to the respondent to cut *sisal* growing on appellant's land in return of his delivering *sisal* fibre in minimum quantities of 50 tons per mensem to the appellant. Unknown to both parties, the estate was incapable of producing the necessary amount of *sisal* and that was the basis of the contract and the mistake was as to a matter of fact essential to the agreement.

The agreement was held not to be a contract within s. 10 "mutual mistake" within s. 20 having been found to exist. This case proceeded on the structure of the Act.

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7 Ibid, 235; 37 (All E.R.).
8 Ibid, 237.
9 *Solle* v. *Butcher* (1949) 2 All E.R. 1107, 1119; (1950) 1 K.B. 671.
10 Ibid; per Goff J. in *Grist* v. *Bailey* (1966) 3 W.L.R. 618; (1966) 2 All E.R. 875.
11 Ibid, 1121; *Cooper* v. *Phibbs* (1867) 2 H.L. 149 refd. to.
12 *Laurence* v. *Lexcourt Holdings & Ltd.* (1973) 2 All E.R. 810, 819; *Solle* v. *Butcher* (1949) 2 All E.R. 1107; and *Grist* v. *Bailey* (1966) 2 All E.R. 875, Appld.
13 *Sheikh Bros. Ltd.* v. *Ochsner* (1957) A.C. 136; (1957) 2 W.L.R. 254 (P.C.), 260. *Bell* v. *Lever Bros. Ltd.,* 1932 A.C. 161. Before the Board the following cases were cited in argument: *Kennedy* v. *Panama Mail Co.* (1866) 2 Q.B. 580; *Norwich Union Fire Insurance Society Ltd.* v. *William H. Price Ltd.,* 1934 A.C. 455; *The Salvador,* 26 T.L.R. 149; *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107; *Leaf* v. *International Galleries* (1950) 2 K.B. 86; (1950) 1 All E.R. 693; *Harrison & Jones* v. *Bunten & Lancaster Ltd.* (1953) 1 Q.B. 646; (1953) 1 All E.R. 903; *Nicholson & Venn* v. *Smith-Marriott,* 177 L.T. 189; *Stewart* v. *Kennedy* (1890) 15 A.C. 108; *Hussainbhoy Karimji* v. *Haridas,* 1928 A. Sindh 21; *Magee* v. *Pennine Insurance Co. Ltd.* (1969) 2 All E.R. 89 (common mistake as to policy of insurance and validity of claim.

The Australian High Court held the doctrine of mistake inapplicable to the sale of a tanker in *McRae* v. *Commonwealth Disposals Commission*[14] and to the sale of real property in *Svanosio* v. *McNamara;*[15] the facts in the two cases were as follows:

In the former case the plaintiff purchased an abandoned tanker stated to be lying on Jourmound Reef and the tanker was found to be non-existent in spite of the assertion of the seller, the Commonwealth Disposals Commissioner which was found to be a reckless mistake.

The trial judge held the contract void on the basis of *Counturier* v. *Hastie.*[16] The High Court (Full Court) held that the Commission could not rely on a mistake as avoiding the contract as the mistake was induced by the series of faults of its own servants who asserted the existence of the tanker recklessly and without any reasonable ground. There was contract and the Commission contracted that a tanker existed at a position specified. Since there was no tanker there, there was a breach of the contract and the Commission was liable for damages for that breach.[17] In *Svanosio* v. *McNamara,*[18]

there was a contract of sale of general law land together with a victuallers licence in respect of a hotel erected thereon. The conveyance was executed and the licence transferred. It was subsequently discovered that the hotel was partially constructed on land conveyed and a substantial part stood on unalienated Crown land. Both parties had assumed the hotel to be constructed in the conveyed land. The vendee claimed a declaration that the contract was void for a mistake and for setting aside the conveyance.

The action failed and the full Court upheld that decision. Dixon C.J. and Fullagar J. held that equity will not undo a sale of land after conveyance unless there is fraud or total failure of consideration or what amounts to that. They also referred to cases where equity gave relief when the vendor had no title to the land at all. "There may be cases of a mistake in which it would be so inequitable that a party should be held to his contract; that equity would set it aside".[19]McTiernan, Williams & Webb JJ. after referring to several English cases[20] where the subject matter was not in existence said

"But even in these cases the contract is probably not void but merely unenforceable. The one party is unable to supply the very thing that the other party contracted to take and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of total failure of consideration."[21]

It is possible to get relief on the ground of common mistake after a contract for sale of land has been completed but cases are rare and those are peculiar cases, e.g. where the property sold already belonged to the vendee.[22]

Mistake as to substance and as to quality.—It has been suggested on the basis of the statement of the law by Lord Atkin in *Bell* v. *Lever Bros. Ltd.*[23] that a distinction should be drawn between a mistake as to substance (or essence) and mistake as to quality (or attributes); a

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14 (1950) 84 C.L.R. 377.
15 (1956) 96 C.L.R. 186.
16 (1856) 5 H.L.C. 673.
17 *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 377, 406-7-410. Pollock's preface to Vol. 101 of R.R. at p. vi saying that *Couturier v. Hastie* (1856) 5 H.L.C. 673 and *Strickland* v. *Turner* (1852) 7 Ex. 208 were cases of construction; and observation of Denning L.J. in *Solle* v. *Butcher* (1950) 1 K.B. 671 at pp. 691, 692, where he said these cases required consideration and of Lord Atkin in *Bell* v. *Lever Bros. Ltd.* (1935) A.C. 161, 218, 222; refd. to. *Barr* v. *Gibson* (1838) 3 M. & W. at pp. 399, 400; 150 E.R. at pp. 1200, 1201 refd. to. See Griffiths C.J. in *Goldbrough Mort & Co. Ltd.* v. *Carter* (1914) 19 C.L.R. 429, 437.
18 (1956) 96 C.L.R. 186.
19 Ibid, pp. 198, 199, 200, 207. Prof. Shatwell: 33 Can. B. Rev., pp. 186-7.
20 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209; *Bingham* v. *Bingham,* 27 E.R. 934; *Cooper* v. *Phibbs* (1867) 2 H.L. 149; *Bell* v. *Lever Bros. Ltd.,* 1932 A.C. 161, 236; *Scott* v. *Coulson* (1903) 2 Ch. 249; *Couturier* v. *Hastie* (1856) 5 H.L.C. 673; *Strickland* v. *Turner* (1852) 7 Ex. 208, 155 E.R. 919.
21 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209; *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 377. 403. Lord Atkin in *Bell* v. *Lever Bros. Ltd.* 1932 A.C. 161, 218, 222 refd. to.
22 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 206; See Devlin J. in *Elder* v. *Auerbach* (1950) 1 K.B. 359; (1949) 2 All E.R. 692; a case of innocent misrepresentation as to an executed lease. But it was applied by Denning L.J. to a case of common mistake in *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107 (a case of a lease; mistake as to applicability of Rent Acts).
23 (1932) A.C. 161, 218; (1931) All E.R. Rep. 1, 28; *Poaltis* v. *Schulz* (1948) 76 C.L.R. 541, 561.

mistake of the former type will avoid the contract and of the latter type will not.[24] Some support for this distinction may be gained from the case of *Kennedy* v. *Panama Mail Co. Ltd.*[25] which was approved in *Bell* v. *Lever Bros. Ltd.*[23] and in which it was held that in the absence of fraud or of a definite warranty, there is no remedy if the mistake is as to quality.[25] In *Kennedy's*[26] case.

the prospectus of a Company mentioned a contract which though made with the Post Master General of New Zealand was not ratified by the Government and as a consequence the value of the shares fell. The plaintiff who had relied on the prospectus claimed to return the shares he purchased and recover the price paid.

The action failed because the shares which the plaintiff bought under the misapprehension as to the existence of the contract were not substantially different from the shares described in the prospectus and applied for on the faith of that description. If mistake operates at all it operates so as to negative or in some cases to nullify consent. The parties may be mistaken as in the identity of the contracting parties, or in the existence of the subject-matter of the contract on the date of the contract or in the quality of the subject-matter of the contract.[27] A mistake as to quality does not avoid a contract in the absence of fraud or of a definite warranty. According to Goff J. in *Girst* v. *Bailey,*[28] the principle stated by Denning L.J. in *Solle* v. *Butcher*[29] was adhered to by him in later cases[30] i.e. the doctrine of "New Equity". A painting of Salisbury Cathedral by Constable, which was a term of contract of sale, was found not to be a Constable. The contract was upheld as the mistake was not of the subject-matter but as to quality.[31]

The views expressed in *Solle* v. *Butcher*[29] and *Leaf* v. *International Galleries*[32] were examined in two later cases. In *Harrison & Jones Ltd.* v. *Bunten Lancaster Ltd.*[33] the goods were sold under a trade description "Sree Brand Kopak"—which was believed to be pure kopak though in truth it was an admixture of tree and bush cotton. The contract was upheld as the mistake was as to quality. Similarly where there was a contract between the parties for the sale of "horsebeans" which were quite different from "feveroles" which both parties believed them to be. This contract, it was held, could not be rectified as notwithstanding the mutual mistake as to the meaning of "feveroles" and "horsebeans" the contract correctly expressed the agreement. It might in certain circumstances be a ground for setting aside a contract in Equity. The plaintiff could have rejected the goods on discovering the mistake and ask for the return of their money but not after accepting the goods.[34] A hire-purchase transaction was entered into in 1955 and in exchange the sellers of a new car took an old Morris car purporting to be 1948 model. Later the car was found to be a 1939 model. The misrepresentation was found to be an innocent one. It was held that as both parties contracted on the basis of a fundamental mistake the transaction could have been rescinded if the mistake had been found earlier otherwise "the loss must lie where it falls".[35] The principle of *Solle* v. *Butcher*[36] was ap-

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24 Taylor: (1948) 11 Mod. L.R. 257.
25 (1867) 2 Q.B. 247.
26 (1867) 2 Q.B. 580; *Bell* v. *Lever Bros. Ltd.*, 1932 A.C. 161; 1931 All E.R. Rep. 1.
27 *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 217, per Lord Atkin.
28 (1966) 3 W.L.R. 618; (1966) 2 All E.R. 875.
29 (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1119.
30 *Leaf* v. *International Galleries* (1950) 2 K.B. 86, 91; (1950) 1 All E.R. 693 (a case of a painting found not to be genuine). *Frederick E. Rose (London) Ltd.* v. *William H. Pim Jnr. & Co.* (1953) 2 Q.B. 450.460. (Sale of horse beans believed to be feveroles). *Oscar Chess Ltd.* v. *Williams* (1957) 1 W.L.R. 370, 373 (mistake as to the age of a car). Per Goff J. in *Grist* v. *Bailey* (1966) 3 W.L.R. 618; (1966) 2 All E.R. 875. But see *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 210.
31 *Leaf* v. *International Galleries* (1950) 2 K.B. 86; (1950) 1 All E.R. 693; *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107.
32 (1950) 2 K.B. 86; (1950) 1 All E.R. 693.
33 (1953) 1 Q.B. 646; (1953) 1 All E.R. 903.
34 *Fredrick E. Rose (London) Ltd.* v. *William Pim Jr. & Co.* (1953) 2 All E.R. 739, 747; (1953) 2 Q.B. 450, 460. See *Leaf* v. *International Galleries* (1950) 2 K.B. 86; (1950) 1 All E.R. 693.
35 *Oscar Chess Ltd.* v. *Williams* (1957) 1 W.L.R. 370, 377 (Denning L.J.) (1957) 1 All E.R. 325, 333; *Cf. Nicholson & Venn* v. *Smith Marriott* (1947) 177 L.T. 189 which was held to be wrongly decided on this point by Denning L.J. in *Solle* v. *Butcher* (1950) 1 K.B. 671, 692; (1949) 2 All E.R. 1107, 1119.
36 (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1119.

plied by Goff J. to set aside an executory contract for sale of land in *Grist* v. *Bailey*[37] which indicates the continuing validity of *Solle* v. *Butcher*[36] despite a considerable body of judgments and articles which criticise it and suggest numerous other versions of the proper scope of the equitable jurisdiction to set aside a contract for mistake. In *Girst* v. *Bailey* [38]

G brought an action for specific performance of an agreement of sale of property for £850 the sale being "subject to the existing tenancy thereof". The defendant averred a mistake as to the existence of tenancy and that if it be found that the plaintiff believed the property to be in occupation of a statutory tenant, then the agreement was void and should be set aside in equity for fundamental mistake of fact.

The Court found a common mistake as to existence of a tenancy. Applying the dictum of Denning L.J. in *Solle* v. *Butcher*[36] Goff J. held that there was equitable jurisdiction to set aside the sale for common mistake of fact because the mistake was fundamental and any fault of the seller not knowing who her tenant was, was not sufficient to disentitle her to relief.[39] Similarly *A* agrees to take an unfurnished dwelling house on lease or to buy it. The house is in fact uninhabitable. *A* would never have entered into the bargain if he had known the fact. *A* has no remedy and the position is the same whether the seller knew the fact or not as long as he made no representation or gave no warranty.[40] In *Smith* v. *Hughes*[41]

the plaintiff offered to sell and exhibited a sample of oats which the defendant took to be old oats whereas they were new oats, which the defendant later refused to accept. The question left to the jury was whether the plaintiff believed the defendant to believe that he was contracting for old oats.

This direction was held not to be sufficient to distinguish between a mistake on the part of the defendant that the oats were old oats and a mistake that they were being offered to him as old oats. In the former case the contract would be valid and in the latter the contract would be void. A new trial was ordered. This case is similar to buying a horse believed to be sound and buying one with the warranty of being sound. Cockburn C.J. said that the rule is that if specific article is offered without an express warranty and the buyer has full opportunity of inspecting and if he acts on his own judgment *caveat emptor* applies. These cases are illustrative of the principle that a mistake as to quality is insufficient to set aside a contract.[42] According to the Australian High Court,[43] *Solle* v. *Butcher*[44] is the only authority for the proposition that a sale of property can be rescinded for innocent material misrepresentation or material common mistake and from the scope of that decision, completed contracts for sale of land are carefully excluded.

A agreed to buy and *B* to sell a consignment of cotton arriving "ex Peerless from Bombay". Actually two ships both named Peerless were to sail from Bombay one in October and the other in December and the buyer meant the October "Peerless" and the seller the December "Peerless". The buyer refused to accept the December shipment and the court upheld his plea.

The ambiguity prevented the court from presuming the existence of any agreement between the parties.[45] If *A* buys a horse believing it to be sound and it turns out to be unsound and the seller has made no misrepresentation as to its soundness, *A* cannot recover back the price and is bound by the contract. It is not open to him to say that the seller must have known from the price paid that the buyer must have thought the horse to be sound.[46]

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37 (1966) 2 All E.R. 875; (1966) 3 W.L.R. 618; 40 A.L.J. 315 (notes). But see *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 210.

38 (1966) 2 All E.R. 875; (1966) 3 W.L.R. 618.

39 *Grist* v. *Bailey* (1966) 2 All E.R. 875, 889; (1966) 3 W.L.R. 618. *Leaf* v. *International Galleries* (1950) 2 K.B. 86; (1949) 2 All E.R. 693 (Equitable relief not possible because of delay). *Frederick E. Rose (London) Ltd.* v. *William Pim & Co.* (1953) 2 All E.R. 739, 747; (1953) 2 Q.B. 450, 460 (also a case of delay); *Oscar Chess Ltd.* v. *Williams* (1957) 1 All E.R. 325, 327 (a case of delay).

40 Per Lord Atkin in *Bell* v. *Lever Bros. Ltd.*, 1932 A.C. 161, 224; 1931 All E.R. Rep. 1, 31. *Wallace* v. *McGirr* (1936) N.Z.L.R. 483 (The buyer negligently entered into a contract of purchase believing the house to be what he had inspected).

41 (1871) 6 Q.B. 597, 606, 607.

42 Chitty on Contracts (24th Ed.) para 284.

43 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 210.

44 (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1119.

45 *Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; 159 E.R. 375.

46 *Smith* v. *Hughes* (1871) 6 Q.B. 597, 606. *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 224; (1931) All E.R. Rep. 1, 31.

In *Psaltis* v. *Schulz*[47] Dixon J. accepted the view "that for no contract to come into existence through a fundamental error, the mistake must be as to the identity of the other party—as opposed to his attributes, as to the substance of the subject-matter—as opposed to its qualities; or as to the nature of the transaction—as opposed to its terms". To this may be added the very existence of the subject-matter.

In a Canadian Case[48] the parties entered into a contract for the sale and purchase of certain lands for S.4700. The northern most boundary was to be 1000 ft. although survey of the land procured before the sale showed 877.2 ft but the latter was indicative of the intention of the parties. About four years after the sale it was discovered that the vendor had no title to 76 ft × 1000 ft., the result being that the vendor's title was only to about half the land sold. The purchaser had purchased the land for investment purposes and apprised the vendor of this fact. The purchaser claimed rescission of the contract and return of the purchase price plus interest. The Court held that in order to rescind for mutual (common) mistake the mistake should go to the root of the contract. And in order to constitute an error *in substantialibus* there must be a mutual fundamental mistake as to the quality of the subject matter. There often can be a fine line between quantity and quality. If the mistake as to quantity is substantial it changes the quality of the subject-matter, then in a proper case rescission "may exist". In the instant case the deficiency is one-half of the land purchased and quite unsuitable for the purpose for which the land was purchased. Therefore there was a common fundamental mistake as to the quality of the subject matter. And the contract was rescinded.

The appellant in another Canadian Case[49] claimed damages for breach of contract for the respondent's failure to supply glass. The suit was dismissed and the claimant appealed. The facts are these:

The appellant, a supplier of windowglass, obtained quotation for the "twin Seal glass" from the manufacturer, the respondents, giving them the particulars of the glass required. This information was asked for and given on telephone, and sometime later confirmed by the respondents' letter in reply to the appellant's letter. The quotation by the respondents was an undervaluation due to mistaken calculation of which the respondents had knowledge. The appellant made a contract with a sub-contractor to supply the glass to him on the basis of quotation by the respondents, but the respondents failed to make the supply and the appellant sued for damages for breach of contract.

The trial Court found that the quotation was the result of a mistaken calculation but that there was a contract between the parties and that in the circumstances the appellant's conduct amounted to fraud. In the result the suit for damages failed and the contract was rescinded and an appeal was taken against the judgment. The appellate Court reversed the findings as to fraud as there was no representation by the appellant which induced the contract and hence there was no fraud; the respondent could not be relieved from the consequences of that mistake which was the result of its own carelessness and the appellant was found entitled to damages for breach of contract.

A purchaser agreed to receive certain amount in full settlement of his claim for non-delivery of goods. Both the seller and the purchaser were under a mistake of the essential fact in calculating the amount. The agreement was held to be void under section 20. The Court held that merely because a cheque drawn or an amount paid in full satisfaction had been accepted, it would not follow that there has been accord and satisfaction so as to disentitle the plaintiff to sue for the proper amount. In this case the decision went more by the question of record and satisfaction than by the question of mistake in quality and quantity.[50]

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47 *Psaltis* v. *Schulz* (1948) 76 C.L.R. 547, 561. *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 217.

48 *Hyrsky* v. *Smith* (1969) 5 D.L.R. (3rd) 355.

49 *Imperial Glass Co. Ltd.* v. *Consolidated Supplies Ltd.* (1960) 22 D.L.R. (2d) (B.C.C.A.) Cheshire & Fifoot on Contract (4th Ed.) P. 188 quoted.

50 *Bharat Electronics Ltd.* v. *M/s American Export Isbrandsen Lines Inco. Madras* (1979) A.M. 267, 272; *Neuchatel Asphalte Co.* v. *Barnett L* 1957-1 W.L.R. 356; (1957) 1 All E.R. 362 reld. upon; *Day* v. *Mclea* 1889-22 Q.B.D. 610 applied in *Shyamnagar Tin Factory Pvt. Ltd.* v. *Snow White Food Product Co. Ltd.* (1965) A. Cal. 541; and also in *Union of India* v. *Narayanlal* (1963) A.P. 152.

False and fundamental assumption.—A contract of insurance is void if the ensured was already dead. The transaction of assignment was avoided and the vendor recovered the policy and the money paid thereunder.[51] A separation deed between a husband and wife entered into under the mistaken belief of their being married was pronounced void in *Galloway* v. *Galloway*.[52]

Under a marine insurance policy on a cargo of lemons, money was paid for lemons under the mistaken belief that they had perished although they had been sold en route. The money was recovered.[53] In *Mackenzie* v. *Royal Bank of Australia*[54] the Privy Council set aside a contract of guarantee on the ground of a material misrepresentation of fact. In *Griffith* v. *Brymere*[55] an agreement to hire a room for viewing the King's Coronation procession was held void because when it was entered into the procession had already been cancelled. In *Magee* v. *Pannine Insurance Company Limited* a number of misstatements were carelessly, but not fraudulently made in a policy for insurance. The policy was accepted and several times renewed. The car covered by the policy was damaged, the plaintiff claimed the value of the car which was by compromise settled at £385. Before the payment was made the untrue statements in the policy were discovered. The Court of Appeal held that although the acceptance by the plaintiff of the insurance Company's offer constituted a contract by compromise, the parties were under a common and fundamental mistake that they thought that the original policy was good and binding. The contract was, therefore, voidable in the circumstances on equitable grounds.[56] See also *Bell* v. *Lever Bros.*[57]

A tax paid, which is not due and was paid by a person, not knowing of the invalidity of the tax, must be refunded by Government.[58] A servant, whose term of office came to an end, was paid under a mistake by the Comptroller and it was held that payment was under a mistake of fact as to his continuance in service and not otherwise and a decree for refund of money so paid was valid.[59]

Sale of land and mistake.—There are dicta that relief can be given after a contract is completed where there is a common mistake upon a material point although there is a partial failure of consideration.[60] But the proper principle appears to be that in the case of a completed contract of sale, rescission is only possible on the ground of common mistake where contrary to the belief of parties there is nothing to contract about.[61]

Lease of flats.—Where premises were leased for office use when the landlord only had a limited permission for using a part of the premises for such purpose and the contract was entired into under this mistake, it was held the lessor could not sue for specific performance of the contract but the defendant was entitled to have the contract rescinded.[62]

Mistake: moveable property.—In the case of personal property, contracts of sale have been held to be void for mistake where property has ceased to exist at the date of the contract.[63] Thus the view of the Australian High Court in the case of completed sale of property

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51 *Scott* v. *Coulson* (1903) 2 Ch. 249.

52 (1914) 30 T.L.R. 531; folld. in *Law* v. *Harragin* (1917) 33 T.L.R. 381; distd. in *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161; (1931) All E.R. Rep. 1.

53 *Norwich Union* v. *Price*. 1934 A.C. 455.

54 (1934) A.C. 468.

55 (1903) 19 T.L.R. 434.

56 (1969) 2 W.L.R. 1278; (1969) 2 All E.R. 281.

57 (1969) A.C. 161; (1931) All E.R. Rep. 11.

58 *U.P.* v. *Kanchaiya Lal*, 1956 A.A. 383; on app. (1959) S.C.R. 1350; (1959) A.SC. 135.

59 *Joseph* v. *Union of India*, 1957 A. Ker. 3; *Cf. Holt* v. *Markham* (1923) 1 K.B. 504; (1922) All E.R. Rep. 134 (money held not recoverable).

60 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209; *Jones* v. *Clifford* (1876) 3 Ch.D. 779; *Bettyes* v. *Maynard* (1882) 46 L.T. 766, 769; *Debenham* v. *Sawbridge* (1901) 2 Ch. 98, 109.

61 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209; *Bingham* v. *Bingham*, 27 E.R. 934 (1748); *Cooper* v. *Phibbs* (1867) 2 H.L. 149.

62 *Lawrence* v. *Lexcourt Holdings Ltd.* (1978) 2 All E.R. 810, 819 *Solle* v. *Butcher* (1949) 2 All E.R. 1107; and *Grist* v. *Bailey* (1966) 2 All E.R. 875 applied.

63 *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209; *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 236; *Scott* v. *Coulson* (1903) 2 Ch. 249, where the supposed assured was dead at the time of insurance. See

where the subject-matter of the contract was not in existence at the time of the contract is that the contract

"is not partially void but unenforceable. The one party is unable to supply the very thing that the other party contracted to take and therefore the contract is unenforceable by the one if executory while if executed the other can recover back money paid on the ground of total failure of consideration."[64]

In *Porter* v. *Latec Finance Company*[65]

a swindler borrowed money on a mortgage from a Finance Company to pay to a previous mortgagee and got the latter paid off. The company brought an action against the previous mortgagee for money had and received by the defendant to the use of the plaintiff such money having been paid under a mistake.

Barwick C.J. held that even if the payment was made under mistake, the mistake as to the borrower was not fundamental to the transaction, and therefore, the plaintiff could not recover from the defendant. The other judges did not express any option on the point.

In one text-book the view was propounded that since the House of Lords paid but lip-service to the idea of fundamental common mistake, and failed to apply the doctrine in circumstances where the mistake was as fundamental as could be imagined,[66] the doctrine is confined to cases of *res suae* or *res extinctae*. This view has not as yet found favour with the English courts,[67] and it remains to be seen whether Indian judges will limit the meaning of the word "essential" in s. 20 in the same way; the three illustrations to the section are so limited. The reason advanced for restricting the scope of operative common mistake is that to hold an agreement void tends to prejudice the rights of innocent third parties.

The mistake must be as to an existing fact.—The mistake must be "as to a matter of fact *essential* to the agreement." It is not enough that there was an error "as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration".[68] The circumstance, therefore, that at the date of a lease neither the lessor nor the lessee supposed that the Government assessment would ever be increased will not avail the lessor to avoid the lease if the assessment is subsequently enhanced.[69] "The circumstance that both the parties to the lease supposed (if they did suppose) that the assessment would never be increased, did not prevent their united will from forming a contract, any more than from making the terms of the contract, when thus concluded, (from being)[70] binding, in spite of any future change of circumstances".[71] As observed by the Privy Council in *Peria Sami* v.

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also *Couturier* v. *Hastie* (1876) 5 H.L.C. 673 (sale of a cargo of corn already sold by the master of the ship).

64 *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 377, 403-4; *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 209, *Bell* v. *Bros. Ltd.* (1932) A.C. 161, 218, 222; (1931) All E.R. Rep. 1.

65 *Porter* v. *Latec Finance Co.* (Q.L.D.) Pty. Ltd. (1964) III C.L.R. 177; 1964 (38) A.L.J.R. 184.

66 Cheshire & Fifoot on Contracts, 3rd edn., 180. This interpretation of *Bell* v. *Lever Bros.* is based upon a false promises: the payments to the two directors Bell and Snelling were not merely to recompense them for lost salary. On that basis the maximum, making no allowance for their opportunity and duty to seek alternative remunerative employment, would be £17,333 for Bell, as against £30,000 paid, and £13,000 for Snelling, as against £20,000 paid. Moreover the sums paid are not proportionate: Snelling's sum should be £22,500. Lord Blanesburgh makes these points in his judgment (at p. 180), and concludes that the company also desired to recognise the exceptional services rendered by the two directors, and to enlist their support in carrying through the amalgamation which had led to their redundancy. See 6th Ed. of Cheshire & Fifoot, pp. 192-198; 9th Ed pp 208-217.

67 Lord Wright, who was the trial judge in *Bell* v. *Lever* and held the agreement void, has always maintained in his writings that the only problem was whether the mistake was sufficiently basic: Legal Essays and Address 214, 379; 8 Camb. L.J. 118, 129. In *Nicholson and Venn* v. *Smith Marriott* (1947) 177 L.T. 189, 191-2, Hallett J. considered *obiter* that the differences between the Carolean and Georgian kings were great enough to make table linen used by them essentially different, for the purpose of the rule that agreements are void for common mistake: both parties believed the linen to be Carolean (17th century), when in fact it was Georgian (18th century).

68 Per Blackburn J. in *Kennedy* v. *Panama Mail Co.* (1867) L.R. 2 Q.B. 580, at p. 588; *Adaikappa Chettiar* v. *Thomas Cook & Son,* 1933 A.P.C. 78; 64 Mad. L.J. 184; 142 I.C. 660.

69 *Babshetti* v. *Venkataramana* (1879) 3 Bom. 154.

70 *Sic;* these words are evidentally inserted by a clerical error.

71 Ibid, p. 158.

Representatives of Salugar, "the grant, whatever its effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made".[72] S. 20 does not apply to a case where the contracting parties have made no mistake as to any existing fact but one of the parties finds itself unable to carry out the terms of its contract on account of the act of a third party to carry out its obligation under another agreement with that second party.[73] Where the parties entered into contracts on the assumption that the Jute Control Order, which was about to expire and was not continued, would be continued, it was held that there was no mistake as to an existing fact and the contract was not void.[74] The difference between the legal effect where there is a mistake of existing fact, and on the other hand where there is an unexpected turn of subsequent events, is well brought out by contrasting two types of cases arising from the cancellation through illness of the coronation procession of King Edward VII. In *Griffith* v. *Brymere,*[75] the plaintiff agreed to hire rooms from the defendant to watch the procession. Unknown to either party, the king's doctors had already decided, prior to the agreement between the parties, to perform an operation which would involve the abandonment of the procession. The Court held the agreement void for mistake, following *Couturier* v. *Hastie.*[76]

In India s. 20 would lead to the same result. In *Krell* v. *Henry,*[77] the facts were the same except that the agreement preceded the decision of the doctors by four days. It was held that the agreement was discharged by frustration. In India the appropriate section would be s. 56 not s. 20. Even a mistake as to an existing fact will not render void an agreement concluded with retrospective effect, where the circumstances have changed between the date from which the agreement is to begin, and the date the bargain is concluded: *Indian Trade & General Insurance Co.* v. *Bhailal.*[78] There the company issued a cover note, insuring goods against fire with effect from a date three days before. Unknown to either party, the goods had been destroyed by fire two days before the issue of the cover note. The company was held liable. Where a settlement was entered into between Government and certain *inamdars* in respect of a village whereby the latter agreed to pay a certain yearly quit-rent, and both parties believed that the *inamdars* were the superior holders of all the lands in the village, it was held that the settlement was void as regards a portion of the lands which subsequently turned out to be *wanta* lands held by certain *girassias* as owners in possession.[79]

Where a property agreed to be sold had been notified for acquisition under the Calcutta Improvement Act, and neither the vendor nor the purchaser was aware of the notification at the date of their agreement, the notification was held to constitute a matter of fact essential to the agreement within the meaning of this section and the agreement was declared void.[80] Upon the same principles a compromise of a suit will be set aside if it was brought about under a mistake as to the subject-matter of the agreement.[81] The view thus expressed is confirmed by later English cases. Not only a compromise,[82] but an order of the Court made by consent,[83] may be set aside if the arrangement was entered into even under a onesided mistake of counsel

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72 (1878) L.R. 5 I.A. 61, at p. 73. So too a vendor is bound to deliver goods at the price set out in the contract of sale although the cost is increased by the subsequent imposition of an excise duty: *Chin Gwan & Co.* v. *Adamjee Hajee Dawood & Co.* (1933) 11 Rang. 201; 146 I.C. 440; 1933 A.R. 79.

73 *U.P. Government* v. *Nanhoo Mal,* 1960 A.A. 420.

74 *Chandanmull* v. *Clive Mills Co. Ltd.* (1948) 2 Cal. 297, 1948 A. Cal. 257, 52 C.W.N. 521.

75 (1903) 19 T.L.R. 434.

76 *Supra* illustration (a).

77 (1903) 2 K.B. 740 (*infra*).

78 1954 A.B. 148.

79 *Secretary of State for India* v. *Sheth Jeshingbhai* (1892) 17 Bom. 407; *Kuchwar Lime & Stone Co.* v. *Secy. of State* (1936) 16 Pat. 159; 166 I.C. 966; 1937 A.P. 65; *Magee* v. *Pannine Insurance Co.* (1969) 2 All E.R. 281; (1969) 2 W.L.R. 1278.

80 *Nursing Dass Kothari* v. *Chuttoo Lall Misser* (1923) 50 Cal. 615; 74 I.C. 996. But if the notification was issued after the contract, the contract would not be void: *Jodha Mal* v. *Associated Hotels of India,* 1950 A.L. 106.

81 *Bibee Solomon* v. *Azeez* (1881) 6 Cal. 687, 706. But a compromise on a disputed title is not affected by a later decision upon that title: *Secy. of State* v. *Nabi Bakhsh* (1927) 100 I.C. 730; 1927 A.O. 198 (estoppel perhaps the better reason).

82 *Hickman* v. *Berens* (1895) 2 Ch. 638.

83 *Wilding* v. *Sanderson* (1897) 2 Ch. 534.

to which the other party, however innocently, contributed, or even otherwise if the mistake was such as to prevent any real agreement from being formed. *A fortiori* it is so in the case of the mistake being common to both parties.[84] An auction sale in execution is not a sale between contracting parties and s. 20 does not apply to it and therefore mutual mistake of fact does not make a contract void.[85]

The existence of a separate warranty in a contract of sale is evidence that the matter of the warranty is not an "essential" part of the contract. In such a case, if there is a breach of the warranty, the purchaser is only entitled to compensation for the breach, and the sale is not even voidable. It is still a stronger case where not only no warranty is given by the vendor, but the purchaser buys "subject to all defects." Thus, where a mortgagee sold his claim under the mortgage subject in effect to all defects, and it was subsequently discovered that the mortgage was inoperative, as it was attested by only one witness, it was held that, though both parties were ignorant of that fact at the time of the assignment, the purchaser was not entitled to rescind the contract and claim back the purchase-money, the purchase having been made subject to all defects.[86]

An administration bond given under s. 256 of the Indian Succession Act, 1865 (now s. 291 of the Indian Succession Act, 1925) is not void under this section, though the party to whom the grant of letters of administration is made may have obtained the grant by fraud upon the Court, and though neither the sureties nor the Court to which the bond is passed were aware of the fraud when the grant was made. In a modern case letters of administration of the estate of a deceased person were granted to *A* on execution of a bond by him and two sureties engaging for the due administration of the estate. It was subsequently discovered that *A* was not entitled to the grant, and that he had obtained it by false and fraudulent representations made in his petition for letters of administration. The grant to *A* was thereupon revoked, and a suit was brought against the sureties to recover from them the amount misappropriated by *A* and forming part of the estate. One of the defences raised on behalf of the sureties was that the bond was void under the present section, and that they were not therefore liable upon the bond. It was contended that both the Court and the sureties were under a mistake as to a matter of fact "essential" to the agreement, namely, that *A* was entitled to letters of administration, and that the sureties would not have executed the bond but for that mistake. But a majority of the High Court of Calcutta held that the mistake of the Court and of the sureties did not relate to the *essential* subject of the contract. The decision was also based on the ground that the liability of sureties under an administration bond did not depend on the validity or invalidity of the grant.[87] This decision was upheld on appeal to the King in Council.[88] The same principle has been held to apply to surety bonds under the Guardians and Wards Act, 1890. Thus, where *A* was appointed guardian of the property of a minor on passing a bond to the District Court executed by him and *B* as surety for the due management and realisation of the minor's property, and failed to account for the income of certain property which actually belonged to the minor, but was not included in the list of properties belonging to the minor annexed to the petition for his appointment, it was held that *B* was liable to make good the amount, though it might be said that both Court and *B* were led to believe by *A* that the property did not belong to the minor.[89] A plea that a contractor tendering did not understand the nature of the work to be done and that he was labouring under a mistake would not entitle him to avoid the contract. More so if he had the means to know everything about the work by exercise of ordinary diligence.[90] See also the commentary on s. 13, above.

At the date of contract of sale of a building for development both parties believed that the

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84 *Huddersfield Banking Co.* v. *H. Lister & Son* (1895) 2 Ch. 273.

85 *Shankarlal* v. *Jethmal,* (1961) A. Raj 193. But see *Mehar Chand* v. *Milkhi Ram,* 13 Lah. 618, (1932) A.L. 401. (F.B.) (where an auction purchaser was held entitled to recover purchase price on equitable grounds in cases where judgment debtor had no saleable interest).

86 *Sada Kavaur* v. *Tadepally* (1907) 30 Mad. 284.

87 *Debendra Nath Dutt* v. *Adm. Gen. of Bengal* (1906) 33 Cal. 713; see particularly pp. 739-740, 746-747, 751, and 755.

88 S.C. (1908) 35 Cal. 955; L.R. 35 I.A. 109.

89 *Sarat Chandra Roy* v. *Rajoni Mohan Roy* (1908) 12 C.W.N. 481.

90 *Nimayya* v. *Union of India* (1958) A.AP. 533.

building was not listed under planning legislation as being of special architectural interest, although it was in the provisional list. But the list was given legal effect soon after the contract, and the purchaser claimed rescission of contract. It was held that the doctrine of common mistake required that the plaintiff must show that the mistake existed at the date of the contract. As the property had not been included in the accepted list of special architectural buildings but this was only an administrative step towards listing and it became a listed building subsequent to the date of the contract, the parties had not been under any common mistake, and the plaintiff's action failed. And further as the defendant had not warranted that planning permission could be obtained for development there was an inherent risk which every purchaser should be regarded as being aware of.[91]

In a Bombay case,[92] *A*, fraudulently representing himself to be *B*, purported to mortgage to *C* property belonging to *B*. *C* then transferred the pretended mortgage to *D*. *D* insisted that the mortgagor should be a party to the deed of transfer. *A*, still personating *B*, joined in executing that deed as a concurring party. The deeds of mortgage and transfer contained the usual covenants.[93] *D* subsequently discovered that the mortgage and transfer deeds were not executed by *B*, but by *A* personating him, and he sued *C* for return of the transfer money. The Court of first instance held that *D* was not entitled to a return of the transfer money; but on appeal, the case was held to be one of a mistake of fact under this section, so that *C* was bound under s. 65 to repay the transfer money to *D*. The correctness of the reversal seems doubtful. On principle *D* was not entitled to recover as on a total failure of consideration: for, although the assignment passed nothing as a conveyance, it gave *D* a title to the debt (for which the property was only a security) as against *A*, who was clearly estopped from denying his identity with *B* for this purpose; and likewise, by estoppel, a right of action against him on the mortgagor's covenant for title express or implied. Moreover *D*, having required the supposed *B*'s concurrence, had not relied on any assurance of *C*'s as to the reality of the mortgage made in the name of *B*. The fact (as presumably it was) that *A* was missing or insolvent or both does not affect the legal result. Then as to the Indian Acts, it is obvious that there was no contract formed between *C* and *D;* but *D* paid *C* not under the agreement but as consideration for an assignment made in pursuance of it, and therefore it does not appear that s. 65 of the present Act applies to this case: neither does anything in the Transfer of Property Act seem applicable.

Mistake of fact and law

The plaintiffs on behalf of the Royal Air Force paid to the defendant gratuity on a higher scale due to a mistake of fact and misapplication of orders. The plaintiffs demanded the repayment of excess on an incorrect ground and the demand was delayed. By that time the defendant had spent the whole of the gratuity.

In an action for recovery, it was held that mistake was not of fact but of law and plaintiffs were estopped as they had induced the defendant to act in the manner he did.[94] A mistake, which is a mutual mistake of general law, will not entitle a party to have the contract rescinded.[95] It is not correct to say that money paid under a mistake of law can never be recovered back.[96] In such cases, it is not an action on contract or imputed contract. It is simply anything more cannot be recovered back. If there is something in the conduct of the defendant showing that of the two he is the one primarily responsible for the mistake then it can be an action for restitution of money which the defendant received but which the law says he

91 *Amalgamated Investment and Property Co. Ltd.* v. *John Walker & Sons Ltd* (1976) 3All E.R. 509, 516; *Davis Contractors Ltd* v. *Fareham Urban District Council* (1956) 2 All E.R. 160 applied.

92 *Ismail Alarakhia* v. *Dattatraya* (1916) 40 Bom. 638, 34 I.C. 515.

93 The report is not clear as to this. The judgments, as reported, are not satisfactory. *Clare* v. *Lamb* (1875) L.R. 10 C.P. 334, is in favour of the decision below and the opinion expressed in the text, but might be distinguished.

94 *Holt* v. *Markham* (1923) 1 K.B. 504; (1922) All E.R. Rep. 134; *Skyring* v. *Greenwood,* 107 E.R. 1064 refd. to. Contra *Joseph* v. *Union of India* (1967) A. Ker. 3 (Salary paid by a mistake of the Comptroller).

95 *Beesly* v. *Hallwood Estates Ltd.* (1960) 1 W.L.R. 549, 563.

96 *Kiriri Cotton Co. Ltd.* v. *Ranchhod Das Dewani* (1960) 2 W.L.R. 127, 133. (A case of recovery of premium paid by a tenant) P.C. *Rogers* v. *Ingham* (1876) 3 Ch. D. 351, 355.

ought to return to the plaintiff. All the particular heads of money had and received such as money paid under a mistake of fact, paid under a consideration which has wholly failed, money paid by one who is not *in pari delicto* with the defendants are only instances where the law says the money ought to be returned.[97] Where neither party is in error as regards the essential facts upon which the contract proceeded and the mistake, if any, was in regard to the effect of Registration, the mistake would be one of law and contract would not be void on that ground under s. 21.[98] A mistaken view of the extent of one's rights is a mistake of law and not of facts.[99]

An agreement based on mutual mistake is void and the same principle will apply to an abandonment of a right under a contract. If both parties are under a misapprehension that a contract had been cancelled due to a mutual mistake the rights of a plaintiff would remain unaffected.[1]

Specific Performance.—As to the right of a party to resist specific performance of a contract on the ground of mistake, see Specific Relief Act, 1963, s. 18, below.

Rectification.—The Courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actual concluded contract antecedent to the instrument sought to be rectified,[2] and that the contract is inaccurately represented in the instrument. Thus in a Bombay Case[3] the plaintiffs chartered a steamer from the defendants to sail from Jedda on "the 10th August, 1892 (fifteen days after the *Haj*)," in order to convey pilgrims returning to Bombay. The plaintiffs believed that "the 10th August, 1892," corresponded with the fifteenth day after the *Haj,* but the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the *Haj*. On finding out the mistake the plaintiffs sued the defendants for rectification of the charter-party. It was held that the agreement was one for the 10th August, 1892; that the mistake was not mutual, but on the plaintiffs' part only; and, therefore, that there could be no rectification. The Court further expressed its opinion that even if both the parties were under the mistake, the Court would not rectify, but only cancel, the instrument, as the agreement was one for the 10th August, 1892, and that date was a matter materially inducing the agreement. See also Specific Relief Act. Ch. III, below, and the undermentioned case.[4]

Compensation.—Note, in connection with the present section, the provision of s. 65 that when an agreement is discovered to be void any person who has received any advantage under the agreement is bound to restore it, or to make compensation for it, to the person from whom he received it. It is or should be elementary learning that a deficiency in quantity of land (or anything) sold which can be adequately dealt with by compensation does not come within this section at all.[5]

Sections 20 and 56—Distinction.—In *Sheikh Brothers Ltd.* v. *Ochsner,*[6] the Privy Council laid down the distinction between ss. 20 and 56. It held that section 56 applies only where an agreement otherwise valid and enforceable is rendered void by impossibility of perfor-

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97 *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Ltd.* (1943) A.C. 32, 62-64; (1942) 2 All E.R. 122; *Kiriri Cotton Co. Ltd.* v. *Ranchhod Das Dewani* (1960) 2 W.L.R. 127, 133. (P.C.).

98 *Kalyanpur Lime Co.* v. *State of Bihar,* 1954 S.C.R. 956, 967; (1954) A.SC. 165.

99 *Habib Miyan* v. *Mohammad Mir,* 1959 A.MP. 221.

1 *Sibtain Fazli* v. *Star Film Distributors,* PLD (1964) 1 S.C. 337, 349 (Pak.).

2 So James V.C. in *Mackenzie* v. *Coulson* (1869) L.R. 8 Eq. 368, 375. But English law does not require this where the negotiation has not crystallised in its entirety: all that is needed is a common continuing intention in regard to the particular provision of the agreement sought to be rectified: *Crane* v. *Hegeman-Harris Co. Inc.* (1939) 1 All E.R. 662, 664-5.

3 *Haji Abdul Rahman Allarakia* v. *The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561; followed in *U Shwe Thaung* v. *U Kyam Dun,* 125 I.C. 259; 1930 A.R. 12.

4 *Madhavji* v. *Ramnath* (1906) 30 Bom. 457.

5 *U Pan* v. *Maung Po Tu* (1927) 100 I.C. 327; 5 Bur. L.J. 206.

6 1957 A.C. 136; (1957) 2 W.L.R. 254. See also *Bell* v. *Lever Bros. Ltd.,* 1932 A.C. 161, 237 per Lord Thankerton.

mance. It had no application to agreements which were void under section 20 by reason of a mutual mistake as to an essential fact and the appellants were not entitled to any compensation under section 56.

It was further held that there is no repugnancy between sections 20 and 56 of the Indian Contract Act, i.e., section 56 applies to enforceable agreements apart from any question of performance. Another reason for that view, was that the words "or with reasonable diligence might have known" in s. 56 imply a set of circumstances in which the promissor is in a different position from the promissee. In other words, the case is to be treated as one of unilateral and not of "mutual" mistake.

21. A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake to fact.

Effect of mistakes as to law.

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Illustration

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. The contract is not voidable.[8]

The general language of this section represents with approximate fidelity the current doctrine of text-books down to the time when the Act was framed, namely, that relief is not given against mistake of law. However, modern authority has shown that the doctrine in question is not acceptable without rather large qualifications which, it is apprehended, Indian practitioners cannot safely neglect. Certainly mistake of law does not universally or generally invalidate transactions in which it occurs; but neither does mistake of fact. A man cannot go back upon what he has deliberately done—not to speak of excusing himself from liability for wrongful act or offence—merely because he alleges that he acted under a misapprehension of the law. It is a citizen's business to know, by taking professional advice or otherwise so much law as concerns him for the matters he is transacting. No other general rule is possible, as has often been observed, without offering enormous temptations to fraud. Nevertheless in England, at any rate, "it is not accurate to say that relief can never be given in respect of a mistake of law",[9] for where the mistake is so fundamental as to prevent any real agreement "upon the same thing in the same sense" (s. 13, above) from being formed, it is immaterial of what kind the mistake was, or how brought about. And in India it does not seem that the present section was intended to give validity to any apparent agreement not satisfying the conditions of real consent as laid down in ss. 10 and 13. Moreover, it is to be observed that the existence of particular private rights is matter of fact, though depending on rules of law, and for most civil purposes ignorance of civil rights—a man's ignorance that he is heir to such and such property, for instance—is ignorance of fact. A man's promise to buy that which, unknown to him, already belongs to him is not to be made binding by calling his error as to the ownership a mistake of law.[10] There seems to be nothing to prevent the Indian Courts from following English authority in cases of this kind, as in fact the Calcutta High Court has done.[11] *A* agreed to take a lease from *B* of certain lands including mineral rights for coal min-

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7 Omitted by A.L.O., 1950.

8 There was a second illustration to this section: "*A* and *B* make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France. The contract is voidable." In this illustration *voidable* was an obvious slip for *void,* which is required both by legal principle and by the express terms of s. 20. If there is really a common mistake on an essential matter of fact there is no contract at all, so the illustration was at best out of place. It was struck out by the Repealing and Amending Act. 1917.

9 *Allcard* v. *Walker* (1896) 2 Ch. 369, 381, per Stirling J. But see under s. 23, pp. 197-8 *Kiriri Cotton Mills Ltd.* v. *Dewani* (1960) A.C. 1 All E.R. 177.

10 See *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149, 170; *Kuchwar Lime & Stone Co.* v. *Secy. of State* (1936) 16 Pat. 159; 166 I.C. 966; 1937 A.P. 65; *Ramanujulu* v. *Gajaraja,* 1950 A.M. 146.

11 *Ram Chandra* v. *Ganesh Chandra* (1917) 21 C.W.N. 404; 39 I.C. 78. See *Appavoo Chettiar* v. *S.I.R. Co.,* 1929 A.M. 177; 114 I.C. 358, principle fully acknowledged, but the mistake of paying a sur-

ing operations; it was provided that *B* should make out a good title to the property. The lease was held by *B* on a tenure which was believed by both *A* and *B* at the date of agreement to carry with it mineral rights. *A* made several payments in advance to *B*, but later when a decision of the Privy Council and a decision of the Calcutta High Court threw very grave doubts upon this understanding of the law, *A* refused to carry out the agreement, and sued *B* for refund of advances. It was held following the principle of *Cooper* v. *Phibbs*[12] that the case was one of a common mistake as to a matter of fact, and that the agreement was void under s. 20, and *A* was entitled to a refund of the advances made by him. (See s. 65, below.)

Again, the section does not say that misrepresentation, at any rate wilful misrepresentation, of matter of law, may not be ground for avoiding a contract under s. 17 or s. 18.

As to the second clause of the section, Indian jurisprudence has adopted the rule of the Common Law that foreign law is a matter of fact, and must be proved or admitted as such, though the strictness of the rule has been somewhat relaxed by the Evidence Act.[13] Accordingly the statement or finding of any foreign law on which the Court proceeds in a given case is no more binding on the Court in any future case, even apart from the possibility of alteration in the law in question, than any other determination or assumption as to matters of fact.

The cases in which the present section has actually been applied have been fairly simple. Thus where a mortgage bond provided that if the mortgagor failed to redeem the mortgaged property within eight years the mortgagee should be the owner of the property, and the mortgagor, being unable to redeem, executed an absolute transfer of the property to the mortgagee, and put him in possession, it was held that a purchaser from the mortgagor of the equity of redemption subsequent to the date of the transfer was not entitled to redeem, even though the mortgagor might have been ignorant of his right to redeem the mortgage notwithstanding the clause in the mortgage precluding him from doing so.[14] Here there was a complete conveyance and transfer of possession from the mortgagor to the mortgagee. But if the matter had rested in contract only, and there was no transfer of the mortgaged property, the mortgagor would have been entitled to redeem the mortgage, on the principle "Once a mortgage, always a mortgage." There would have been no consideration for a promise to transfer the property to the mortgagee, and the question whether there was any mistake, and if so, whether of fact or law, would really have been superfluous.

An erroneous belief that a widow forfeits by her remarriage the rights of an occupancy tenant under the N.-W.P. Tenancy Act,[15] to which she has succeeded on the death of her first husband as his heir, is a mistake of law, and a contract grounded on such belief is not voidable, though the mistake may be common to both the parties to the contract.[16] Similarly, an erroneous belief that a judgement-debtor is bound by law, to pay interest on the decretal amount, though no interest has been awarded by the decree, is a mistake of law, and a contract grounded on such belief is not voidable. Such a belief is not a belief as to a matter of fact essential to the agreement within the meaning of s. 20: the Privy Council so held in *Seth Gokul Dass* v. *Murli*.[17] This is difficult to reconcile with a decision of the Bombay High Court that a contract founded upon the erroneous belief that a judgement-debtor is bound by law to pay interest on the decretal amount, though no interest has been awarded by the decree, was void under s. 20, as being a contract entered into under a mistake as to a matter of *fact* essential to the agreement.[18] It was said in that case that such a mistake was "a mistake as to the private rights of the parties and as such a mistake of fact." That such a mistake is not a mistake of

charge for railway carriage not really authorised by the regulations was held to be a pure mistake of general law. *Balaji* v. *Annaparnabai*, 1952 A.N. 2.

12 See *supra*, note 91a.

13 Indian Evidence Act, 1872, s. 38: "When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant."

14 *Vishnu Sakharam* v. *Kashinath* (1886) 11 Bom. 174.

15 See now the U.P. Tenancy Act, 1939.

16 *Sabihan Bibi* v. *Madho Lal* (1907) All. W.N. 197.

17 (1878) 5 I.A. 78; 3 Cal. 602.

18 *Narayan* v. *Raoji* (1904) 6 Bom. L.R. 417.

fact, but one of law, is abundantly clear from *Seth Gokul Dass's* case, where their Lordships said: "There was, no doubt, a mistake of *law* on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendant, but also to the (Court which made the order of attachment)".[19] The erroneous belief that the tribunal under a Debt Conciliation Act had jurisdiction over a non-agriculturist is a mistake of law.[20]

A contract giving a person the right to pluck and gather *Kendu* leaves is not void on the ground that there was a mutual mistake as to the law by which the tenants have the right to gather the leaves and sell to whomsoever they please and this law was known to both sides. This is governed by s. 21 and not by s. 72.[21] Where a contract is the result of mistake of law of both parties, any sum of money paid under the contract falls under section 21 and not section 72.[22]

If the law does not permit the alienation of Sirdari interest, the same cannot be permitted merely because the alienation was under a mistake of law and the purchaser had paid full value for such interest under that mistake.[23]

Where administrative surcharge at the rate of Rs. 2.50 per quintal was paid by an exporter for getting a permit from Government and that payment was without any sanction of law, the mistake is one of law which falls under s. 21 and not sec. 72, Contract Act, and that mistake does not render the contract voidable.[24]

Difference between S. 72 & Sections 21 and 22.—There is no conflict between s. 72 on the one hand and sections 21 and 22 on the other. A contract made under a mistake of law of parties falls under s. 21 and not under s. 72, Contract Act. And s. 72 deals with cases where money is paid by a mistake or under coercion.[25]

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

At this day this section may seem open to the remark that it contradicts a proposition which no competent lawyer would think of asserting. But when the Act was framed it was not obviously superfluous; for strange things had been said within the foregoing ten years or thereabouts by one or two of the Judges of the Court of Chancery, and lawyers practising in the Courts, as they then were, of Common Law were not expected to have any knowledge of equity, and regarded the doctrines laid down in the name of equity by Vice-Chancellors as mysterious which did not concern them.

As an illustration of the rule, *Haji Abdul Rahman Allarakhia* v. *The Bombay and Persia Steam Navigation Co.*,[26] cited in the commentary on s.20, "ratification", above may be referred to.

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19 (1878) 5 I.A. 78, at p. 84; 3 Cal. 602, at p. 608. If a mortgagee advances money under the erroneous belief that a prior unregistered mortgage deed would not take precedence even if registered subsequently, he cannot avoid the mortgage transaction: *Jowand Singh* v. *Sawan Singh*, 1933 A.L. 836.

20 *Ghanshyam* v. *Girijashankar* (1944) Nag. 244, 1944 A.N. 247.

21 *State of Orissa* v. *Mohammad Khan* (1961) A. Or. 75. *Cf. Sibtain Fazli* v. *Star Film Distributors*, PLD (1964) I S.C. 337, 349 (Pak.) (case of mistake as to cancellation of a contract).

22 *State of Orissa* v. *K.S. Mohammad Khan* (1961) A. Or. 75; *Shib Prasad* v. *Grish Chandra*, 1948 A.P.C. 297; 28 Pat. 913. See also under s. 72.

23 *Smt. Ram Patti Devi* v. *Board of Revenue* (1973) A.A. 288; 290; *Jaswant Singh* v. *State of U.P.* (1971) All. L.J. 748 folld.

24 *Dhanyalakshmi Rice Mills etc.* v. *Commissioner of Supplies* (1976) A.SC. 2243, 2250; (1976) 3 S.C.R. 387.

25 *Calcutta Corporation* v. *Hindustan Construction Co. Ltd.* (1972) A. Cal. 420, 427; *Dhanyalakshmi Rice Mills* v. *Commissioner of Supplies* (1976) 3 SCR 386; (1976) A.SC. 2243, 2250.

26 (1892) 16 Bom. 561.

What considerations and objects are lawful and what not.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon, an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.[27]

(j) *A*, who is *B*'s *mukhtar*, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay, 1,000 rupees to *A*. The agreement is void, because it is immoral.[28]

(k) *A* agrees to let her daughter on hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

S. 23 inspired by English Common Law.—Section 23 of the Contract Act was inspired by the Common Law of England and should be construed in that light.[29] It lays down that the consideration or object of an agreement which is forbidden by law would be considered to be illegal. The principle behind section 23 is that if anything is done against the public law or public policy that would be illegal in as much as the interest of public will suffer in case a contract against public policy is permitted to stand.[30]

Unlawful Objects.—By s. 10 an agreement is a contract (i.e. enforceable) only if it is made for a lawful consideration and with a lawful object. The present section declares what

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27 See *Mohan Lal* v. *Udai Narayan* (1910) 14 C.W.N. 1031; 7 I.C. 2, which is a parallel case.
28 *See Manikka Mooppanar* v. *Peria Muniyandi*, 1936 A.M. 541; 70 Mad. L.J. 724; 164 I.C. 31.
29 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781.
30 *Suresh Chand* v. *Hari Ram & others* (1976) All. L.J. 465, 469.

kind of consideration and object are not lawful. Its phraseology is not happy.[31] Properly we speak of the consideration for a promise, not the consideration of an agreement. If I agree to sell you a piece of land for Rs. 20,000, my promise to convey the land is the consideration for your promise to pay the price, and your promise to pay the price is the consideration for my promise to convey the land. There is nothing that can be called the consideration of the agreement between us as a whole. If we read "promise" for "agreement," the text becomes clearer; and s. 2 (e) (see commentary thereon, above), though that sub-section is itself not as clear as might be desired, appears to warrant us in doing this. See also illustration (a) to the present section.

The word "object" in this section was not used in the same sense as "consideration," but was used as distinguished from "consideration," and meant "purpose" or "design".[32] It was so observed in a case where *A* had agreed to sell goods to *B*, and *B* while in insolvent circumstances assigned the benefit of the contract to his brother-in-law *C* for a *consideration* of Rs. 100, the *object* both of *B* and *C* being to defraud *B*'s creditors. It was said that the consideration for the assignment, namely, the sum of Rs. 100, was lawful, but the object was unlawful, as it was to defeat the provisions of the Insolvency Act.[33]

S. 23 is not concerned with motive. It is confined to the object of transaction and not to the reasons or motive which prompted it. *'B'* borrowed a certain amount of money from *'A'* in order to bribe a certain officer. After the bribing was done, *'B'* obtained a loan from *'C'* in order to pay off *'A'* and executed a mortgage in favour of *'C'*. It was held that the object of the mortgage was not to affect an illegal purpose as such illegal purpose had already been effected, and, therefore, the mortgage transaction was not contrary to public policy.[34]

With regard to a consideration being forbiden by law, it is to be observed that, where the consideration is a promise, it may be forbidden in one of two distinct senses. The promise may be of something which it would be unlawful to perform; and here it is perhaps simpler to say that the object of the agreement, namely, the unlawful performance, is forbidden. Sometimes, on the other hand, although there is nothing unlawful in performing the promise, a positive rule of law, founded on reasons of general expediency, will not suffer any legal obligation to arise from a promise of that kind. So it is in the cases of wagers, and of agreements in restraint of trade outside the limited sanction given to them. In such cases we shall say that the object of the agreement is not unlawful if by "object" we mean the actual performance; but we shall say that it is unlawful if by "object" we mean the creation of an obligation to perform the things promised. This ambiguity is not cleared up by anything in the language of the Act. It does not, however, seem material for any practical purpose.

There is another possible reason, however, for the use of the word "consideration". A man may enter into a contract lawful in itself, and perform it in such a manner or by such means as to violate some distinct requirement or prohibition of the law. By so doing he may deprive himself of any claim to recover on the other party's promise to pay for his work, and this whether the other party knew anything beforehand of his unlawful action or not. Now in an agreement by mutual promises each of the promises is, properly speaking, the consideration, and the only consideration, for the other; but in discussing the subsequent duties of the parties as to performance the word "consideration" is sometimes applied, in a loose and extended sense, to those cases where the duty of performance on the one part is, according to the original intent of the agreement, conditional on previous or simultaneous performance on the other. In this inaccurate but not uncommon sense it may be said that, when a promisor who might have performed his promise lawfully performs it unlawfully, the consideration for the reciprocal promise becomes unlawful; and the language of the Act may have been designed to

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31 The illustrations correspond very nearly to those framed by the Law Commissioners in the first draft, cl. 10. The text is quite different. See *Nathusa Pasusa* v. *Munir Khan* (1943) Nag. 42; 1943 A.N. 129.

32 Cited and followed in *Sreenivasa Rao* v. *Rama Mohana Rao,* 1952 A.M. 579.

33 *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, 710; S.C. on appeal (1907) 34 Cal. 289. See also *Sabava Yellappa* v. *Yamanappa Sabu,* 1933 A.B. 209; 35 Bom. L.R. 345; *Matta Jaggilodu* v. *Matta Byramma,* 1941 A.P. 349.

34 *Kashinath and another* v. *Bapurao & others* (1940) A.N. 305, 311, 312; *Kalikumari* v. *Manomohinee* (1935) A. Cal. 748 disting.; *Fender* v. *Mildmay* (1938) A.C.1; (1937) 3 All E.R. 402 referred to.

cover such cases. A typical English example is *Bensley* v. *Bignold,*[35] where a printer, having put a false imprint on a pamphlet, instead of his true name and address, as required by statute, was not allowed to recover the price of his work. It does not appear whether the defendant was a party to the falsification or not, or for what purpose it was done. Here a personal and quasi-penal disability is imposed on the plaintiff for reasons of general policy without regard to the original character of the agreement, and with the result of conferring corresponding gain on the defendant, whose deserts may be no better in themselves.[36] Practically it is convenient to treat these cases under the head of unlawful agreements, as the broad principles and the results are the same.

Unlawful intention, like negligence, is not presumed by the law, nor is any man expected to presume it without evidence. Therefore, if a contract can on the face of it be lawfully performed, the existence of an undisclosed intention by one party to perform it unlawfully, or use it as part of an unlawful scheme, will not disable the other party from enforcing it, at any rate by way of damages; and if the construction is doubtful, that construction which admits of a lawful performance is to be preferred. Again, if there exists or arises a legal impediment, unknown to the parties at the time of contracting, to the performance of a contract in the manner which otherwise would have been the most obvious, this will not of itself avoid the contract if it can still be substantially performed without breaking the law.[37] But if both parties in fact contemplate an unlawful manner of performance, the case falls within the rule "that a contract lawful in itself is illegal if it be entered into with the object that the law should be violated".[37] A contemplated unlawful or immoral use of property (including money) to be obtained under a contract is an unlawful object within the meaning of this rule, and this whether such use is part of the bargain or not, and whether the party supplying the property is to be paid out of the profits of its unlawful use or not. If both parties know of the wrongful or immoral intention, the agreement is void; if the party who is to furnish the property does not know of it, the contract is voidable at his option when he discovers the other party's intent. This is well settled both by English[38] and Indian[39] decisions.

There are two general principles. Firstly a contract which is entered into with the object of committing an illegal act is unenforceable. If the intent is mutual it is not enforceable at all and if it is on the part of one party he cannot enforce the contract. Secondly the Court will not enforce a contract which is expressly or impliedly prohibited by statute, it does not matter what the intent of the parties was, it is unenforceable. The same principle applies to contracts legal in form but performed illegally.[40]

Illegal contract by performance.—By a contract the defendants agreed to carry loads for the plaintiffs to the seaport. A tube weighing 25 tonnes manufactured by the plaintiffs was loaded on one of the vehicles of the defendants which was not meant for such heavy loads and

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35 (1822) 5 B. & Ald. 355; 24 R.R. 401.

36 See also *Anderson* v. *Daniel* (1924) 1 K.B. 138; *B. & B. Viennese Fashions* v. *Losane* (1952) 1 All E.R. 750, where goods were delivered without the invoice required by statute, and the buyer was held not liable for the price. The illegality in such a case is confined to the performance of the contract, and it is only the seller who commits a wrong. The buyer may therefore sue him for breach of contract, if the goods are not in accordance with the contract: *Marles* v. *Philip Trant* (1954) 1 Q.B. 29 (the Court of Appeal also held that where the damages have been caused by a third party, from whom the seller bought, avowedly for re-sale, the seller may recover from the third party the damages he has had to pay to his buyer, although this involves pleading an agreement unlawfully performed to establish the damage.

37 *Waugh* v. *Morris* (1873) L.R. 8 Q.B. 202: see especially at pp. 207, 208; *Hindley & Co. Ltd.* v. *General Fibre Co. Ltd.* (1940) 2 K.B. 517; *Gursaran Lal* v. *Seral Kumar* (1956) A. All 136.

38 E.g., *Pearce* v. *Brooks* (1866) L.R. 1 Ex. 213; *Smith* v. *White* (1866) L.R. 1 Eq. 626. But a transfer of property once executed in possession cannot be set aside on this ground: *Ayerst* v. *Jenkins* (1873) L.R. 16 Eq. 275; *Alexander* v. *Rayson* (1936) 1 K.B. 169.

39 *Pragilal* v. *Ratan Lal,* 1931 A.A. 458; 131 I.C. 546; *Shahabudin Sahib* v. *Venkatachalam,* 1938 A.M. 911; (1938) 2 Mad. L.J. 523; *Fielding & Platt Ltd.* v. *Najjar,* (1969) 2 All E.R. 150 (Plaintiff aware of and actively participating in illegal purpose.)

40 *St. John Shipping Corporation* v. *Joseph Rank Ltd.* (1951) 1 Q.B. 267; *B.B. Viennese Fashions* v. *Losane* (1952) 1 T.L.R. 750; (1952) 1 All E.R. 909.

the loading was therefore illegal. The loading was done in the presence of the plaintiffs representative. *En route* the vehicle overturned and the tube was damaged. The plaintiffs brought an action for damages

It was held that even if the contract when made was legal its performance, participated in by the plaintiff was illegal, the load being a breach of regulations. The plaintiffs were debarred from claiming damages.[41]

An agreement may be rendered unlawful by its connection with a past as well as with a future unlawful transaction. Thus the giving of security for money purporting to be payable under an agreement whose purpose was unlawful is itself an unlawful object, even though it was not stipulated for by the original agreement.[42] In a Calcutta case property was leased for the purpose of carrying on organized prostitution. The lessee deposited a sum of money with the lessor for which the lessor subsequently passed a promissory note. The suit on the promissory note was dismissed on the ground that a bond or other instrument connected with an illegal agreement could not be enforced.[43] Loan to discharge obligation under an illegal contract to the knowledge of the lender is not enforceable.[44] A transfer for an unlawful consideration as void but it does not follow that the transferor is entitled to get back the property not on the ground of the legality of the transfer but on the ground that the Court will not help a *particeps criminis* but would say "let the estate lie where it lies". But the remedies of a plaintiff of carrying out a tainted transfer will not arise when the carrying out of the unlawful object is stipulated as condition subsequent on the failure of which the transfer will cease to have effect.[45]

With regard to the tendency of an agreement to "defeat the provisions of any law", these words must be taken as limited to defeating the intention which the Legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void merely because it tends to defeat some purpose ascribed to the Legislature by conjecture, or even appearing, as matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda not forming part of the enactment. It is not defeating the provisions of a law to take advantage of the lack of any provision for some particular case. If the enactment as it stands is intelligable, the Court cannot assume that the omission was not intended.

An agreemet entered into with a fraudulent object is a particular species of the genus of agreements contemplating or involving injury to the person or property of another. The general term "injury" means criminal or wrongful harm. Evidently there is nothing unlawful in agreeing to carry on a business lawful in itself, though the property of rivals in that business may, in a wide sense, be injured by the consequent and intended competition.

There is no department of the law in which the Courts have exercised larger powers of restraining individual freedom on grounds of general utility, and it is impossible to provide in terms for this discretion without laying down that all objects are unlawful which the Court regards as immoral or opposed to public policy. The epithet "immoral" points, in legal usuage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment. "Public policy" points to political, economical, or social grounds of objection, outside the common topics of morality, either to an act being done or to a promise to do it being enforced. Agreements or other acts may be contrary to the policy of the law without being morally disgraceful or exposed to any obvious moral censure.

English authorities on the subject of agreements being held unenforceable as running

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41 *Ashburn Benson Peace & Co. Ltd.* v. *A.V. Dawson Ltd.*(1973) 2 All ER 856, 862; *Aderson Ltd.* v. *Daniel* (1924) 1 KB 138, 149; and *B & B Viennese Fashions* v. *Lasone* (1952) 1 All ER 909, 913; and *J.M. Allan (Merchandising)* v. *Cloke* (1963) 2 All ER 258, 261 applied.

42 *Fisher* v. *Bridges* (1854) 3 E. & B. 342; 97 R.R. 701, Ex. Ch.; *Geere* v. *Mare* (1863) 2 H. & C. 339, 133 R.R. 707. This doctrine has been extrajudicially criticised, but seems quite sound.

43 *Kali Kumari* v. *Mono Mohini,* 1935 A. Cal. 748; 160 I.C. 212. The decision, *Liladhar* v. *Sunderlal,* 1932 A.N. 32; 136 I.C. 875, seems to be of doubtful validity.

44 *Spector* v. *Ageda* (1971) 3 All E.R. 417.

45 *Saradambal Amma* v. *Natesa Mudaliar* (1972) 1 M.L.J. 244, 251; *Mucklester* v. *Brown* (1801) Ves.

counter to positive legal prohibitions, to morality, or to public policy, are extremely voluminous and various. Many of them are inapplicable to the circumstances of India; not that the elementary rules of law or morality differ in substance in England and in India, but because under the conditions of Indian manners and society such facts as are dealt with by certain classes of English decisions do not occur. References to some of the English cases on matters of general interest will be found in the judgements of Indian Courts digested below. Some topics, on the other hand, are still of practical importance in India, though they are obsolete or all but obsolete in England. We proceed to discuss the several heads of the section with reference to the Indian authorities.

Ignorance of Law.—It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*[46] Where two persons together have the common design to use a subject-matter for an unlawful purpose, so that each participates in the unlawful purpose then that contract is illegal in its formation and it is no answer for them to say that they did not know the law on the matter.[47] True proposition is that money paid under a mistake of law without more cannot be recovered back.[48] But it can be recovered if out of the two parties the duty of observing the law is placed on one of them. Then they are not *in pari delicto*.[49] If both sides have knowledge of illegality the contract is unenforceable.[50] If only one party has such knowledge the innocent party can enforce the contract.[51] A contract to do something which cannot be performed without violation of law is void whether the parties knew the law or not.[52] A creditor lending money for marriage of a debtor's daughter's marriage without knowledge of its contravention of Child Marriage Act can recover his loan[53]

"Forbidden by law."—An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the Legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature. This definition was accepted and quoted with approval by the Supreme Court in *Gherulal Parekh* v. *Mahadeodas*.[54] Parties are not, as a rule, so foolish as to commit themselves to agreements to do anything obviously illegal, or at any rate to bring them into Court; so the kind of question which arises in practice under this head is whether an act, or some part of a series of acts, agreed upon between parties, does or does not contravene some legislative enactment or regulation made by lawful authority. The decision may turn on the construction of the agreement itself, or of the terms of the Act or other authoritative document in question, or on both. In particular it may have to be considered whether the intention of the legislator was to prevent certain things from being done, or only to lay down terms and conditions on which they might be done.[55] It is easy to say that properly drawn Acts or Regulations ought to leave no doubt on that point, but ex-

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52, 69; *Gascoigne* v. *Gascoigne* (1918) 1 K.B. 283. refd. to.

46 *Kiriri Cotton Mills Ltd.* v. *Dewani* (1960) A.C. 192; (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.) *Archbolds (Freightage) Ltd.* v. *Spanglett* (1961) 1 All E.R. 417; (1961) 2 W.L.R. 170, 177, 180 (both parties presumed to know the law).

47 *J.M. Allan (Merchandising) Ltd.* v. *Cloke* (1963) 2 W.L.R. 899, 903; *Waugh* v. *Morris* (1873) 8 Q.B. 202 dist.

48 *Rogers* v. *Ingram* (1876) 3 Ch.D. 351, 355; *Kiriri Cotton Mills Co. Ltd.* v. *Dewani* (1960) A.C. 192, 203; (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.).

49 *Browning* v. *Morris* (1778) 2 Cowp. 790, 792; *Kiriri Cotton Mills Ltd.* v. *Dewani* (1960) A.C. 192, (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.); *Harse* v. *Pearl Life Assurance Co.* (1904) 1 K.B. 558, 564.

50 *Waugh* v. *Morris* (1873) 8 Q.B. 202, 208; *Archbolds (Freightage) Ltd.* v. *Spanglett* (1961) 1 All E.R. 417; (1961) 2 W.L.R. 170 (C.A.).

51 *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* (1961) 2 W.L.R. 170, 179; (1961) 1 All E.R. 417.

52 *Gulabchand* v. *Kudilal* (1959) A.M.P. 151. 165 (F.B.) on app. (1966) A.SC. 1735; *Reggazzoni* v. *K.C. Sethia Ltd.* (1956) 2 All E.R, 487; *Waugh* v. *Morris* (1873) 8 Q.B. 202, 208.

53 *Punnakotiah* v. *Kolikamba* (1967) A.AP. 83.

54 (1959) Supp. 2 S.C.R. 406, 417; (1959) A.SC. 781, 786.

55 Cited and applied in *Chacko Mathai* v. *Aippu Yojakku,* 1953 A.T.C. 44.

perience has shown that such doubts are possible and have not been uncommon. Broadly speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it; but an act which is in itself harmless does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted. There was a time when the English Courts almost regarded it as meritorious to evade statutory regulations, and encouraged evasions of them by fine distinctions; but that attitude is long out of date, and examples of it cannot now be taken as precedents.

It is possible for a statute to attach a penalty to making a particular kind of agreement, and at the same time to provide that such an agreement, if made, shall not be, therefore void. The payment or taking of *Tilak* money is made punishable under Bihar Dowry Restraint Act of 1950. Hence money paid as *Tilak* money cannot be recovered if the bridegroom's people refuse to proceed with the marriage.[56] We do not know of more than one such case in England,[57] and one such in India.[58]

If a contract is expressly or by necessary implication forbidden by statute or if it is *ex facie* illegal or both parties know that though *ex facie* legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way, i.e. by direct or indirect enforcement of rights under the contract. And for this purpose both the parties are presumed to know the law. If expressly prohibited by law, the contract is void *ab initio*.[59] If both parties have knowledge that a contract could not be carried out without a violation of the law, the contract would be unenforceable.[60] But if only one party has such knowledge the innocent party is not precluded because otherwise it would injure the innocent, benefit the guilty and put a premium on deceit.[61] If a contract can be performed in one of two ways, i.e. legally or illegally, it is not an illegal contract though it is unenforceable at the suit of a party who chooses to perform it illegally.[62]

The plaintiff hired a van which unknown to him had a licence to carry the owner's goods and not the goods of others and the plaintiff's goods were stolen through the negligence of the driver of the van. The transaction was *ex facie* neither illegal nor contrary to public policy.

The Court was thus not constrained to refuse aid to the plaintiffs who did not know that the contract would be performed illegally.[61]

The sale of a motor vehicle without a current certificate of fitness in breach of a regulation disentitles the party at fault to sue on it because the contract is performed in a prohibited manner, although it was not illegal *ab initio*.[63] A contract of sale of land without complying

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56 *Ramekbal Singh* v. *Harihar Singh* (1962) A.P. 343.

57 See Pollock Contract, 13th ed., 278. Failure to observe special registry rules by the parties to a transfer of property does not make it unlawful. *Maung Ye* v. *M.A.S. Firm* (1928) 6 Ran. 423; 111 I.C. 105. The Special Marriage Act, 1872, s. 16 (contrast s. 15) and the Child Marriage Restraint Act, 1929 (commonly called the Sarda Act). s. 4, impose penalties on the solemnization of certain marriages but do not in terms declare that the marriages are not void, though that is the effect of the Acts.

58 Foreign Exchange Regulation Act, 1947.

59 *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* (1961) 2 W.L.R. 170, 177. 180; distinguishing *In re Arbitration between Mahmoud and Isphani* (1921) 2 K.B. 716 and *J. Dennis & Co. Ltd.* v. *Munn* (1949) 2 K.B. 327; (1949) 1 All E.R. 616. In both these cases, there was a statutory prohibition against the act. In the former "no person shall buy or sell... except in accordance with... a licence". In the latter "the execution... of any operation specified... shall be unlawful except so far as authorised". *Kanniappa* v. *Karuppiah* (1962) A.M. 240 (F.B.); *Gulab Chand* v. *Kudilal* (1959) A.M.P. 151, 165 (F.B.); on app. (1966) A.SC. 1734; *Reggazzoni* v. *K.C. Shethia Ltd.* (1956) 2 All E.R. 456; *Waugh* v. *Morris* (1873) 8 Q.B. 202, 208; *Foster* v. *Drescoll* (1929) 1 K.B. 470, 510, 521; (1928) All E.R. Rep. 130.

60 *Waugh* v. *Morris* (1873) 8 Q.B. 202, 208 (per Lord Blackburn); *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* (1961) 2 W.L.R. 170, 171, 179 (C.A.).

61 *Archbolds (Freightage) Ltd.* v. *Spanglett* (1961) 2 W.L.R. 170, 179 (C.A.).

62 *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* (1961) 2 W.L.R. 170, 182 (C.A.); *Strongman* v. *Sincock* (1955) 2 Q.B. 525; (1955) 3 All E.R. 90 (C.A.). (A builder building without a licence where a licence was required).

63 *Berrett* v. *Smith* (1965) N.Z.L.R. 460, 463, 465; *Anderson Ltd.* v. *Daniel* (1924) 1 K.B. 138; *B. & B. Viennese Fashions* v. *Losane* (1952) 1 All E.R. 909; and *Marles* v. *Philip Trant & Sons Ltd.* (1954) 1 Q.B. 29; (1953) 1 All E.R. 645 refd. to; *St. John Shipping Corporation* v. *Joseph Rank Ltd.* (1957) 1 Q.B. 267; (1956) 3 All E.R. 683.

with the provisions of the Town Planning & Development Act is illegal and invalid for contravention of the Act. Neither the Act nor the Regulations thereunder expressly prohibited selling before the issue of a certificate thereunder but the prohibition was implied from the steps to be taken by any person desiring to sell land. The contract was held to contravene the provisions of the Act and was therefore illegal and invalid.[64] By a provision of the Landlord and Tenant (Rent Control) Act the payment of premium was prohibited and if paid it was recoverable. Under the Act the expression "premium" includes... any other pecuniary consideration in addition to rent", which was held to include any consideration whereby there is benefit to the landlord or detriment to the tenant. The mere fact that the premium was required to be paid not to the landlord, nor to any person on his behalf, but to a third party could not remove the transaction from the operation of the Act, since it could not be supposed that the legislature intended that a landlord might lawfully require the payment of premium for the benefit of a third party.[65] Under Uganda Rent Restriction Ordinance penalty is imposed on the landlord if he receives any sum of money by way of premium and fails to observe the law. As the parties are not *in pari delicto,* the tenant is not precluded from suing for recovery of premium paid in contravention of the Ordinance. Nor does the absence of remedy under the Ordinance affect the right of the tenant to recover.[66]

Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to English law. The principles may be stated thus:

> "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; (but they) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of the revenue".[67]

The High Court of Bombay acted on these principles[68] where the question arose whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. S. 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sublet the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sublease. It was contended on behalf of the defendant that the sublease was unlawful, as it was made without the permission of the Collector, and that the lessee was not therefore entitled to recover the amount claimed by him. But this contention was overruled. Parsons J., after citing the passage set forth above, said:

> "In our opinion this case falls within the latter class, *because the statute itself does not forbid or at-*

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64 *George* v. *Greater Adelaide Land Development Co. Ltd.* (1929) 43 C.L.R. 91, 101; *Harse* v. *Pearl Life Assurance Co.* (1904) 1 K.B. 558 applied.

65 *Elmdene Estate Ltd.* v. *White* (1960) 2 W.L.R. 359, at pages 365, 366, 368 and 373; (1960) 1 All E.R. 306 (H.L.); *Rex* v. *Birmingham (West) Rent Tribunal* (1951) 2 K.B. 54; (1951) 1 T.L.R. 77; (1951) 1 All E.R. 198 dist.

66 *Kiriri Cotton Mills Ltd.* v. *Dewani* (1960) A.C. 192; (1960) 1 All E.R. 177 (P.C.); (1960) 2 W.L.R. 127. *Gobindram* v. *Ramphul Singh* (1973) A. Punj. 94, 99 (Rent Restriction laws).

67 Pollock, Principles of Contract, 13th ed., 276. Cited and applied in *Babiah* v. *Mohammed Abdus Subhan,* 1954 A. Hyd. 156 (F.B.), and *Fakirchand* v. *Bensilal,* 1955 A. Hyd. 28 (F.B.); *Bhashayya* v. *Chinnapareddi* (1960) A.A.P. 39; Contract contra to Central Excise Act; *Jankibai* v. *Ratan Velu* (1962) A.M.P. 117 (F.B.) (breach punishable with fine; object protection of revenue).

68 *Bhikanbhai* v. *Hiralal* (1900) 24 Bom. 622; followed *Abdullah* v. *Allah Diya* (1927) 8 Lah. 310; 100 I.C. 846; 1927 A.L. 333; *Bhagwant Genuji* v. *Gangabisan* (1941) Bom. 71; 42 Bom. L.R. 750; 191 I.C. 806; 1940 A.B. 369, where the authorities are reviewed. *Mohamed Syed Baba* v. *Universal Traders Timbers* (1976) A.J. & K. 9,11 (transfer of forest lease). But see *P.L. Kapoor* v. *C.I.T.* (1973) 1 All. 293, 313, 315 (imposition of penalty without declaring the contract illegal)

tach a penally to the transaction of subletting, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals."

Ranade J. said:

"As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under section 23 of the Contract Act. As no penalties are prescribed under the (Tolls) Act, the agreement does not *prima facie* fall under the 1st clause of section 23."

Similarly where the lessee of a ferry under the Madras Ferries Act, 1890, transferred the ferry to the defendant without the permission of the Collector as required by the terms of the lease, it was held that the transfer was not for that reason unlawful, as neither the Act nor any rule framed under the Act prohibited such transfer. In such a case, though the transfer may be invalid against Government, it is valid as between the transferee.[69] Similarly where a license to cut grass was given by the Forest Department under the Forest Act, 1878,[70] and one of the terms of the license was that the licensee should not assign his interest in the license without the permission of the Forest Officer, and a fine was prescribed for a breach of his condition, it was held that there being nothing in the Forest Act to make it obligatory upon the parties to observe the conditions of the license, the assignment would be binding upon the parties, though it was competent to the Forest Officer to revoke the license if he thought fit to do so.[71] So was the case where a forest lease prohibited transfer without Government sanction of the lease & the transfer was held not hit by s.23 & therefore not void. *Mohammad Syed Baba* v. *Universal Timber Traders* (1976) A. J. & K. 9,11. But an agreement to sell agricultural land without the permission of the Collector as required under s. 4 of Hyderabad Prevention of Agricultural Land Alienation Act is not enforceable as that would be in contravention of a law.[72] The above Acts, which are intended solely for the protection of revenue, must be distinguished from Abkari and Opium Acts, which have for their object the protection of the pubiic as well as the revenue. Thus an agreement to sublet a license to sell arrack issued under the Madras Abkari Act, 1886,[73] or a license to manufacture and sell country liquor granted under the Excise Act, 1881.[74] or a license to sell opium issued under the Opium Act, 1878,[75] or a license to manufacture salt under the Bombay Salt Act, 1890,[76] without the permission of the Collector, is illegal and void, the sublease in each case without such permission being prohibited by statute, and no suit will lie to recover any money due or any sum deposited under such an agreement. The result is the same where the holder of such a license does not actually sublet or transfer the license, but does an act which amounts to a sublease or a transfer, as where he sells his business in an excisable article in consideration of a money payment with leave to the purchaser to carry on the business in his name, and obtains an indemnity from the purchaser against all loss, claims and demands in respect of the business. In that case he cannot recover from the purchaser either the consideration money or payments made by him for debts contracted by the purchaser in the business and covered by the indemnity.[77] Similarly, a

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69 *Abdullah* v. *Mammod* (1902) 26 Mad. 156; *Gauri Shanker* v. *Mumtaz Ali Khan* (1879) 2 All. 411 (F.B.).

70 See now the Indian Forest Act, 1927.

71 *Nazaralli* v. *Babamiya* (1916) 40 Bom. 64; 30 I.C. 913; *Harkaran* v. *Aggarwal* v. *Champalal Mahajan,* 1962 A.MP. 22.

72 *Narasappa* v. *Sheikh Hazarat,* 1960 A. My. 59.

73 *Thithi Pakurudasu* v. *Bheemudu* (1902) 26 Mad. 430; *Krishna Menon* v. *Narayana Ayyar* (1962) A. Ker. 21 (F.B.).

74 *Debi Prasad* v. *Rup Ram* (1888) 10 All. 577. This Act has been repealed by the U.P. Excise Act, 1910. As to what amounts to a sublease, *Radhey Shivam* v. *Mewa Lal* (1928) 116 I.C. 89; 1929 A.A. 210; *Palepu Narayanmurthy* v. *Mallapudi Subrahmanyam* (1928) 114 I.C. 655; 1928 A.M. 119.

75 *Raghunath* v. *Nathu Hirji* (1894) 19 Bom. 626.

76 *Ismailji* v. *Raghunath* (1909) 33 Bom. 636; *Rabiabibi* v. *Gangadhar* (1922) 24 Bom. L.R. 111; 66 I.C. 393.

77 *Behari Lall* v. *Jagodish Chunder* (1904) 31 Cal. 798.

partnership agreement entered into in violation of the terms of a license granted under the Bombay Abkari Act, 1878, which prohibited the license from admitting any partner in the business, the violation being punishable under the Act, is void as forbidden by law;[78] and if a person, being aware of this prohibition, does join as a partner, and advances capital for that purpose, he cannot recover back the amount advanced.[79] Where a rule framed, under the Madras Abkari Act, 1886, prohibited, on pain of a fine, the holder of a license for the sale of toddy from being interested in the sale of arrack and the holder of a license for the sale of arrack from being interested in the sale of toddy, it was held that an agreement of partnership in the business of selling arrack and toddy entered into between a holder of a license for the sale of toddy and the holder of a license for the sale of arrack was void, and that neither party could sue the other for the recovery of money due to him in respect of the partnership.[80] The Silk Control Order of Bengal of 1945 did not contain a provision prohibiting the transfer or subletting of an excise shop or prohibiting the use of the permission to purchase or sell silk and therefore in a partnership, continuing after the repeal of the Control Order, a partner will be entitled to sue for accounts even for the period the order was in force and the return of the amount due.[81] As the licensee must be known to and approved by the authorities, purchase of toddy shops by a *benamidar* is illegal.[82] A right to collect a tax not leviable under the law cannot be transferred. It can be challenged even though the transferee has collected the tax during a portion of the period of the contract.[83]

But a condition prohibiting the licensee from 'selling, transferring or subletting'' has been held not to prohibit the licensee from admitting partners in the business to which the license relates.[84] The same has been held of a condition prohibiting the licensee from ''subletting, selling, mortgaging or otherwise alienating whole or in part, the privilege granted by this license of manufacturing salt''.[85] Madras decisions have taken a contrary view.[86] A distinction is, however, made between a case in which the partner merely shares in the profits and takes no active part in the sale of liquor, and a case in which the partnership deed entitles the other partners to take part in the business of the licensee.[87] In *Gordhandas* v. *Champsey Dossa,*[88] the Privy Council held that an agreement to share the profits of the licensee's business did not amount to subletting or alienation of the license. Accordingly it has been held that where a license has been granted to partners, and one of the partners enters into a sub-partnership, such a sub-partnership does not amount to a subletting or transfer of the license, as the sub-

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78 *Hormasji* v. *Pestanji* (1887) 12 Bom. 422. See also *Babiah* v. *Mohammed Abdus Subhan,* 1954 A. Hyd. 156 (F.B.); *Rama Rao* v. *Papayya,* 1954 A. Andh. 51. In a later Punjab case it was held that a partnership agreement by a licensee under the Excise Act, 1896 (now repealed, see Punjab Excise Act, 1914), was not void under this section, as it did not contravene any of the rules framed under that Act: *Bisheshar Das* v. *Govind Ram* (1906) Punj. Rec. No. 114; *Bassayya* v. *Kotayya* (1964) A.AP. 145; *Velu Padayachi* v. *Sivasooriam* (1950) A.M. 444 folld.; *C.I.T.* v. *Union Tobacco Co.* (1960) A. Ker. 276; But see *Meikole* v. *Periasami* (1967) A.M. 449 (prohibition contained in a Government contract); *Uma Shankar Shaw* v. *C.I.T.* (1959) 37 I.T.R. (S.C.) dist.; *Maniam Hiria* v. *Naga* (1957) A.M. 620.

79 *Gopalrav* v. *Kallappa* (1901) 3 Bom. L.R. 164.

80 *Marudamuthu* v. *Rangasami* (1900) 24 Mad. 401. *Velu Padayachi* v. *Sivasooriam* (1950) Mad. 987, 1950 A.M. 444. But the illegality of a partnership affords no reason why a third party who has lent money to the partnership and is not *particeps,* should not recover a proportion of his loan from the partner who originally held the license: *Brahmayya* v. *Hamiah* (1920) 43 Mad. 141; 54 I.C. 45.

81 *Mafizud Din* v. *Habibud Din,* 1957 A. Cal. 336.

82 *Venkata Subbayya* v. *Attar Sheikh,* 1949 A.M. 252. See also *Fakirchand* v. *Bensilal,* 1955 A. Hyd. 28 (F.B.).

83 *Ram Kirpal* v. *Municipal Committee, Bilaspur* (1963) A.M.P. 240.

84 *Gawri Shankar* v. *Mumtaz Ali* (1879) 2 All. 411, 413; *Karsan* v. *Catlu* (1913) 37 Bom. 320; 19 I.C. 442.

85 *Champsey Dossa* v. *Gordhandas Kessowji* (1917) 19 Bom. L.R. 381; 40 I.C. 805. In *Nalain Padmanabham* v. *Sait Badrinath* (1912) 35 Mad. 582; 10 I.C. 126, it was assumed that the words ''You shall not sell, transfer or subrent your privilege'', included the admission of partners.

86 *Ramanayudu* v. *Seetharamayya* (1934) 58 Mad. 727; 155 I.C. 544; 1935 A.M. 440 (F.B.); *Satyala* v. *Bhogavali,* 1935 A.M. 895; 158 I.C. 1055; *Chennayya* v. *Jani Kamma,* 1944 A.M. 415; *Italia* v. *Cowasjee* (1944) Mad. 697, 1944 A.M. 295, 1 Mad. L.J. 97.

87 *Velu Padayachi* v. *Sivasooriam* (1950) Mad. 987, 1950 A.M. 444 (F.B.).

88 1921 A.P.C. 137.

partner cannot interfere in the business of the licensees.[89] A license under the Abkari Act cannot be obtained *benami,* as that would defeat the purpose of the Act, and therefore no suit can be filed against the *benamidar* to recover any sum of money from him.[90] The sale of fermented liquor without a license, such a sale being punishable under the Bengal Excise Act, 1878,[91] is unlawful, and the vendor is not entitled to recover the price thereof from the buyer.[92] Paying a sum of money for the purchase of a licence is illegal under the Export Control Order because (1) it will amount to the transfer of the privilege under the export licence and (2) it will be export of goods by a person, the exporter, although the goods are not his property. Any agreement for the payment of price for the licence will be abetment of an offence and hence barred by s.23, Contract Act.[93]

A contract to obtain a license and do a thing in accordance with law is not illegal, but initially valid,[94] and even though the agreement subsequently becomes illegal because no licence is obtained, s. 65 will apply and any advantage received under the contract must be restored.[95] If one party promises to obtain the licence, he may even be liable in damages to the other party for breach of warranty in failing to obtain a licence, unless the latter has been guilty of culpable negligence.[96] A promise to pay commission to a person soliciting insurance business before his obtaining a licence under Life Insurance Act is contrary to law and therefore not payable.[97]

Money lenders:—A loan by a moneylender, who has no licence as required by the Hyderabad Moneylenders' Act at the date of the loan, but procures one only during the pendency of the suit, is not recoverable, as the purpose of the Act is not merely to supervise and regularise moneylending, but to protect borrowers by making such loans void.[98] A bench of the Patna High Court has reached a similar decision under the Bihar Act,[99] but a Nagpur bench has held that under the Central Provinces and Berar Act production of a registration certificate prior to the delivery of judgement suffices.[1] If the object of a statute is the protection of revenue and not the general public—e.g. the C.P. & Berar Moneylenders Act—then a money-lending transaction is not void and the debt can be recovered if the provisions of registration—the breach of which is punishable with fine—are complied with even after the suit is filed.[2] *'A'* lent a sum of money to *'B'* who refused to repay on the ground of *'A'* not being a registered money lender. On *'A'* bringing in action for the debt *'B'* compromised with *'A'* and agreed to repay and not raise the plea of *'A'* being a money lender. This was after he took legal advice. *'B'* then repudiated the compromise. But the Court of Appeal held that *'B'* could not reopen the issue of illegality after the voluntary compromise after competent legal advice.[3]

Reciting a smaller consideration in a sale deed.—Permitting parol evidence to establish the real and larger consideration than the one recited in the deed of sale would not make the

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89 *Venkataratnam* v. *V.,* 1944 A.M. 394.
90 *Venkata Subbayya* v. *Attar Sheikh,* 1949 A.M. 252.
91 Repeated by the Bengal Excise Act, 1909.
92 *Boistub Charan* v. *Wooma Churn* (1889) 16 Cal. 436.
93 *M/s Nathmal Bhaironbux & Co.* v. *Kashiram* (1973) A. Raj. 271, 277.
94 *Italia* v. *Cowasjee* (1944) Mad. 697, 1944 A.M. 295; *Velu Padayachi* v. *Sivasooriam,* 1950 A.M. 444, 447.
95 *Babulal Agarwala* v. *Vijaya Stores,* 1955 A. Or. 49
96 *Strongman* v. *Sincock* (1955) 3 All E.R. 90 (C.A.).
97 *Life Insurance Corporation* v. *Madhava Rao,* (1972) A.M. 112.
98 *Mohammed Bin Salem* v. *Umaji,* 1955 A. Hyd. 113 (F.B.), overruling *Shamshir Ali* v. *Ratnaji,* 1952 A. Hyd. 58 (F.B.).
99 *J.P. Misser* v. *B. Dass* (1952) Pat. 963, 1953 A.P. 259. (Here the moneylender had no licence, but subsequently assigned the debt to another moneylender, who had a licence).
1 *Patiram Tukaran* v. *Baliram,* 1954 A.N. 44, following the 1952 Hyderabad Full Bench decision before it had been overruled in 1955; *Janki Bai* v. *Ratan Melu* (1962) A.M.P. 117 (F.B.).
2 *Janaki Bai* v. *Ratan Melu,* 1962 A.MP. 117 (F.B.).
3 *Binder* v. *Alachouzos* (1972) 2 Q.B. 151; 1972 2 All ER 189.

deed of sale invalid for the consideration recited though not real is still valid and is not hit by s. 23, Contract Act.[4]

A contract is not opposed to law merely because in the notice inviting tenders the measurement of stresses was given in inches and not in metric measures.[5]

In a Madras case an agreement by a Madras District Municipality by which it framed out its right to collect fees on the slaughter of animals was held void as being *ultra vires,* so that the Municipality could not sue on it. The court said "The powers of a Corporation must be strictly construed and it is hardly too much to say that what is not permitted to such a body is forbidden".[6] But this, according to current English authorities, is not accurately expressed. There is no such rule of construction as supposed, and acts *ultra vires* are not *forbidden;* the attempt to do such an act is a nullity.[7] Cases on the doctrine of *ultra vires* are not really relevant to s. 23.

The surrender of a *Raiyati* holding by a *raiyat* in favour of his landlord and transfer by the landlord to the plaintiff of the same holding making a permanent *chapparbandi* lease was held to be a device to circumvent the provisions of the Chota Nagpur Tenancy Act (S. 46) which prohibits the transfer of *raiyati* rights by a *raiyat* and such transfer is void under s. 23 of Contract Act.[8]

A father agreed not to take any share in the movable or immovables of his father's estate in order to prevent the prosecution of his son for theft of ornaments from the father's house. Such an agreement purporting to forfeit his share in father's estate besides requiring registration is void under s.23 Contract Act.[9]

Transfer of land before the Ceiling Act.—A transfer of land bona fide effected in anticipation of Ceiling legislation but at a time when there was no prohibition of transfer nor any existing law will not be hit by section 23, particularly when the statute did not prohibit any transfer after the notified date under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961.[10]

Contracts of partnership illegal.—Contracts of partnership or agreements involving transfer of a licence in contravention of the provisions of law for the sale of liquor or excisable articles or other articles or which are contrary to other laws are void and moneys paid thereunder cannot be recovered back. The following cases are illustrative of this principle: partnership to carry on trade in tobacco when the partners will be guilty of an offence against the Central Excise laws if they carried on the trade on a licence in favour of one partner,[11] if as a consequence of entering into a partnership the licensee passes an interest to another and thereby contravenes what the law seeks to forbid.[12] The license is a personal privilege.[13]

Under Central Excise Act, trading without a licence or aiding another to so trade would be an offence. Therefore, if money is advanced by a trader with a licence to another without a licence to buy tobacco for the former, it is a violation of the law and consequently illegal under section 23 and the money so advanced is not recoverable as the liability arises from a transaction prohibited by law.[14]

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4 *Dhoddiah Chettiar.* v. *Madukkarai Estates Tea Factory* (1974) 1 Mad. L.J. 146, 151.
5 *Yogendra Kumar Jalan* v. *Union of India* (1972) A. D. 234, 236.
6 *Municipal Council, Kumbakonam* v. *Abbahs Sahib* (1913) 36 Mad. 113; 11 I.C. 669.
7 See Pollock, Principles of Contract, 12th ed., 101 *sqq.*
8 *Garaj Narain Singh* v. *Babulal Khemka* (1975) A.P. 58, 60.
9 *Mst. Haliman* v. *Mohammad Manir* (1971) A.P. 385, 388.
10 *Naganatha Ayyar* v. *Authorised Officer* (1971) 1 Mad. L.J. 274, 283.
11 *Govindraj* v. *Kandaswami Gounder,* 1957 A.M. 186.
12 *C.I.T.* v. *Union Tobacco Co.,* 1960 A. Ker. 276; *Umacharan Shaw & Bros.* v. *C.I.T.* (1959) 37 I.T.R. 271 dist. (S.C.); *Velu Padayachi* v. *Sivasooriam Pillai,* 1950 Mad. 987; (1950) A.M. 444 (F.B.). *Budharam Balakram* v. *Dhuri Co-operative Society* (1972) A. Punj 185 (a licence under Cotton Control Order).
13 *Budhram Balakram* v. *Dhuri Co-operative Society* (1972) A. Punj. 185, 188; (1973) Punj. 677.
14 *Virayya* v. *Subba Rao,* 1959 A. AP. 647.

Agreement of partnership with a financier in a licensed ganja and opium business without the permission of the Collector is prohibited; a financier cannot be admitted into partnership in such business and the transfer of licence even partially is illegal. The Income-tax authorities would be justified in not registering the partnership.[15] The Allahabad High Court has held that where a licensee enters into partnership with a non-licensee, the mere formation of partnership does not amount to transfer of the licence.[16]

In an Allahabad case on the basis of a liquor licence in the names of some of the partners, a partnership agreed to carry on the business of excise contract. It necessarily implied that contract will be carried on by partners in whose names the licence stands in accordance with law, i.e., those partners will carry on the sale who had the licence or whose names were incorporated in the licence. Hence such a partnership is not illegal merely because it contravenes some executive instructions which have no force of law. And the partnership cannot be refused registration by the Income Tax authorities.[17]

The provision securing the purchase price of the shares of a company by the issue of a debenture on the company's assets is an illegal provision being contrary to s.54 of the Companies Act, 1948.[18]

Where an agent purchasing chillies for a principal knows that they have to be sent to the principal outside the district, which was prohibited by an order of the Collector under the Defence of India Rules, the contract is unlawful under s. 23 and he cannot recover any money under the contract.[19] It has been held that

> "...a void contract is a paradox, in truth there is no contract at all."[20]

Partnership not void—Partnerships where there is no transfer of a licence or contravention of a law are not void. The following cases illustrate this rule: a partnership between a licensee and a non-licensee where the rules require an intimation of the partnership to the Excise authorities, any breach of which is punishable with a fine for non-intimation;[21] a partnership between a licensee under the Opium Act and a third party who only contributes capital and shares in profits and losses.[22]

If one partner has a licence for carrying on tobacco trade at a place *A* and another partner at a place *B* and neither of them purchase or sell tobacco in an area outside their respective licences and they have joint business for sharing profits,[23] such a partnership not being illegal, a promissory note by one partner in settlement of accounts with the other is not a void document.[23] The U.P. Excise Act and the manual do not make a breach of the condition of a licence punishable. Therefore the position is that where an enactment merely imposes a penalty without declaring a contract made in contravention of it to be illegal or void, the imposition of penalty by itself without more does not necessarily imply a prohibition of the contract.[24]

In *Umacharan Shaw & Bros.* v. *C.I.T.*[25]

three brothers formed a joint Hindu family carrying on the business of sale of foreign liquor at three shops the licences for which were in the name of three different members but not in the name of the Joint

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15 *Machapatra Bhandar* v. *Income-tax Commissioner* (1965) 58 I.T.R. 67; (1965) A. Or. 160.
16 *P.C. Kapoor* v. *Commissioner of Income Tax* (1973) 1 All. 293, 306; 90 I.T.R. 172; (F.B.); *C.I.T* v. *Prakash Ram Gupta,* 72 I.T.R. 366; *Mohd. Wasarat Hussain* v. *C.I.T.* (1971) 82 I.T.R. 718 reld. on.
17 *P.C. Kapoor* v. *C.I.T.* (1973) 1 All. 293, 306; 90 I.T.R. 172 (F.B.) *Jer & Co.* v. *C.I.T.* 60 I.T.R. 805; *Oudh Cocogem & Provision Stores* v. *C.I.T.* 59 I.T.R. 819 disting.
18 *South Western Mineral Water Co. Ltd.* v. *Ashmore* (1967) 1 W.L.R. 1110.
19 *Krishna Rao* v. *Kodandarama* (1960) A. AP. 190.
20 Per President Gresson: *Fawcett* v. *Star Car Sales Ltd.* (1960) N.Z.L.R. 406 at p. 412; quoted in *Ingram* v. *Little* (1960) 3 All E.R. 332, 340.
21 *Bhushayya* v. *Chinnapareddi* (1960) A. AP. 39; *Kalyansundaram* v. *Chockalingam* (1952) A.M. 293 followed. *Chandaji Sukhraj & Co.*v. *Lal & Co.* (1960) A. AP. 444.
22 *Shiv Dayal* v. *Bishan Das* (1961) A. Punj. 405.
23 *Bhushayya* v. *Chinnapareddi,* 1960 A. AP. 39, 40. *Dhuri Co-operative Society* v. *Budhram,* (1971) A. Punj. 134. (Partnership with a person with licence under Cotton Control Order not illegal.)
24 *P.C. Kapoor* v. *C.I.T.* (1973) 1 All. 293, 313, 315 (F.B.) *Smt. Janakibai Chunilal* v. *Melaram* (1962) A.MP. 117 (F.B.) reld. on.
25 (1959) 37 I.T.R. 271, 276 (S.C.).

family. The members separated and entered into a partnership for the registration of which they applied to the Income-tax Officer which was rejected *inter alia* on the ground of the provisions of the Bengal Excise Act which provided that a licence may be cancelled if transferred or sublet without the permission of the licensing authority.

On these facts, the Supreme Court found that there was no subletting or transfer of the licence and that the partnership was not illegal and was valid.

A suit for enforcing a contract for the transfer of a route permit cannot succeed as such transfer is prohibited by s. 59 of the Motor Vehicles Act and the prohibition has relation to matters of public interest and its enforcement would defeat the provisions of the law within s. 23 of Contract Act.[26]

A partnership business in transport can be carried on with vehicles belonging to a partner with a permit in his name as also with vehicles of the partnership in the name of one partner. The Act does not require vehicles belonging to the partnership with permits also in the name of the partnership. Such partnership is legal.[27] But the Madras High Court has held that a partnership contract between *A* and *B* to carry on business of transport by lorry with a permit in the name of one of the partners is illegal and opposed to public policy being in contravention of the Motor Vehicles Act. Hence any claim arising out of settlement of accounts of such partnership is also illegal and cannot be enforced.[28]

A carrying on the business of manufacture and sale of safety matches, agreed to take *B* as a partner for a period of 6 years. *A* was to get *B*'s name added in the licence and *B* agreed to and did pay Rs. 10,000 towards capital. The business was carried on but *B*'s name was not added in the licence. Subsequently *A* & *B* was expelled from the partnership. *B* sued for restitution of the moneys paid by him.

The contract, it was held, was not *per se* illegal but as a joint licence was not obtained, *A* was guilty of breach of contract which disabled further performance and *B* was entitled to restitution of the moneys paid by him.[29]

In *Shamlal* v. *State of U.P.*,[30] the court allowed deduction of money paid by Government under orders of the Court from the Provident Fund of a dismissed Government servant because of an undertaking given by the servant in court that it be so deducted.

If the transfer of a licence without permission is "invalid", an agreement to transfer it, entered into before the licence is obtained, would also be void on grounds of public policy under s. 23.[31]

Agreements to assign or sublet licenses granted under the excise laws must be distinguished from agreements to sublet a contract with a public department.[32] Thus in a Bombay case[33] the defendant contracted with the Executive Engineer of the Public Works Department to supply materials for the construction of a public road. One of the conditions of the contract was that no work was to be underlet by the contractor without the express permission in writing of the Executive Engineer or his duly authorised agent. Subsequently the defendant, without obtaining the requisite permission, entered into an agreement with the plaintiff under which the plaintiff was to do the contract work, and the defendant to pay him all the moneys

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26 *Rama Rao* v. *Suryanarayana*, 1964 A. AP. 256.

27 *Dayabhai & Co.* v. *C.I.T.* (1966) 59 I.T.R. 364; (1966) A. MP. 13. *Mangilal* v. *Gheesukhan* (1980) A. Raj. 14, 19. (A case of truck permit.)

28 *Vardarajulu* v. *Thavasi Nadar*, 1963 A.M. 413; 1963 Mad. 942; *Padayachi* v. *Sivasooriam*, 1950 Mad. 987; 1950 A.M. 444; *Maniam Hiria* v. *Naga-Maistry*, 1957 A.M. 620; *Kanniappa Nadar* v. *Karuppiah Nadar*, 1962 Mad. 441; (1962) A.M. 240.

29 *Kanniappa* v. *Karuppiah* (1962) A.M. 240 (F.B.); *Murlidhar Chatterjee* v. *Thavasi Nadar* (1963) Mad. 942; (1963) A.M. 413 (A case of motor transport).

30 (1968) A.A. 139, 146.

31 *S. Sibtain Fazli* v. *Star Film Distributors*, PLD (1964) 1 S.C. 337, 363 (Pak.).

32 The formation of a partnership by a contractor with the Forest Department for executing the work under his direction is in itself only a matter of agency and not a subletting of his rights contrary to the Forest Act: *Nukala Venkatanandram* v. *Immidisetty Dhanaraju* (1928) 117 I.C. 298; 1929 A.M. 689.

33 *Gangadhar* v. *Damodar* (1896) 21 Bom. 522.

that might be received by him from the Executive Engineer under the contract after deducting 10 per cent as the defendant's profit. It did not appear that the plaintiff knew of the condition against underletting contained in the contract. The plaintiff sued the defendant for the balance of money due to him under the agreement. It was held that, as the plaintiff did not appear to have any knowledge of the restrictive condition in the contract, he was entitled to enforce his own contract against the defendant. The Court did not consider it necessary to decide whether the sub-contract was void as opposed to public policy, at the same time intimating its opinion that the sub-contract was to be distinguished from the subletting of a license granted under the excise laws and intended by the Legislature for the use of the licensee only. It was further held that, even if the plaintiff could not enforce his contract, he was at all events entitled under the circumstances to receive from the defendant compensation for the work and labour of which the defendant has received the benefit; but taking a partner is not illegal.[34] The plaintiff at the instance of the defendant erected a factory building without the consent of the Government as required by statute and without a licence. He had been told that the licence had been obtained and thus was the victim of a fraud. He was innocently persuaded to perform the act by the fraud of the defendant. He could therefore recover such sum as would sufficiently recompense him so as to place him in the same position as he would have been if he had never entered the contract.[35] There is no law prohibiting contracts between two companies—one private and the other public—merely because there are common shareholders or common directors. A contract entered into by a Managing Director of public company with a private company in which he holds an interest is not illegal even though in some cases a Court of Equity may not enforce the contract.[36]

Debt incurred for minor's marriage.—Money lent for a daughter's marriage without knowledge of the marriage being in contravention of the Child Marriage Act can be recovered.[37] The marriage of a Hindu minor with a girl below fifteen is not invalidated or rendered illegal by the Child Marriage Restraint Act, 1929. The marriage properly performed remains valid although those who arrange it or participate in it are liable to be prosecuted. Therefore a debt incurred for the marriage by a Joint Hindu Family major members is binding on the joint family property, the debt not being for an illegal purpose.[38] The Orissa High Court has however held such an alienation void even if ever a part of the consideration was for the marriage.[39] Sale of property where the necessity was of the marriage of minor children but the purchaser was not aware of their ages, is not invalid and cannot be impeached. Such considerations are very valid in the case of a vendor with limited ownership.[40]

Before illegality effected.—Even where a transaction is illegal, it is better to allow the plaintiff to resile from it before it is completed and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains.[41]

The Supreme Court of New South Wales has, however, held that in a case where the plaintiff has repudiated a contract which is illegal as opposed to public policy for which the defendant has given no consideration while illegal purpose remains wholly executory the Court should grant equitable relief by ordering repayment of money paid, goods delivered or

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34 *Meikole* v. *Pariasami* (1967) A.M. 447.
35 *Hatcher* v. *White* (1953) 53 S.R. (N.S.W.) 285.
36 *A.J. Judah* v. *Ramapada Gupta* (1959) A. Cal. 715, 728.
37 *Punnakotiah* v. *Kolikamba* (1967) A.AP. 83. See also *Archbolds (Freightage) Ltd.* v. *Spanglett* (1961) 2 W.L.R. 170, 179; (1961) 1 All E.R. 417.
38 *Parasram* v. *Naraini Devi* (1972) A.A. 357, 359; *Tattya Mohyaji Dhomse* v. *Rabha Dadaji Dhomse* (1953) A.B. 273; *Rambhan Ganjaram* v. *Rajaram Laxman* (1956) A.B. 250; & *Hansraj Bhuteria* v. *Askaran Bhuteria* (1941) A. Cal. 244 not folld.
39 *Maheshwar Das* v. *Sakhi Dei* (1978) A. Or. 84, 86; *Gherulal Parekh* v. *Mahadeodas* (1959) A.Sc. 781 disting.; *Ram Jash Agarwalla* v. *Chandmandal* (1937) 2 Cal. 764; *Birupakshya Das* v. *Kunjabihari* (1960)26 Cut. L.J. 431; (1961) A. Or. 104.
40 *Tribeni Prasad* v. *Basudeo Prasad* (1980) A.P. 220.
41 *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291; appd. in *Pertherpermal Chetty* v. *Muniandi Servai*, 35 I.A. 98, 103; *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192; (1960) 1 All E.R. 177 (P.C.).

property transferred to the defendant pursuant to the contract notwithstanding an element of turpitude in the contract and both sides are *in pari delicto*. But the Court gave no opinion on the point if the defendant had given legal consideration. In this case an elderly widow executed a memorandum of transfer of certain property to Wilson and under the agreement agreed to pay £6500 if he promised not to give evidence in a prosecution which he had initiated against her son, a solicitor. The agreement also provided that the property was worth £3200. Wilson at no time made any request for the charge being withdrawn and had expressed his willingness to give evidence. The plaintiff brought an action for rescission of the memorandum of transfer and injunction restraining Wilson from registering it.[42]

Forbidden by law and void.—A contract which is void and unenforceable is not "forbidden by law" within s. 23. What is void cannot be equated with what is "forbidden by law".[43] In the latter case the legislature prohibits it or penalise it, in the former, it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed the promisor may not be allowed to go back upon it without restoring the benefit but the promisee would get no help from the Court if he comes to Court.[44]

Contract by unregistered partnership.—Although an unregistered firm could not take a contract under the P.W.D. rules, yet there was no bar to an individual partner taking such a contract in his own name for and on behalf of himself and another financing the work both forming an unregistered partnership and a suit *inter se* for rendition of accounts would not be barred.[45]

"Defeat the provisions of any law."—The term "law" in this expression would seem to include any enactment or rule of law for the time being in force in India. This branch of the subject may thus be considered under three heads according as the object or consideration of an agreement is such as would defeat (1) the provisions of any legislative enactment, or (2) the rules of Hindu or Mahomedan law, or (3) other rules for the time being in force in India.[46]

1. Legislative enactments: Void agreements.—Where a lessee of a village from a *zamindar* agreed to collect from the *ryots* and pay over to the *zamindar* an annual festival cess up to that time recovered by the *zamindar*, it was held that the *zamindar* could not recover from the lessee the amount of the cess collected by him, the cess being of a nature prohibited by the Bengal Rent Recovery Act, 1859, s. 10.[47] Where a tenant agreed by a registered *kabuliat* to deliver to his landlord in addition to rent certain agricultural produce, and further to supply the landlord with a cart and bullocks when necessary, and in default to pay the cash value of the said dues along with the rent, it was held that the agreement was one to pay cess, and was therefore void as being barred by the provisions of the U.P. Land Revenue Act, 1901, s. 56.[48] And where the manager of a temple at Broach sued the defendant to establish the right of the temple to levy a cess on cotton purchased in Broach and exported from it, it was held that, assuming that the defendant impliedly assented to pay the cess, the agreement was unlawful as being against the provisions of the Bombay Town-Duties Abolition Act, 1844, which abolish-

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42 *Clegg* v. *Wilson* (1932) 32 S.R. (N.S.W.) 109, 125.

43 *Gherumal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 415, 421; (1958) A.SC. 781, 792. See H.C. judgement (1958) A. Cal. 703, 707 (wagering contract is not opposed to public policy or immoral or unlawful); *Dip Narain Singh* v. *Nageshwar Prasad*, 52 All. 338; (1930) A.A. 1,3.

44 *Dip Narain Singh* v. *Nageshwar Prasad*, 52 All. 338; (1930) A.A. 1.3.

45 *Budheswar Barua* v. *Jatindra Nath Barua* (1976) A. Gau. 12.

46 In *A.R.L.P. Firm* v. *U Po Kyaing* (1939) Rang. 311; 183 I.C. 673; 1939 A.R. 305 (F.B.), one member of the Court held that "law" in the first paragraph of s. 23 means law enacted by any competent Legislature, and "law" in the second paragraph means personal or customary law, basing his opinion on the notes to s. 23 in the last edition of this book. It is respectfully submitted that nothing in those notes can be construed as confining "law" in the second paragraph to personal or customary law and that the word cannot be so confined.

47 *Kamala Kant Ghose* v. *Kalu Mahomed* (1869) 3 B.L.R.A.C. 44. See also *Mohan Chand* v. *Manindra Nath*, 1955 A. Cal. 442. But an agreement to perform defined services in lieu of rent is not an illegal "imposition" on the tenant within the Bengal Tenancy Act: *Radhu Hari* v. *Narendra Nath Chatterjee* (1929) 115 I.C. 34; 49 Cal. L.J. 189; 1929 A.Cal. 224.

48 *Sis Ram* v. *Asghar Ali* (1913) 35 All. 19.

ed cesses of every kind not forming part of the land revenue.[49] Similarly where *A* was required under the Code of Criminal Procedure[50] to furnish a surety for his good behaviour, and *B* agreed to become a surety on condition that *A* would deposit with him the sum in which he was required to go bail, and the deposit was made, it was held, in a suit brought after the expiry of the period of suretyship, that *A* was not entitled to recover the deposit from *B*, as the effect of the agreement was to defeat the provisions of the Code by rendering *B* a surety only in name.[51] Likewise, a surety who has given a bail for an accused person cannot recover from the accused the bail which has been forfeited in consequence of the accused failing to appear when required by the Court which released him on bail.[52] And it is conceived that a suit would not have lain to recover the amount of a loan by a British subject to a native prince in India without the consent of the Government so long as such loans were prohibited by the East India Company's Act, 1797 (now repealed by the Government of India Acts of 1915 and 1935). But where an agreement is merely "void" as distinguished from "illegal," e.g., an agreement to give time to a judgement debtor without the sanction of the Court,[53] either party may, on performing his part of the contract, enforce the contract as against the other.[54] It is not illegal to deal with an irregular unregistered association in ignorance of its character.[55] Money lent on a mortgage is recoverable by sale of mortgaged property even if a society has no power to lend money on a mortgage. Such a transaction is not illegal within section 23 of the Contract Act merely because it is in excess of authority.[56] An agreement between the Electricity Board and a consumer that the latter will bear the cost of a transformer, if it is stolen, is void as being contrary to public policy because under the Electric Supply Act 1948 it is the duty of the Electricity Board to maintain the service line of which the transformer is a part.[57]

The provisions commonly found in statutes relating to insolvency[58] afford further illustrations of the class of agreements now under consideration. Thus an agreement by which an insolvent who had obtained his personal, but not his final, discharge settled the claim of one creditor without notice to the official assignee or his other creditors, and by which that creditor agreed not to oppose his final discharge, was void as in fraud of the creditors and as inconsistent with the policy of the statute then in force.[59] Similarly a promissory note whereby a creditor secures for himself a payment from an insolvent larger than he is entitled to under a composition deed is void where the other creditors are not aware of the arrangement. The same principle applies even though the note may have been passed to the creditor by a third party if it is done with the insolvent's knowledge.[60] And a composition deed whereby a debtor

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49 *Gosvami Shri Purushotamji Maharaj* v. *Robb* (1884) 8 Bom. 398.

50 Then Act X of 1872, s. 505, now Act V of 1898, s. 107.

51 *Fateh Singh* v. *Sanwal Singh* (1878) 1 All. 751. Distinguished in *Dula Ram* v. *Akhey Raj,* 1952 A. Ajm. 28, where *P,* who had deposited money with *D* to stand surety for an accused charged under s. 323 I.P.C., was held entitled to recover from *D,* on the ground that the surety was not for good behaviour as in 1 All. 751, but it was a case where the Court could have been satisfied under s. 513 Criminal Procedure Code, if the accused himself deposited the money. This is contrary to *Laxmanlal* v. *Mulshankar* (1908) 32 Bom. 449, 453, a bench decision, where a similar argument was rejected because the deposit permitted by s. 513 is allowed only in substitution of the bond the principal himself would otherwise execute, not in substitution of any bond which his surety executes.

52 *Sunder Singh* v. *Kishen Chand* (1899) Punj. Rec. No. 1; *Bhupati Ch. Nandy* v. *Golam Ehibar Chowdry* (1919) 24 C.W.N. 368; 56 I.C. 539; *Bur Singh* v. *Kehru,* 1938 A.L. 732.

53 Such an agreement was declared to be void under the Code of Civil Procedure, 1882, s. 257A. That section is not re-enacted in the Code of Civil Procedure, 1908.

54 *Bank of Bengal* v. *Vyabhoy* (1891) 16 Bom. 618. See also *Abaji Sitaram* v. *Trimbak Municipality* (1903) 28 Bom. 66. 73.

55 *Appa Dada Patil* v. *Ramkrishna Vasudeo Joshi* (1930) 53 Bom. 652; 121 I.C. 581; 1930 A.B. 5.

56 *Radhasoami Satsang Sabha* v. *Hanskumar Kisanchand* (1959) A.M.P. 172; *In re Coltman, Coltman* v. *Coltman* (1881) Ch.D. 64, 70.

57 *U.P. State Electricity Board* v. *Smt. Lakshmi Devi Sehgal* (1977) A.A. 499. 503; *Lachoomal* v. *Radheyshyam* (1971) 3 SCR 698; (1971) A.SC. 2213 disting.

58 The "Insolvent Debtors Act" which was referred to in the earlier editions of this work (a reference which seems to have escaped the notice of earlier editors) has long had its place taken by the Presidency-towns Insolvency Act, 1909, and by the Provincial Insolvency Act., 1920, which replaced the Act of 1907. The earlier cases cited in the notes however are still useful guides to the legal principles involved.

59 *Naoroji* v. *Kazi Sidick Mirza* (1896) 20 Bom. 636.

60 *Krishnappa Chetti* v. *Adimula Mudali* (1896) 20 Mad. 84; *Mohammad* v. *Parameswara* (1906) 16 Mad.L.J. 418; *Atumal Ramoomal* v. *Dipchand Kessumal* (1939) Kar. 147; 179 I.C. 901; 1939 A.S. 33.

assigned the whole of his propterty to trustees for the benefit of such of his creditors as should sign the deed within a certain period is void as against the official assignee.[61] On like grounds a collusive assignment of a contract by a party thereto on the eve of his insolvency to his brother-in-law with the object of defrauding his creditors is void under this section and s. 6, cl. (*h*), of the Transfer of Property Act, 1882,[62] as the effect of such an assignment is to defeat the provisions of the Insolvency Act by preventing the benefit of the contract from vesting in the official assignee.[63] An official assignee must not raise money for pursuing a suit for the estate by agreeing with creditors who advance it to give preference to their debts,[64] but where a discharged insolvent agrees to pay his old debt in consideration of the creditor entering into a fresh transaction, the agreement is valid.[65]

A mortgage of immovable property belonging to a minor by a person holding a certificate of administration in respect of the estate of the minor under the Minors (Bengal) Act, 1858,[66] is void where it is made without the sanction of the Court, even though the mortgage money was advanced to liquidate ancestral debts and to save an ancestral property from sale in the execution of a decree.[67] Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of section.[68] Thus a sale by occupancy tenants of occupancy rights is void, it being of such a nature that if permitted it would defeat the provisions of the N.-W.P. Rent Act, 1873.[69] Similarly an agreement to transfer the rights of an ex-proprietary tenant in a *mahal* is illegal, as it would defeat the provisions of the N.-W.P. Rent Act, 1881, s.7[70] But there is nothing in the provisions of the latter Act to render an assignment by a *lambardar* of the profits of a *mahal* unlawful under this section.[71] A usufructuary mortgage of an occupancy holding by an occupancy tenant is void under this section, for, if permitted, it would defeat the provisions of the Agra Tenancy Act, 1901, s. 21.[72] Similarly an agreement by an ex-proprietary tenant to pay rent for his ex-proprietary holding at a rate higher than that prescribed by s. 10 of that Act, is void, as it would make the provisions of that section entirely nugatory.[73] And where an ex-proprietary tenant mortgaged his rights in contravention of s. 7A of the Oudh Rent Act, 1886, the mortgage was held to be void and the mortgagee was not entitled to recover moneys paid under the mortgage.[74] A contract of sale of occupancy tenancy by an occupancy tenant without the consent of the landlord is not *ab initio* void under Assam (Temporarily Settled Districts) Tenancy Act and s. 23 of Contract Act is not applicable.[75] If such a mortgage debt is redeemed by executing a bond or passing a promissory note, both the bond and the promissory note would be unenforceable.[76] But where a landholder, who has been re-entrusted with his land by the Court of Wards, but remains under a statutory disability preventing him from transferring any interest beyond his life without the previous sanction of the Collector,

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61 *Manmohandas* v. *N.C. Macleod* (1902) 26 Bom. 765.

62 Clause (h) of s. 6 of the Transfer of Property Act provides that no transfer can be made for an unlawful object or consideration within the meaning of s. 23 of the Contract Act.

63 *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (1907) 34 Cal. 289, on appeal from (1906) 33 Cal. 702.

64 *Re Purushothamdoss* (1927) 116 I.C. 125; 55 Mad.L.J. 657; 1929 A.M. 385.

65 *Dooply* v. *Chotalal* (1938) Rang. 19; 174 I.C. 863; 1938 A.R. II.

66 Repealed by the Guardians and Wards Act, 1890, of which see ss. 29 and 30.

67 *Chimman Singh* v. *Subran Kaur* (1880) 2 All. 902.

68 *Phali* v. *Matabadal* (1883) All. W.N. 7 (a case under N.-W.P. Rent Act, 1881, s.9, relating to occupancy rights); *Indar* v. *Khushli* (1886) All. W.N. 88 (a case under N.-W.P. Land Revenue Act, 1873, s. 125, relating to *sir* land).

69 *Jhinguri* v. *Durga* (1885) 7 All. 878. See now the U.P. Land Revenue Act, 1901.

70 *Kashi Prasad* v. *Kedar Nath Sahu* (1897) 20 All. 219. See now the U.P. Land Revenue Act, 1901.

71 *Chadma Lal* v. *Kishen Lal* (1894) All. W.N. 17; *Bhagwan Das* v. *Bhajju Mal* (1894) All. W.N. 140.

72 *Ram Sarup* v. *Kishan Lal* (1907) All. W.N. 76. See now the Agra Tenancy Act, 1926. *Mukund Lal* v. *Sunita,* 1931 A.A. 461; 132 I.C. 422.

73 *Prag* v. *Sital* (1914) 36 All. 155;22 I.C. 965. Similarly of a contract for the sale of land contravening the rule against perpetuities: *Dinkarrao* v. *Narayen* (1922) 24 Bom.L.R. 449; (1923) 47 Bom. 191.

74 *Mohammad Muzaffar Hussain* v. *Madad Ali,* 1931 A.O. 309; 132 I.C. 543.

75 *Bipin Bihari* v. *Masrab Ali,* 1961 A. Asm. 173.

76 *Jagannath* v. *Baij Nath* (1936) Luck. 679; 165 I.C. 587; 1937 A.O. 150.

purports to transfer such an interest without such sanction, the transferee on dispossession after the death of the transferor may sue the latter's legal representatives for breach of the covenants for title and quiet enjoyment.[77]

The Privy Council has held that an agreement by the defendants for relinquishment of all their *Sir* and *Khudkasht* lands and ex-proprietary rights therein to the plaintiffs none of whom were at the date of the agreement proprietors, landholders or co-sharers in the land to be relinquished, and for payment of damages for any breach of the agreement by them, is illegal and void as being in contravention of the policy of the said Act.[78] And where a specific individual has been declared, under an Act, to be incompetent to transfer land belonging to him a transfer of his land by that person is void under this section, and such a transfer cannot be enforced even after removal of the disability.[79] It has been held by the High Court of Madras that an agreement by a debtor not to raise the plea of limitation is void under this section, as it would defeat the provisions of the Limitation Act,[80] though not avoided by s. 28 (see notes thereon below). Under s. 60(I)(i) of the Civil Procedure Code, 1908, the salary of a railway servant to the extent of Rs. 100 is exempt from attachment, and therefore a compromise decree making moneys from the salary of a railway servant earning less than Rs. 100 payable by instalments is void and unenforceable.[81] But a stipulation for payment of compound interest, though not allowed by the Regulations in force in the Santhal Parganas,[82] is not unlawful within the meaning of the present section.[83] Nor is an alienation made pending a temporary injunction under s. 492 of the Civil Procedure Code (now O. 39, r.1) unlawful under this section.[84] A loan by a military officer to a man under his command is not unlawful as being against the law, though such a loan may be against the rules of discipline.[85]

A compromise of a suit whereby the defendant agrees to a mortgage decree being passed against him even in respect of a claim not secured by a mortgage is not unlawful or opposed to public policy.[86] There is nothing in the Bengal Drainage Acts[87] to render invalid a contract between a landlord and his tenant by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed, in consequence of a scheme of works carried out under the Acts benefiting it.[88] A bond passed by a ward of the Court of Wards is void. But if after the death of the ward, and after the estate is released from the Court of Wards, the son of the deceased ward obtains a fresh advance from the lender and passes a bond for a sum which includes the loan to the deceased, the bond is valid even as regards that loan, provided it is proved that the lender refused to make a fresh advance unless the son agreed to pay also the loan made to the father.[89] There is nothing in the Central Pro-

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77 *Gulabchand* v. *Suryajirao,* 1950 A.B. 401, following *Nisar Ahmad Khan* v. *Mohan Manucha,* 1940 A.P.C. 204, where the P.C. held a mortgage to be void for want of the Collector's sanction, but the covenant to pay nevertheless enforceable.

78 *Moti Chand* v. *Ikram-Ullah Khan* (1917) 39 All 173; 39 I.C. 454; 44 I.A. 54; 1916 A.P.C. 59.

79 *Radha Bai* v. *Kamod Singh* (1908) 30 All. 38 (a case under Jhansi Encumbered Estates Act., 1882, s. 8, relating to disqualified zamindars). This Act was repealed by the Bundelkhand Encumbered Estates Act, 1903 (U.P. Act 1 of 1903).

80 *Ballapraguda* v. *Thummana* (1917) 40 Mad. 701; 35 I.C. 575. See also *Bhagwati Prasad* v. *Chatrapal* (1946) All. 711, 225 I.C. 122, 1947 A.A. 38.

81 *Madras & Southern Maharata Railway* v. *Rupchand Jitaji* (1950) Bom. 185; (1949) 51 Bom. L.R. 1024; 1950 A.B. 155; *Prem Prakash* v. *Mohan Lal* (1944) Lah. 379 (F.B).

82 Regulation III of 1872, s.6, and Regulation V of 1893, s. 24.

83 *Shama Charan* v. *Chuni Lal* (1898) 26 Cal. 238.

84 *Manohar Das* v. *Ram Autar* (1903) 25 All. 431.

85 *Asa Singh* v. *Sadda Singh* (1873) Punj. Rec. No. 16.

86 *Bhuvanagiri Subbarayudu* v. *Maradugula Venkataratnam* (1907) 17 Mad.L.J. 200.

87 Bengal Act VI of 1880 and Bengal Act II of 1902.

88 *Jyoti Kumar* v. *Hari Das* (1905) 32 Cal. 1019 See *Bahadur Sing* v. *Bedkantha,* 1947 A. Cal. 70, 225 I.C. 538.

89 *Bindeshri Prasad* v. *Sarju Singh* (1923) 21 All. L.J. 446; 73 I.C. 458. In partition suit a decree was passed against one of the parties for Rs. 1,000 for the marriage expenses of another party. In order to evade the Child Marriage Restraint Act, 1929, the marriage of the party in whose favour the decree was held that the decree could be executed for the marriage expenses, since the act which the contract was designed to promote was legal where performed and no question of public policy therefore arose; *Anandaramayya* v. *Subbaya,* 1940 A.M. 901; (1940) 2 Mad. L.J. 353; *sed quaere,* for an act may be contrary to public policy, though not within the criminal law, and the policy of the Legislature was

vince and Berar Relief of Indebtedness Act which renders a contract of sale of the debtor's immovable property invalid, if the contract of sale provides for the payment of the vendor's debts.[90]

Forbidden by Law.—*Jambu Rao's Case* was this:

The plaintiff was owner of a certain area of land. He agreed to purchase another area of land and the two parcels together would have exceeded the ceiling prescribed under the Bombay Tenancy and Agricultural Lands Act of 1948. The seller having refused to complete the transaction the plaintiff sued for specific performance and the question for decision was whether the enforcement of contract would result in transgression of the Bombay Act. The Supreme Court held it would not as the object of the agreement was not to defeat the provisions of any law. The transfer itself was not invalid. The parties were agriculturists. There was no restriction against transfers and only the acquisition of an area in excess of the ceiling was invalid resulting in its vesting in the State Government.

The contract of purchase with the knowledge that the purchaser would hold land in excess of ceiling is not void and a suit for enforcement of the contract cannot be resisted on the ground that if permitted would result in transgression of the law.[91]

Where the plaintiff and defendants entered into a contract to do business in oil seeds in the Bombay market and the plaintiff was authorised to do business through sub-agents and also authorised to do business in accordance with the custom of *badla* in the Bombay markets; the contract between the parties was held not to be a wagering contract but the contract was otherwise void as having been entered into for an object which was prohibited by law, namely the law forbidding forward contracts (Bombay Forward Contracts Control Act) and the Oil Seeds Forward Prohibition Order and Essential Supplies Act with the Central Order of 1943.[92]

Where *'A'* enters into a contract with *'B'* to engage on *'A's* behalf in speculative business and *'B'* enters into contract with third parties for the purpose of carrying out the objects of the contract with *'A'* in that case it is immaterial whether *'B'* dealt with third parties as a principal or as being sub-agent, and if the contract between *'A'* and *'B'* is illegal under section 23 of the Contract Act *'B's'* suit against *'A'* must fail.[93] The suit was for recovery of losses incurred in speculative oilseed transactions.

Forbidden by law: Dowry.—A suit by the daughter-in-law against her father-in-law for the recovery of dowry is not maintainable in view of the Dowry Prohibition Act, 1961. It is submitted that the facts of this case are not clear and it is not shown why the dowry given by the parents and in possession of the father-in-law is not recoverable from the father-in-law particularly in view of 6(1)(b) which specifically provides for giving by the receiver of the dowry to the bride within one year.[94]

Tenancies.—The following tenancy agreements are illegal being in breach of the provisions of Rent Acts: An agreement by a tenant contracting out of the provisions of a Rent Act enacted for the protection of tenants;[95] letting out of premises against the provisions of the U.P. Control of Rents & Eviction Act by resorting to a sham transaction of partnership;[96] an agreement in a contract allowing a tenant to assign or sublet the premises is void, being in breach of a provision of law in Bombay prohibiting subletting or assignment of leases and plea of waiver is not available to the tenant;[97] as assignment in breach of a covenant expressly in-

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certainly to prohibit such marriages so far as possible, even though they were not made criminal if performed outside British India. The decision can however be supported on another ground, that the executing court could not go behind the decree.

90 *Balkishan Nathani* v. *Luxmanrao*, 1951 A.N. 187.

91 *Jambu Rao* v. *Appayya* (1968) A.SC. 1358; *Pahunchi Lal* v. *Man Singh* (1971) A.A. 444, 446.

92 *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons etc.* (1975) A.SC. 1223; (1975) 3 S.C.R. 1; *Shivnarayanan Kabra* v. *The State of Madras* (1967) 1 S.C.R. 138, 144; (1967) A.SC 986 989. folld.

93 *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons etc.* (1975) A.SC. 1223, 1233; (1975) 3 S C.R. 1; *Gherulal Parakh* v. *Mahadeodas Maiya* (1959) SC 781, 792, relied upon.

94 *Ouseph Thomas* v. *Mathai Sarakutty* (1975) 1 Ker. 715.

95 *V.B. Raju* v. *K. Avatharam* (1965) A.AP. 86. Contra *Raja Chetty* v. *Jaganathadas* (1950) A.M. 284 (it was an Act solely for his benefit and protection without infringing any public right or policy). *Lachhoomal* v. *Radhye Sham*, (1977) A.S.C. 2213: (1971) 3 S.C.R. 693.

96 *Abdul Shakoor* v. *Rent Control & Eviction Officer*, 1959 A.A. 440.

97 *Woman Shrinivas Kini* v. *Ratilal* (1959) Supp. 2 S.C.R. 217; (1959) A. SC. 689. *Lachhoomal* v. *Radhye Sham*, (1977) A.SC. 2213: (1971) 3 S.C.R. 693.

serted at the request and protection of a superior landlord even though superior landlord is not a party to the sublease and cannot forfeit it for breach of the covenant;[98] creation of a tenancy without, as required by U.P. Rent Control Act, informing the District Magistrate that the house had fallen vacant;[99] or in contravention of an order of the District Magistrate under s. 7 of the U.P. (Temporary) Control of Rent & Eviction Act.[1] But the following agreements were held legal as they were not in breach of any provision of any of the various Rent Acts.

An agreement for termination of a lease if two months' rent remained unpaid even though inconsistent with the Rent Act would be binding on the parties. One reason for upholding this agreemeent was that it was not against public policy to abridge the rights of the landloard, who, under the Act, could re-enter on non-payment of one months's rent.[2]

On the same principle of waiver, the Andhra Pradesh High Court upheld an agreement for increase of rent in a case where no application of fixation of fair rent was made and no fair rent was fixed. Such an agreement was held not to be inconsistent with the provisions of the Rent Act.[3] In a suit for ejectment of a tenant under the U.P. (Temporary) Control of Rents & Eviction Act (1943) a valid decree for ejectment can be passed by compromise and s.3 thereof does not prohibit the passing of such decree even if none of the grounds mentioned in s.3 is mentioned in the compromise. The protection being for the benefit of the tenant, he can waive that right.[4] The Supreme Court has held that the protection is a matter of public policy and is for the protection of the tenants in general and cannot be waived.[5]

But the Madhya Pradesh High Court has held that such a compromise cannot be enforced when not one of the grounds for eviction mentioned in M.P. Act are set out in the compromise.[6]

A tenancy created in the absence of an allotment order by District Magistrate under the provisions of U.P. (Temporary) Control of Rent & Eviction Act, 1947, is not void or illegal.[7]

Under the C.P. & Berar Letting of Houses & Rent Control Order a letting of premises is prohibited in the absence of an order under clause 23 or clause 24 or an assurance that letting is permitted under clause 22(3). A letting without such orders will be void. Therefore a lease by a landlord without these formalities will not be binding and a suit for restoration of possession lies.[8]

Where after a decree for ejectment and arrears of rent was passed the parties agreed in execution and after attachment that judgment debtor will not appeal against the decree and will pay the decretal amount and vacate the premises in a month the agreement was held valid.[9]

A premium paid by a tenant to a landlord in breach of the Uganda Rent Control Ordinance is an illegal payment and can be recovered by the tenant, as the prohibition is against the landlord to charge rent.[10] An agreement to pay premium is unenforceable under s.23 of Contract Act.[11]

Similarly an agreement for payment of premium is prohibited and is an offence under the Karnataka Rent Control Act 1961 and therefore an agreement whereby the tenant was to spend money on repairs and reconstruction of a premises in lieu of 20 years lease and this expense was not to be taken into account against rent is illegal and falls within s.23 Contract Act.[12]

But a contract between a landlord and a statutorily protected tenant to give up possession for the landlord's promise to pay a sum of money to him, the tenant, is not illegal as an attempt to get out of Rent Acts. The landlord, although he cannot obtain possession except under the Rent Act, yet if the tenant per-

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98 *Drive Yourself Hire Co. Ltd.* v. *Strutt* (1953) 2 All E.R. 1475.
99 *Lakshmi Chand* v. *Niadar Mal* (1961) A.A. 295; *Shamsher Bahadur* v. *State of U.P.* (1964) A.A. 394.
1 *Shyam Sundarlal* v. *Lakshmi Narain* (1961) A.A. 347.
2 *Raja Chetty* v. *Jagnnathadas* 1950 A.M. 284.
3 *Jamunabai* v. *Narayanamurthy,* 1959 A.AP. 108.
4 *Sri Tej Chadha* v. *Smt. Sidheshwari* (1973) A.A. 324, 328; *Lachhoomal* v. *Radhey Sham* (1971) 3 S.C.R. 693; (1971) 3 S.C.R. 693; (1971) A.SC. 2213 refd. to.
5 *Murlidhar Agarwal* v. *U.P.* (1974) A. SC. 1924, 1928: (1975)1 S.CR. 575
6 *Hubbilal Sadashiv* v. *Mahomed Magbool Ahmed Khan* (1977) A. MP. 65; *Nagindas* v. *Dalpatram* (1974) 2 S.C.R. 544; (1974) A.SC. 2213 reld. on; *Chandanbai* v. *Surjan* (1972) A. MP. 106 not folld.
7 *Mani Kant Tiwari* v. *Babu Ram Dixit* (1978) A.A. 144; *Murlidhar Aggarwal* v. *State of U.P.* (1974) A. SC. 1924; approving *Udhoo Das* v. *Prem Prakesh* (1964) A.A.1 F.B. folld.
8 *Kakubhai & Co.* v. *Nathmal Kissen Lal* (1980) A.B. 25.
9 *Gousmohoddin Gajabur Saheb* v. *Appasaheb* (1976) A Knt. 90 *Gajendra Singh* v. *Durga Kumari* (1925) A. A. 503 (F.B.); 23 All L.J. 561; *Shivji* v. *Ratiram* (1931) A.N. 126 reld. on.
10 *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.).
11 *Gobindram* v. *Ramphul Singh* (1973) A. Punj. 94, 99.
12 *Dhiraj Lal Vittalji* v. *Mrs. Ivy Dickson* (1975) Knt. 529.

forms his part, he can recover the sum of money promised.[13]

Contracts forbidden by regulations under the Defence of India Act are illegal.[14] Agreements in contravention of the Jute Control Order and the Oil Seeds Order are void, and so are any references to arbitration contained in such agreements.[15]

Under a building agreement a building contractor carried out certain work in a building, but the work was not in accordance with the bye-laws of the local authority and was thus contrary to the terms of the agreement; and the contractor did not give notice to the local authority. Objections were raised by the local authority but on an undertaking given, it did not insist on immediate compliance with the bye-laws.

The building agreement was held not to be illegal and the work done was not illegal.[16] The letting of a premises for a club, which required planning permission on the understanding that permission will be applied for, is letting for a legal purpose and the contract is not illegal, even though after taking possession the lessee applied for permission but it was refused.[17]

Breach of Control Order.—The Indian Telegraph Act is not merely a fiscal statute. The object of the legislature in imposing conditions in regard to telephones is to effectively provide a modern public amenity and utility service and the maintenance of public administration, order and safety. S.20A provides for imposing not a single penalty but continuing penalties for a continuing breach of the conditions. Hence an agreement between *A & B* of submitting the telephone by installing it in the non-subscriber's premises is prohibited and fobidden by law and hit by s.23 of the Contract Act.[18] A forward contract in jute or jute goods in contravention of section 15(4) of the Forward Contracts (Regulation) Act, 1952, which prohibits such contracts except under certain specified circumstances, and which is penalised under another provision of the Act, is invalid.[19] An agreement to share commission between an insurance agent and an insurer is void and unenforceable as it is in violation of a provision of law.[20] Thus, a forward contract with a buyer in Italy to supply oil, the contract being prohibited by the law of India, will not be enforced in India as the contract is illegal and any award given by arbitrators in pursuance of arbitration clause in the contract will not be enforceable under general principles of law applicable to the enforceability of the contracts themselves or of foreign awards made as a consequence of any terms in such contracts.[21] A forward contract which was not void *ab initio* but became void and unenforceable due to prohibition of law (Cotton Control Order), will become enforceable when the inhibition is lifted.[22] A contract in contravention of the Forward Contracts (Regulation) Act of 1952 is void. If under a contract, the right of the seller to obtain payment of the price of the goods can be transferred, the contract is not non-transferable and is therefore void under the Act of 1952.[23] An arbitration clause in a contract which is illegal and void and which forms part of the contract is itself void.[24]

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13 *Rajbenback* v. *Mamon* (1955) 1 Q.B. 283; (1955) 1 All ER 12.
14 *Abdullah Saheb* v. *Guruvappa,* 1944 A.M. 387.
15 *Birla Jute Manufacturing Co.* v. *Dulichand,* 1953 A. Cal. 450; *Hussain Kasam Dadar* v. *Vijayanagaram Commercial Association,* 1954 A.M. 528. See also *David Taylor* v. *Barnett* (1953) I.W.L.R. 562.
16 *Townsend (Builders) Ltd.* v. *Cinema News & Property Management Ltd.* (1959) 1 W.L.R. 119.
17 *Best* v. *Glenville* (1960) 1 W.L.R. 1198. The dictum of Lord Goddard C. J. in *Attorney-General* v. *Smith* (1958) 2 Q.B. 173 at page 180 considered.
18 *Seetharama Sastry* v. *Naganath* (1968) A.AP. 315.
19 *Sundar Lal & Son* v. *Bharat Handicrafts Private Ltd.* (1968) 1 S.C.R. 608; (1968) A.SC. 406; *Sri Bajrang Jute Mills Ltd.* v. *Lalchand Dugar,* 68 C.W.N. 749 overruled; *Ratanlal* v. *F. Mangilal* (1963) A.M.P. 323 (contract with entries relating to forward contracts of linseed in Indore State as consideration is illegal; as such is prohibited).
20 *Administrator Hindustan Cables Employees Co-operative* v. *Jatindra Kumar Das* (1968) A. Cal. 146; *Hayman* v. *Darwins Ltd.* (1942) 1 All E.R. 337; (1942) A.C. 356; *Anderson* v. *Daniel* (1924) 1 K.B. 158 refd. to.
21 *S. Anonmina* v. *S. Gorakharam,* 1964 A.M. 532.
22 *F. Hagami Lal* v. *Bhuralal* (1961) A. Raj. 52.
23 *Suvalal Jain* v. *Clive Mills Co. Ltd.,* 1960 A. Cal. 90; *Raymon & Co.* v. *Khardah Co. Ltd.,* 1960 A. Cal. 86 on app. (1963) 3 S.C.R. 183; (1962) A. SC. 1810.
24 Ibid.

The Jute Export Control Order of 1949 does not prohibit or make unlawful a contract for sale of jute goods at a price exceeding the ceiling price. Neither the consideration nor the object of such contract is unlawful or is of such a nature as to defeat the provisions of the control order.[25]

The word 'lawful' in O. 23, r. 1 of C.P.C. is to be read in terms of s.23 of Contract Act.[26]

Deposits-ban of under Prize chits and money Circulation Scheme (Banning) Act 1978.—A firm receiving deposit repayable with interest at 12% and which could be withdrawn at any time by losing interest of 1% does not fall within S. 2 (c) of the Act read with the Statutory form under the Act. And the mere fact that enhanced interest at 36% was paid in cash cannot be called a gift within S. 2(e) because it is a regular payment not dependent on a chance event. It is a payment for consideration because the deposit itself is the consideration.[27]

Breach of Exchange Control Act.—In *Dhanrajamal Gobindram* v. *Shamji Kalidas & Co.*,[28]

cl. 6 of the contract for purchase and sale of East African cotton provided that the buyers were to obtain import licence from the Government of India, failing which the seller would "at their discretion" be entitled either to carry over the goods at the cost of the buyers or call upon them to take immediate delivery on payment in British East Africa, and in default to sell the goods in British East Africa and claim the deficit, if any, between the contractual price and the price obtained on re-sale. By a subsequent letter the sellers confirmed that "if necessary" they would carry over the goods for two months.

This was held not to be vague.

Clause 7 further provided that notwithstanding the import policy followed by the Government of India in respect of the import of the contracted goods, the buyers would be bound to obtain the necessary import licences and communicate the numbers thereof to the sellers on specified dates, failing which clause 6 would operate. The buyers did not perform the contract and the sellers after notice to them resold the goods and thereafter claimed the deficit which the buyers refused to pay.

It was urged that clauses 6 and 7 contemplated acquisition of property or exchange in Africa and thus were in breach of section 5 of the Foreign Exchange Regulation Act since no general or special exemption had been granted thereunder by the Reserve Bank.

The Supreme Court held[28]:

"The contention that the contract involved an actual or, at least, a contingent right to or acquisition of property abroad is not correct. Even if it were so, the contract is saved by s.21, as already explained. In our opinion, the contract was not void for illegality."

2. Rules of Hindu and Mahomedan law.—The rules must of course be such as are recognized and enforceable by Courts of law; they do not include rules of an exclusively religious character which operate *in foro conscientiae* only.

An agreement that would defeat the provisions of Hindu law would be unlawful within the meaning of the present clause. A contract to give a son in adoption in consideration of an annual allowance to the natural parents is an instance of this class, and a suit will not lie to recover any allowance on such a contract, though the adoption may have been performed. The Hindu law does not recognise in this *kali yug* any adoption but that of a *dattak* son, and such a son is defined in the Dattaka Chandrika (s. 1, par. 12) as a son *"affectionately* given by his father or mother." Besides defeating the provisions of the Hindu law, such an agreement would involve an injury to the person and property of the adopted son, "inasmuch as, if it could be proved that the boy was purchased and not given, it is very probable that the adoption would be set aside, and if such adoption were set aside he would not only lose his status in the family of his adopting father, but also lose his right of inheritance to his natural parents".[29] An agreement in restraint of exercise of power to adopt by a widow with her

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25 *Guljarilal Kanoria* v. *Busi & Stephenson Ltd.* (1960) A. Cal. 590.
26 *Putto Lal* v. *Sumersinghji* (1963) A. Raj. 63.
27 *Sanchaita Investment* v. *State of West Bengal* (1981) A. Cal. 157.
28 *Dhanrajamal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020; (1961) A.S.C. 1285.
29 *Eshan Kishore* v. *Haris Chandra* (1874) 13 B.L.R. App. 42; *Sitaram* v. *Harihur* (1910) 35 Bom. 169, at pp. 179, 180; 8 I.C. 625; *Raghubar Das Mahant* v. *Raja Natabar Singh* (1919) 4 Pat. L.J. 42; *Narayen* v. *Gopalrao* (1922) 24 Bom. L.R. 414; 67 I.C. 850. But a family agreement merely collateral to an

deceased's husband's coparceners is void on grounds of public policy whether it is absolute or partial. Hence such an agreement on payment of an annual sum of money by way of maintenance is void as opposed to public policy. It is also repugnant to Hindu law. An adoption in breach of such agreement is valid.[30] A legal agreement between parties does not become illegal, if there is a clause therein that if the agreement fails then another agreement which is contrary to law will come into existence.[31]

A contract entered into by Hindus living in Assam, by which it is agreed that, in the event of the husband leaving the village in which the wife and her friends resided, the marriage shall become null and void, is contrary to the policy of Hindu law.[32] Again, it is a rule of Hindu law that for the fulfilment of the duties which the law imposes upon a wife she must reside with her husband wherever he may choose to reside. An agreement, therefore, by a Hindu husband that he will not be at liberty to remove his wife from her parents' abode to his own abode is illegal, as tending to defeat the rule and being opposed to public policy. An agreement of this kind is no defence to a suit by the husband for the restitution of conjugal rights and a decree directing the wife to live with him at his house.[33]

An agreement entered into before marriage between a Mahomedan wife and husband by which it is provided that the wife shall be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights.[34] And so is an agreement entered into after marriage between a Mahomedan wife and husband who were for some time prior to the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband she should be free to leave him.[35] Upon the same principle, an agreement between a Mohamedan husband and wife for a future separation is void, and the wife cannot on separation recover the maintenance allowance provided by the agreement.[36] But an agreement made between a Mahomedan wife and husband entered into before marriage by which it is provided that the wife shall be at liberty to divorce herself from her husband under certain specified conditions is valid, if the conditions are of reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of the contingencies, repudiate herself, in the exercise of the power, and a divorce will then take effect as if the *talaq* had been pronounced by the husband. This is known in Mahomedan law as *talaq* (divorce by the husband) by *tafwiz* (delegation), the wife being as it were, the delegate of the husband to pronounce the *talaq*.[37] An agreement contemporary with the marriage whereby the husband undertook not to ill-treat his wife and also agreed that the wife would be entitled to claim the customary maintenance allowance if relations between husband and wife became strained is not void.[38] But an ante-nuptial agreement between a Hindu husband and wife enabling the wife to avoid the marriage if the husband marries an additional wife, or does not treat her kindly, or asks her to live at place *D* instead of place *B*, is void, such

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adoption does not avoid it: *Penumasta Subbaraju* v. *Indukuri Narayanaraju* (1926) 51 Mad. L.J. 366; 97 I.C. 232; 1926 A.M. 1093.

30 *Punjab Rao* v. *Sheshrao*, 1962 A.B. 175.

31 *Sibtain Fazli* v. *Star Film Distributors*, P.L.D. (1964) 1 S.C. 337. 364 (Pak.).

32 *Sitaram* v. *Mussamut Aheeree Heerahnee* (1873) 11 B.L.R. 129, 134, 135.

33 *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901) 28 Cal. 751; *Lahoran Sheikh Nabbi* v. *Madar Baksh* (1878) Punj. Rec. No. 20.

34 *Abdul* v. *Hussenbi* (1904) 6 Bom. L.R. 728.

35 *Meherally* v. *Sakerhanoobai* (1905) 7 Bom. L.R. 602.

36 *Fatma* v. *Ali Mahomed* (1912) 37 Bom. 280; 17 I.C. 946; *contra Muhammad Muni-ud-din* v. *Jamal Fatima* (1921) 43 All. 650; 63 I.C. 883 followed *Muhammad Ali Akbar* v. *Fatima Begum*, 1929 A.L. 660; 119 I.C. 486.

37 *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327; *Ayatunnissa Beebee* v. *Karam Ali* (1908) 36 Cal. 23; *Maharam Ali* v. *Ayesa Khatun* (1915) 19 C.W.N. 1226; 31 I.C. 562, 1916 A. Cal. 761 the condition in this case was divorce if husband married a second wife; followed *Badu Mia* v. *Badrannessa* (1919) 29 C.L.J 230, 40 I.C. 803. The wife must establish clearly that the conditions entitling her to exercise the delegated power have been fullfilled: *Mirjan Ali* v. *Mt. Maimuna Bibi*, 1949 A. Asm. 14; *Buffatan Bibi* v. *Sheikh Abdul*, 1950 A. Cal. 304; *Saifuddin Sekh* v. *Soneka Bibi*, 1955 A. Asm. 153.

38 *Jamila Khatoon* v. *Abdul Rashid*, (1939) A.L. 165; 184 I.C. 105; *Buffatan Bibi* v. *Sheikh Abdul*, 1950 A. Cal. 304.

an agreement being repugnant to the spirit of the Hindu law.[39]

The Courts have held some caste customs to be invalid as being opposed to the spirit of Hindu law. These are—(1) a custom permitting a married woman to leave her husband and contract a second marriage without the husband's consent;[40] (2) a custom authorising a woman to contract a second marriage without a divorce, on payment of a certain sum to the caste;[41] (3) a custom by which the marriage tie can be dissolved by either party without the consent of the other, on payment of a sum of money to be fixed by the caste.[42] The Calcutta High Court, however, has recognised the validity of a custom which allows a married woman, who has been relinquished by her husband, to contract a second marriage.[43] A *karnavan* of a *tarwad* cannot part by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as *karnavan*.[44] Such an agreement is invalid on the principle that "there can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law".[45]

3. Other rules of law in force in India.—It is now a settled principle of law that where a decree is silent as to subsequent interest on the amount decreed, interest cannot be recovered by proceedings in execution of the decree.[46] But an agreement in the nature of a compromise between a decree-holder and a judgment-debtor, which proceeds upon ignorance common to both parties thereto, as to the above principle, is not illegal as defeating the provisions of that law.[47] Again, it is a well-established rule of law that, unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful so as to be enforceable under the provisions of s. 375 of the Civil Procedure Code (now O. 23, r. 3).[48] Similarly, a receiver being an officer of the Court, the Court alone is to determine his remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority.[49] A promise, therefore, to pay the salary of a receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor.[50] An engagement of a Chartered Accountant to be paid on the basis of percentage of the relief obtained in an income-tax case of an assessee is opposed to the provisions of the Chartered Accountants Act. It would be so even though it may include fees to be paid to Counsel.[51] Rule 148 of the Railway Establishment Rules which provide for termination of the services of Railway servants who are temporary servants, i.e. those who, without a lien on a permanent post under Government, are appointed to a temporary post or officiate in a permanent post without the procedure required under Art. 311 of the constitution is not void under s.23 of the Contract Act S. 23 applies to agreements *inter parts*.[52] But an agreement providing for remuneration to be paid to an executor not out of the assets of the testator, but from the pocket of a third person, is neither forbidden by the Administrator-General's Act, 1874, s. 56,[53] nor is it one which if permitted would defeat the provisions of that Act, nor is it against public policy.[54]

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39 *Chait Ram* v. *Mussammat Nathi* (1900) Punj. Rec. No. 15; *Rambhabai* v. *Kanji Ravji,* 1953 A. Sau. 88.
40 *Reg.* v. *Karsan Goja* (1864) 2 Bom. H.C. 117; *Narayan* v. *Laving Bharthi* (1877) 2 Bom. 140.
41 *Uji* v. *Hathi Lalu* (1870) 7 Bom. H.C. (A.C.) 133.
42 *Keshav* v. *Bai Gandhi* (1915) 39 Bom. 538; 29 I.C. 952.
43 *Jukni* v. *Queen-Empress* (1892) 19 Cal. 627: *In re Mussamut Chamia,* 7 C.L.R. 354.
44 *Cherukomen* v. *Ismala* (1871) 6 M.H.C. 145.
45 *Ib.* per Holloway J. at p. 150.
46 *Pillai* v. *Pillai* (1875) 2 I.A. 219; 15 B.L.R. 383.
47 *Seth Gokul Das* v. *Murli* (1878) 3 Cal. 602.
48 *Monmohini Guha* v. *Banga Chandra Das* (1903) 31 Cal. 357.
49 See Civil Procedure Code, O. 40, r.1.
50 *Prokash Chandra* v. *Adlam* (1903) 30 Cal. 696.
51 *R.B. Basu* v. *P.K. Mukherjee,* 1957 A. Cal. 449.
52 *Priya Gupta* v. *General Manager, N.E. Ry.,* 1959 A.A. 643.
53 This Act has been repealed; see now the Adm. General's Act, 1913.
54 *Narayan Coomari Debi* v. *Shajani Kanta Chatterjee* (1894) 22 Cal. 14.

An agreement to let to hirers a roulette table with the necessary accessories for playing a game known as *Roulette Royale* is unlawful and therefore void and unenforceable. Any sum due under an agreement of hiring is not recoverable.[55] A contract which is not *per se* illegal but has become incapable of performance because of the default of one of the parties, entitles the other party to restitution of the moneys paid by him.[56] The fact that a contract is not enforced by a Court of Equity on equitable ground does not make the contract illegal within section 23 of the Contract Act. The contract may be perfectly good and yet not enforceable in a Court of Equity.[57] A compromise that the defendant would deposit the money in the presence of the deity of a temple and the plaintiff would take it from there and if either party resiled from the agreement the suit would be decided against him was held to be valid and binding on the parties.[58]

An order having the force of law.—A contract of tenancy entered into in violation of s.7 (2) of the U.P. (Temporary) Control of Rent & Eviction Act is not void under s. 10 read with s. 23 of the Contract Act because such tenancy is not "forbidden by law" but by an order of the District Magistrate under that provision (S. 7 (2)) and that Order has "the force of law" and is not law,[59] even though such a contravention would make the landlord liable to prosecution and the tenant to abetment and to eviction from the leased premises despite the fact that the District Magistrate's order was passed after the tenant inducted by the landlord had already got into possession, *Abdul Hameed* v. *Mohammed Ishaq* (1975) A.A. 166, 171.[60] It is submitted that the order made by District Magistrate which has "the force of law" is in effect "law" and would therefore be covered by the word "law" in section 23 of the Contract Act. The Supreme Court in interpreting the words "have the force of law" in section 10(2) of the Delimitation Commission Act held them to have the effect of a "law" made by Parliament.[61] The Maximum Price Control Order prescribed the maximum price at which paddy might be sold and any contravention thereof was punishable under s.7 of Essential Commodities Act. Hence an agreement to sell at a price higher than the maximum would be void under s.23, Contract Act.[62]

One of the orders under Defence of the Realm Regulations prohibited sales in the United Kingdom of certain articles to any person not holding a licence for sale for use in the United Kingdom. The plaintiff had a licence to sell but the defendant had no licence to buy. A contract to make such a sale being absolutely prohibited, as a contravention of the Regulation was an offence and the regulation was for public benefit, it was illegal for the plaintiff to make the contract and such a contract cannot be enforced.[63]

A lease deed containing a clause that the tenant will not claim the benefit of the U.P. (Temporary) Control of Eviction & Rent Act 1943 and a clause that the Act will not apply to the lease is to that extent void and a suit for eviction under s.3 of that Act is not maintainable or permissible without the District Magistrate's permission. Further a tenant cannot waive the protection of that provision it not being a benefit of an individual tenant but a matter of public policy.

It is submitted that in view of the severance of powers under the Constitution the exercise of jurisdiction by a Court of Law cannot be dependent on the discretionary permission of

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55 *J.M. Allan (Merchandising) Ltd.* v. *Cloke* (1963) 2 W.L.R. 899.
56 *Kanniappa* v. *Karuppiah* (1962) A.M. 240; *Murlidhar Chatterjee* v. *International Film Co. Ltd.* (1943) A.P.C. 34; 70 I.A. 35 folld.
57 *Albert Judah* v. *Ramapada Gupta* (1959) A. Cal. 715, 728.
58 *Nageshwarrao* v. *Seetharama*, 1957 A. AP. 69.
59 *Udho Das* v. *Prem Prakash* (1964) A.A.1. (F.B.) overruling; *Sham Sundar Lal* v. *Lakshmi Narain Mathur* (1961) A.A. 317. F.B. overruled in *Abdul Hameed* v. *Mohammed Ishaq* (1975) A.A. 166, where such order was held to be law.
60 *Udho Das* v. *Prem Prakash* (1964) A.A. 1 (F.B.).
61 *Meghraj Kothari* v. *Delimitation Commission & Others* (1967) A.S.C. 669.
62 *R. Manikyam* v. *M. Satyanarayana* (1972) A. AP. 367, 368.
63 *Re: Mahmoud and Ispahani* (1921) 2 K.B. 716; (1921) All E.R. Rep. 217; *Little* v. *Poole* (1829) 9 B & C 192; 202, 207 appld.

the executive—the District Magistrate being an Executive Officer.[64]

By a compromise between a landlord and tenant of a shop it was agreed—

(a) that on the expiry of thirty days from the date of intimation the shop in dispute would automatically stand released to the landlord;

(b) the landlord would continue to utilise the accommodation for his own business or the business of his son;

(c) if the landlord at any time discontinues to use the premises for his own business he will let it out to the tenant on reasonable terms and not to anyone else;

(d) that the shop is already in possession of the landlord and the tenant will not be entitled to take any steps till the landlord himself desires to let out the shop to the tenant.

This compromise was challenged and it was held[65] by a majority that so long as the Act and the Rules continued in force the control of letting vested in the District Magistrate and not in the parties and by compromise that power could not be curtailed and the power was given for the benefit of the general public and for the reason above stated the compromise was void under section 23, Contract Act and the tenant committed no fraud when he applied for eviction of the landlord under section 7-A of the Act and for delivery of actual physical possession to him. The minority view was that even if the compromise was unlawful and the decree passed on that account void the mere fact of the tenant having submitted to the consent decree declaring the order of allotment to be invalid and recognising the right of the landlord to occupy the shop was a highly relevant circumstance bearing on the exercise of discretion of the District Magistrate and the non-disclosure of the fact of the consent decree by the tenant in his application under section 7-A vitiated the order of the District Magistrate.

Legality of Waiver.—In *Lachoomal* v. *Radhey Shayam*[66] the Supreme Court held that the provisions of an Act which is for the benefit of an individual and not prohibited by statute as a matter of public policy can be waived on the principle *Cuilibet Licet renuntiare juri pro se introducto*. But in a later case[67] where a tenant objected to the jurisdiction of a civil Court in matters of eviction without the permission of the District Magistrate under the U.P. (Temporary) Control of Rents and Eviction Act it was held to be barred as violative of s. 23, Contract Act as it was for the benefit of the public and could not be waived.

"Fraudulent."—A sale of immovable property pending a suit against the vendors to recover a debt is not invalid merely because the motive of the vendors may have been to prevent the land from being attached and sold in execution. In such a case the only question is whether the sale was a real transfer of the title to the land for a fair money consideration. The motive of the vendors to defeat the execution of any decree that may be passed against them is immaterial.[68] In this connection may be noted the provisions of s. 53 of the Transfer of Property Act, 1882. That section provides *inter alia* that "every transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed," but that "nothing in this section contained shall impair the rights of any transferee in good faith and for consideration." Such a transfer is not illegal, for the section merely declares that it shall be *voidable* at the option of the party affected by the transfer. Where the object of an agreement between *A* and *B* was to obtain a contract from the Commissariat Department for the benefit of both, which could not be obtained for both of them without practising fraud on the Department, it was held that the object of the agreement was fraudulent, and that the agreement was therefore void.[69] But an agreement bet-

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64 *Murlidhar Agarwal and another* v. *State of Uttar Pradesh* and others (1974) A.SC. 1924. 1928; (1975) 1 S.C.R. 575; *Lachoomal* v. *Radhey Shyam* (1971) 3 S.C.R. 693; (1971) A. SC. 2213 disting.

65 *Sri Krishna Khanna* v. *Additional District Magistrate Kanpur,* (1975) A.S.C. 1525, 1529 & 1533: (1975) 3 S.C.R. 709; *Sures Chand* v. *Hari Ram* (1976) 74 All. L.J. 465.

66 (1971) 3 S.C.R. 698; (1971) A.SC. 2213, 2215.

67 *Murlidhar Agarwal* v. *State of U.P.* (1974) A.SC. 1924, 1928.

68 *Pullen Chetty* v. *Ramalinga Chetty* (1870) 5 M.H.C. 368, referring to *Sankarappa* v. *Kamayya* (1866) 3 M.H.C. 231 and *Gnanabhai* v. *Srinivasa Pillai* (1868) 4 M.H.C. 84. See also *Rajan Harji* v. *Ardeshir Hormusji* (1879) 4 Bom. 70.

69 *Sahib Ram* v. *Nagar Mal* (1884) Punj. Rec. No. 63.

ween *A* and *B* to purchase property at an auction sale jointly, and not to bid against each other, is perfectly lawful.[70] A condition in an agreement of sale giving to the vendor the right to rescind though unqualified in its terms is subject to the qualification that the vendor is not guilty of conduct falling short of fraud or dishonesty which might be described as reckless.[71]

Tortious Act.—Even though such clean bills of indemnity was a common practice, an agreement to indemnify a master of a ship against losses arising from the issuing of a clean bill of lading in respect of leaking and defective old barrels is unenforceable because the consideration is illegal—a tort.[72] In dealing with the general practice of indemnities for clean bills of lading, Lord Evershed referred to the observations of Wright J. in *United Baltic Corporation Ltd.* v. *Dundee, Perth & London Shipping Co. Ltd.*[73] that in the eye of any of Her Majesty's Courts there can be no enchantment to the continuance of a general practice on the part of Her Majesty's subjects, in whose keeping in some degree must reside the good name and business reputation of Englishmen, whereby falsehood is treated as a convenient fiction for serving business interests.

If the object of a contract is the commission a deliberate act of tort, the contract is illegal even though no criminality or fraud is involved. Hence printer cannot recover the cost of printing a matter if he knew it to be libellous.[74]

Defrauding Revenue and breach of laws of another country.—A contract to do that which is in contravention of the law to safeguard revenue may or may not be void according as the object is to make a contravention expensive or to prohibit it. In the latter case it would be void.[75]

Fiscal Law.—English Courts will not enforce an agreement, whatever be its proper law, if it is contrary to English law, whether statute law or common law: nor will they enforce it even though it is not contrary to English law, if it is void for illegality under the proper law of contract. Further the English Courts will not enforce performance or give damages for non-performance of an act, whatever the proper law of the contract, if the act would be illegal in the country in which it is required to be performed. But there is an exception the scope of which is not settled and that is the breach of revenue or fiscal law of the country.[76] In *Dhanrajmal's* case,

> the Supreme Court held that there was no breach of the Exchange Control Act as the contract did not involve the acquisition of property abroad. Even if it was, it was saved by section 21 of the Exchange Control Act.[77]

Agreements of sale prohibited by statute are forbidden by law and opposed to public policy such as attempts to cheat the revenue (S.269)(a) and (b), Income Tax Act, and s.64(c) Stamp Act.) But they do not affect the transactions or make them illegal and hence earnest money cannot be retained by the vendor, guilty of a fraudulent sale.[78]

An agreement to defraud revenue is illegal,[79] even the revenue of a foreign country. Therefore a transaction between a husband and wife the result of which was the breach of the revenue law of a foreign country is illegal.[80] English Courts would not enforce a contract to

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70 *Nanda Singh* v. *Sunder Singh* (1901) Punj. Rec. No. 37. *Quis negavit?*
71 *Baines* v. *Tweddle* (1959) 3 W.L.R. 291; (1959) 2 All E.R. 724 (C.A.).
72 *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.* (1957) 3 W.L.R. 403, 414; *Silver* v. *Ocean Steamship Co. Ltd.* (1930) 1 K.B. 416.
73 *United Baltic Corporation Ltd.* v. *Dundee, Perth & London Shipping Co. Ltd.* (1928) 32 Lloyd's L.R. 272; *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.* (1957) 3 W.L.R. 403, 420; (1957) 2 All E.R. 844 (C.A.). Lord Evershed M.R. did not think that on ground of public policy the plaintiff should be denied relief.
74 Chitty: On Contract (24th Ed.) para 915.
75 *C.I.T.* v. *Union Tobacco Co.* (1960) A. Ker. 276; *Bhushayya* v. *Chinnapareddi* (1960) A.A.P. 39. See *Basayya* v. *Kotayya* (1964) A.A.P. 145; *Parayachi* v. *Sivasoorian* (1950) A.M. 444 folld.
76 *Mackender* v. *Feldia* (1966) 3 All E.R. 847, 851.
77 *Dhanrajmal Gobindram* v. *Shamji Kalidas* (1961) A.S.C. 1285; (1961) 3 S.C.R. 1020.
78 *Jaswant Rai* v. *Abnash Kaur* (1974) 1 Del. 689, 709.
79 *Miller* v. *Karlinski* (1945) 62 T.L.R. 85; *Alexander* v. *Rayson* (1936) 1 K.B. 169. *Anand Prakash Om Prakash* v. *Oswal Trading Co.* (1976) A.D. 24, 27.
80 *Emery* v. *Emery* (1959) Ch. 410.

smuggle goods into or out of foreign and friendly country.[81] Under an agreement between the parties the defendants undertook to sell and deliver to the plaintiff, c.i.f. Geneva, a quantity of jute bags which to the knowledge of both parties were to be shipped from India and to be resold to South Africa contrary to the Indian regulation prohibiting export to South Africa. The contract was to be governed by English law. The agreement was held to be unenforceable because English Courts would not enforce an agreement by two persons knowingly to break these laws or to procure someone else to break them.[82] Though the English Courts would not enforce the revenue or penal laws of another country, yet they would take notice of the laws of a friendly country (whether revenue, penal or political laws or howsoever else described) to the extent that they would not enforce an agreement by two persons knowingly to break those laws or to procure someone else to break them.[83] The reason for this is that it would be a breach of the comity which should exist between countries and especially between countries of the British Commonwealth. The Courts of one country should not help break the laws of another.[84] In order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law.[85] A cheque issued in England on an English Bank by a Pakistani resident in England in return for a cheque of an equivalent amount issued in England on a Pakistani Bank is not affected with ilegality and the Pakistan Exchange regulations do not affect the transaction between persons resident in England.[86] A breach of a provision fixing export price which is contrary to public policy of another country is not binding in India.[87] But agreement and re-arrangement to avoid tax are made every day and are not illegal.[88]

Foreign Law: Proper Law.—Where the contract is governed by a foreign law, the proper law of contract is foreign, the contract will not be enforced in England if it is unenforceable under the proper law unless the vitiating illegality under the proper law is one which the Courts in England decline to recognise because e.g. it imposes an unfair discrimination upon one or both of the contracting parties.[89]

Where, however, a contract is valid by a foreign law and is opposed to public policy in England, then its nature has to be seen. If it involves criminality by statute or at Common law, it will not be enforced in England.[90] Where though not criminally it offends one of the recognised heads of public policy the Courts in England have not enforced it.[91]

But English Courts will not enforce a contract where the performance of that contract is forbidden by law of the country where it is to be performed.[92]

Illegality under proper law.—In the case of a jeweller's block policy negotiated in England, a claim was made on the ground of loss by theft. The underwriters discovered that the merchants made a practice of smuggling diamonds into Italy. The claim was rejected on the ground of non-disclosure of the smuggling activities and the underwriters sought a declaration that the policy was void but it was held that the contract being voidable and not void *ab*

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81 Per Lord Somervell of Harrow in *Reggazzoni* v. *K.C. Sethia Ltd.* (1957) 3 W.L.R. 752; *Foster* v *Driscoll* (1929) 1 K.B. 470, 510, 521; (1928) All E.R. Rep. 130. (A partnership contrary to U.S.A. Laws. To import liquor into U.S.A. contrary to Prohibition Laws. Such partnership is illegal even if the object is not achieved.)

82 *Reggazzoni* v. *K.C. Sethia* (1956) 2 All E.R. 487. Cf. *Pratabmul* v. *K.C. Sethia* (1951) 2 All E.R. 352 (H.L.).

83 *Reggazzoni* v. *K.C. Sethia* (1956) 2 All E.R. 487; *Foster* v. *Driscoll* (1929) 1 K.B. 470.

84 *Reggazzoni* v. *K.C. Sethia & Co.* (1956) 2 All. E.R. 487, 490.

85 *Waugh* v. *Morris* (1873) 8 Q.B. 202, 208 (Blackburn J.); *Foster* v. *Driscoll* (1929) 1 K.B. 470, 521 and 510. (Case of partnership contrary to U.S.A. Laws.)

86 *Sharif* v. *Azad* (1966) 3 All E.R. 785.

87 *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522.

88 *Ionian Bank Ltd.* v. *Couvereur,* (1969) 1 W.L.R. 781.

89 Chitty: On Contract (24th Ed.) Para 923 relying on *Kahler* v. *Midland Bank* (1950) A.C. 24; (1949) 2 All E.R. 621; *Zivonstenska Banka National Corporation* v. *Frankman,* (1950) A.C. 57; (1949) 2 All E.R. 611; *Mackender* v. *Feldia A.G.* (1967) 2 Q.B. 590, 601; (1966) 3 All E.R. 847.

90 *Boissevain* v. *Well* (1950) A.C. 327; (1950) 1 All E.R. 728,

91 Chitty: On Contract (24th Ed.) Para 924.

92 *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* (1920) 2 K.B. 287; (1920) All E.R. Rep. 427.

initio, illegality under the proper law of contract would merely make the policy unenforceable. In that case, the proper law was Belgian law.[93] An agreement between an association of shipowners to use various means to dissuade customers from shipping their goods by the Mogul Line is lawful and gives the Mogul Line no right to sue but the agreement is unenforceable as between the members of the association.[94] The plaintiff claimed the repayment of £4,000 paid to the defendant in London for conveying to him a flat outside the scheduled territories. He alleged that it was implied term of the agreement that the consent of the Treasury should be obtained which had not been obtained. As the payment was held to be illegal being contrary to Exchange Control Act, the plaintiffs could not bring the action and the claim was struck out.[95] In *Fielding & Platt Ltd.* v. *Najjar* an English Company agreed to manufacture and deliver an aluminium press to a Lebanese Company. The price was to be paid by promissory notes given at intervals during the progress of the work. The note when presented was dishonoured. When an action was brought the Lebanese Company pleaded illegality in the agreement e.g. the English Company's agreement to render false invoices for deceiving Lebanese authorities into admitting the goods not covered by the import licences. The contract was enforced even on the assumption of illegality as there was not sufficient evidence of an English Company appreciating the illegality.[96]

Contravention of Gold Control Order.—Under National Security (Exchange Control) Regulation every person in possession of gold was to deliver it to the Commonwealth Bank. A bailment of gold in contravention of that regulation was illegal. The bailor could not sue for return of gold from the bailee because he would be obliged to prove the contract of bailment.[97]

Severability of legal and illegal portions of bailment.—Where a contract of bailment is with regard to gold and gems, the former being illegal and the latter legal and the two are severable the latter will be enforced.[96] The right to collect a tax, which is not leviable under the law, cannot be transferred as it is illegal. It can be challenged even though the transferee has collected the tax during a portion of period of the contract.[99]

"Injury to the person or property of another."—The consideration or object of an agreement is unlawful when it involves or implies injury to the person or property of another. A mortgage-bond, whereby a person who is entitled to a moiety only of certain property mortgages the whole of that property, is not void under this section as to the moiety belonging to him, merely because he purports to motgage the other moiety also not belonging to him.[1] A bond which compels the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unlawful and void, "such a condition," the Court said, "is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable".[2] A compromise between parties to a dispute as to management of endowed property by a Shebait which provides

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93 *Mackender* v. *Feldia A.G.* (1966) 3 All E.R. 849.

94 *Mogul Steamship Co.* v. *McGregor Gow & Co.;* 1892 A.C. 25; (1891-94) All E.R. Rep. 263; *ESSO Petroleum* v. *Harpes Garage* (1967) 1 All E.R. 699, 707 (H.L.)

95 *Shaw* v. *Shaw* (1965) 1 W.L.R. 537.

96 (1960) 1 W.L.R. 357; (1959) 2 All E.R. 150.

97 *Thomas Brown & Sons Ltd.* v. *Fazal Deen* (1962) 108 C.L.R. 391; (1962) 36 A.L.J.R. 229, 236; *Bownmakers Ltd.* v. *Barnet Instruments Ltd.* (1945) 1 K.B. 65, 71 dist.

98 *Thomas Brown & Sons Ltd.* v. *Fazal Deen* (1962) 108 C.L.R. 391; (1962) 36 A.L.J.R. 229, 236.

99 *Ram Kripal* v. *MUnicipal Committee, Bilaspur,* 1963 A.MP. 240.

1 *Jogu Mohen Deb* v. *Davdoong Burman* (1908) 12 C.W.N. 94.

2 *Ram Sarp* v. *Bansi Mandar* (1915) 42 Cal. 742; 30 I.C. 955; *Sathish Chandra* v. *Kashi Sahu* (1918) 3 Pat. L.J. 412; 46 I.C. 418. In an English case, *Horwood* v. *Millar's Timber Co. Ltd.* (1917) 1 K.B. 305, the Court of Appeal treated as illegal an agreement, whereby a borrower bound himself never without the consent of the lender to change his employment or his residence, or to part with any of his property, or to incur any obligation legal or moral. They stigmatised the borrower's condition as one

for future succession without consultation of the family of the founder as provided in the deed of endowment is not illegal under s. 23 of the Contract Act as it does not cause injury to property of another.[3] For another instance of an agreement void under this head, see the adoption case cited in the notes to this section under the head "Rules of Hindu and Mahomedan Law," above.

Compromise between some partners.—In a suit for rendition of accounts every plaintiff is also a defendant and a defendant a plaintiff. Therefore unless there is a settlement between all the partners including the heirs of a deceased partner, there cannot be a lawful compromise under O.XXIII rule 3 C.P.C. particularly when it may prejudice the rights of parties not joining the compromise.[4]

In a case of a gift to a woman, the object of which was past cohabitation, the Rajasthan High Court held that the gift was valid as a gift was a transfer without consideration. The word object in S. 23 means purpose or design and past cohabitation even though adulterous cannot be an object of an agreement. In S.23 the object and not the motive of the parties has to be considered.[5]

In a Madras case a gift was made by the defendant to his concubine, the plaintiff for natural love and affection and the plaintiff resided in the gifted property for ten years. Later a release called rectification deed was executed by defendant for a consideration of Rs.50/- acknowledging the title of the plaintiff. The previous deed also recited that the plaintiff should continue to live with the defendant. This was held to be a gift and not an agreement for any immoral consideration. The motive was the past cohabitation and future cohabitation which was not intended to be a condition precedent.[6]

"Immoral."—This means "immoral" according to the standards of morality approved by the Courts and accordingly a settlement in consideration of concubinage was held to be void, notwithstanding that it was made by a member of a community among whom concubinage carried no stigma.[7] A gift to a permanent concubine motivated by a desire to compensate for past services is invalid;[8] qua coparcenery property

Immoral—whether sexual immorality.—The limitation on the word "immorality" imposed by the statute, namely, "the court regards it as immoral" shows that immorality is also a branch of the common law like the doctrine of public policy and, therefore, should be confined to the principles recognised and settled by Courts, which have confined the concept to sexual immorality.[9] The word 'immoral' is used in section 23 in a restricted sense and precedents confine it only to sexual immorality and a new head cannot be evolved to bring wagering within its fold.[10]

"Its (of immoral) juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what

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of slavery. But see *Anandiram* v. *Goza* (1918) 27 Cal.L.J. 459; 45 I.C. 965; where the Court was inclined to a different opinion, and dist. *Karuppannan* v. *Pambayan;* 1927 A.M. 531; 101 I.C. 39 (no penal interest); *Wallis* v. *Day* (1837) 2 M. & W. 273; 46 R.R. 602, decided only that a covenant to serve in a certain trade for life, and not exercise it otherwise, is not in itself in excessive restraint of trade. *Cp.* Pollock, Principles of Contract, 13th ed., 356.

3 *Harishankar* v. *Bishwanath* (1965) A.P. 33.

4 *Smt. Kiran Arora* v. *Ram Prakash Arora* (1980) A.D. 99, 102.

5 *Pyare Mohan* v. *Smt. Narayani* (1982) A. Raj, 43, 47; *Nagaratnamba* v. *Kunuku Ramayya* (1968) A.S.C. 253; (1968) 1 S.C.R. 43. followed.

6 *Saradambal Amma* v. *Natesa Mudaliar* (1972) 1 Mad. L.J. 244, 253; *Ram Sarup* v. *Bella* 11 I.A. 44; 6 All. 313 (P.C.) folld. *Thayarama* v. *Sitaramaswami,* 23 Mad. 613 disting.

7 *Subava Yellappa* v. *Yamanappa Sabu,* 1933 A.B. 209; 35 Bom. L.R. 345. Mulla's definition of immorality (in 7th Ed. p. 152) applied in *Gherulal* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 405, 415; (1959) A.SC. 781.

8 *Nagaratnamba* v. *Ramayya* (1968) A.SC. 253; *Manicka* v. *Muniammal* (1968) A.M. 392 (a promissory note in favour of a married woman with whom the promissor had an adulterous connection) referring to *Marakkal* v. *Chinnana* (1958) 71 Mad. L.W. (S.N.) 137.

9 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 446; (1959) A.S.C. 781.

10 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781, 797. See also Anson: Law of Contract (22nd Ed.) 320.

is immoral may be against public policy, for public policy covers political, social and economic ground of objection."[11]

"Although it has sometimes been said that contracts *contra bonos mores* are void, the only aspect of immorality with which Courts of Law have actually dealt is sexual immorality;..."[12]

The contention that wagering contracts are illegal under Hindu law or such contracts are immoral according to Hindu law doctrine of pious obligation of sons to discharge the father's debts was held unsustainable in law and negatived by the Supreme Court.[13] Mulla's definition of Immorality page 152 (1944 ed.) was applied in *Gherulal* v. *Mahadeodas.*[14] The case-law both in England and India confines the operation of immorality to sexual immorality. The word "immoral" is very comprehensive and it may be said that what is repugnant to good conscience is immoral.

"Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose."[11]

A landlord cannot recover the rent of lodging knowingly let to a prostitute who carries on her vocation there.[15] Otherwise, if the landlord did not know that the lodgings where required for prostitution.[16] Similarly, money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered.[17] Likewise money advanced by the plaintiff to the defendant to enable the defendant to continue cohabitation with a dancing girl cannot be recovered.[18] Ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back.[19] On this last point, the English Courts adopt a different attitude, holding that property loaned, hired or pledged for an immoral purpose can be recovered by the owner, provided that he can establish his title otherwise than through the medium of the illegal transaction. In *Bowmakers Ltd.* v. *Barnet Instruments,* Du Parcq L.J., delivering the judgement of the Court of Appeal, having emphasised that *prima facie* a man is entitled to his own property, stated the law as follows:

"In our opinion a man's right to possess his own chattels will as a general rule be enforced as against one who, without any claim of right, is detaining them or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, or is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim".[20]

An old case where the plaintiff could not recover as he was caught by the proviso is *Taylor* v. *Chester.*[21] *P* pledged half a banknote with *D* as security for money advanced to be

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11 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 446; (1959) A.S.C. 781.

12 Anson's Law of Contracts, 22nd Ed., p. 320.

13 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781; *The State of Bombay* v. *R.M.D. Chamarbaughwala* (1957) S.C.R. 874; (1957) A.S.C. 699 considered.

14 (1959) Supp. 2 S.C.R. 406, 415; (1959) A.S.C. 781.

15 *Gaurinath Mookerjee* v. *Madhumani Peshakar* (1872) 9 B.L.R. App. 37; *Pirthi Mal* v. *Mussammat Bhagan* (1898) Punj. Rec. No. 2; *Brinkman* v. *Abdul Ghafur* (1904) Punj. Rec. No. 65; *Bani Mancharam* v. *Regina Stanger* (1907) 32 Bom. 581, at pp. 586 *et seq.; Choga Lal* v. *Piyari* (1908) 31 All. 58. There is an English decision that the rent of a flat let to a woman, who to the landlord's knowledge would use the premises to receive visits from her paramour, cannot be recovered: *Upfill* v. *Wright* (1911) 1 K.B. 506. The award of mesne profits in ejectment in *Mariam Begum* v. *Mungi* (1928) 113 I.C. 366; 1928 A.S. 173, is unintelligible as reported.

16 *Sultan* v. *Nanu* (1877) Punj. Rec. No. 22.

17 *Bholi Baksh* v. *Gulia* (1876) Punj. Rec. No. 64; *Kali Kumari* v. *Mono Mohini,* 1935 A. Cal. 748; 160 I.C. 212; *Gangamma* v. *Kuppammal* (1938) Mad. 789; 183 I.C. 680; 1939 A.M. 139.

18 *Pannichand* v. *Nanoo Sanker* (1908) 18 Mad. L.J. 456.

19 *Alla Baksh* v. *Chunia* (1877) Punj. Rec. No. 26.

20 (1945) K.B. 65, 71. Criticised by Professor Hamson in 10 Camb. L.J. 249. Approved *obiter* by a Bench of the Nagpur High Court in *Haji Habib* v. *Bhikamchand,* A.I.R. 1954 Nag. 306, 314, 316, 318. *Obiter* because the proviso was applied. *Bowmakers* v. *Barnet Instruments* (1945) K.B. 65; (1944) 2 All E.R. 579; dist. in *Thomas Brown & Sons Ltd.* v. *Fazal Deen* (1962) 108 C.L.R. 391, 411; *Waman Shrinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 223; (1959) A.SC. 689. See *Gascoigne* v. *Gascoigne* (1918) 1 K.B. 223 (Plaintiff cannot maintain action by setting up his own fraudulent design); but see *Moody* v. *Cox & Hatt* (1917) Ch. 71 (C.A.).

21 (1869) L.R. 4 Q.B. 309, 38 L.J.Q.B. 225.

spent immorally in *D*'s brothel. If *P* pleaded his ownership, *D* could reply that the note was pledged with her. *P* could not plead payment, so that he had to rely on the illegality of the transaction, and could not recover. The Court indicated that if *P* could have made out his case without pleading the illegality he would have been entitled to judgment.[22] It is submitted that the decision would have been different had *D* never advanced the money. This was the position in *Bigos* v. *Bousted,* [23] and it seems that Bousted might have succeeded had he relied on his ownership of the share certificate, which he had deposited with Bigos in return for a promise to provide Bousted with Italian money, in Italy, in contravention of the currency control regulations. Bigos furnished no such money, but Bousted in suing to recover the share certificate, merely pleaded the rule that property handed over in consideration of an agreement which though illegal has remained executory, may be recovered back upon repudiation of the transaction.[24] The Court held against Bousted, as there was no repentance by him to bring him within the ambit of this rule, but he merely repudiated because Bigos would not do his part.[25] Had Bousted relied, however, on his title, it seems that he must have recovered, for if Bigos pleads the pledge, Bousted's reply is that no money was advanced, and it is Bigos who is left to raise the illegality of the transaction.[26] An assignment of a mortgage to a woman for future cohabitation is void, and it can be set aside at the instance of the assignor though partial effect may have been given to the illegal consideration.[27] And it has been held that money paid by a wife to a third person to be given as a bribe to a gaoler for procuring the release of her husband from gaol could not be recovered back on failure of the gaoler to procure the release.[28] Whether bribery is included in the word "immoral" was not decided by the Supreme Court in *Gulabchand* v. *Kudilal,*[29] but it was decided that it was otherwise covered by section 23. Therefore an agreement to sell 2½ annas share of managing agency by way of a bribe to plaintiff, a member of committee appointed to enquire into the affairs of a company, is illegal and not enforceable. For proving the allegations of bribery in a civil suit, the standard of proof is not the same as that in a criminal case.[30]

An agreement to pay maintenance for an illegitimate child is not illegal even though under Moslem Law there may *not* be any liability to maintain such children.[31]

An agreement to pay a commission or a consideration to a person to induce another to pay a substantially higher price for property worth much less was held by the Andhra Pradesh High Court to be immoral, within section 23 of the Contract Act. The court relied on illustration (j).[32] The two Supreme Court cases which have been discussed above, do not seem to have referred to this illustration. It is also significant that illustration (k) deals with sexual im-

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22 See also (1945) K.B. 65, 71. Note the misunderstanding of *Taylor* v. *Chester* in *Vilaiyat Hussain* v. *Misran* (1923) 45 All. 396, 399, where the Court remarks that where the plaintiff has to produce a document, the defendant may cross-examine him or issue interrogatories, and show that he is *in pari delicto*. But the whole point of *Taylor* v. *Chester* is that despite the illegality the plaintiff can recover, and will not be deemed to be *in pari delicto,* unless he has to *rely* upon the illegality of the transaction as an integral part of his case.

23 (1951) I All E.R. 92.

24 See *infra* s. 65.

25 Note that in India, Bousted could recover under this head, as the illegal purpose has failed, and in India the cause of the failure is irrelevant: *Tirupathi* v. *Lakshmana,* 1953 A.M. 545, 547 (doubting *Bigos* v. *Bousted* on this point); *Petheperumal* v. *Muniandi Servai* (1908) 35 Cal. 551, 559 (P.C.); s. 84, Indian Trusts Act.

26 See also Paton on Bailment, 35-6.

27 *Thasi Muthukannu* v. *Shunmugavelu* (1905) 28 Mad. 413; *Kandaswami* v. *Narayanaswami* (1923) 45 Mad. L.J. 551; 76 I.C. 306. See also *Alice Mary Hill* v. *William Clark* (1905) 27 All. 266, and *Mussammat Roshun* v. *Muhammad* (1887) Punj. Rec. No. 46; *Ghuma* v. *Ram Chandra Rao* (a flagrant example); 1925 A.A. 437; 88 I.C. 411; and note that agreements of this class are wholly void, not merely voidable. All these cases are quite plain on the principles of English law.

28 *Protima Aurat* v. *Dukhia Sirkar* (1872) 9 B.L.R. App. 38.

29 (1966) A.S.C. 1734, 1738.

30 *Gulabchand* v. *Kudilal* (1966) A.S.C. 1734 *Cf. Gherulal Parekh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781. 797.

31 *Sukha* v. *Ninni* (1966) A. Raj. 163; *Khwaja Muhammad Khan* v. *Hussaini Begum,* 37 I.A. 152; 32 All. 410 refd. to.

32 *Narayana Rao* v. *Ramchandra Rao* (1959) A.A.P. 370, 377; *Shiv Saran* v. *Kesho Prasad* (1917) A.P. 92 diss. from.

morality—an agreement to let a daughter for concubinage.[33] Similarly, where the plaintiff advanced moneys to the defendant, a married woman, to enable her to obtain a divorce from her husband, and the defendant agreed to marry him as soon as she could obtain a divorce, it was held that the plaintiff was not entitled to recover back the amount, as the agreement had for its object the divorce of the defendant from her husband, and the promise of marriage given under such circumstances was *contra bonos mores*.[34] An agreement to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced. Such an agreement may be for giving true evidence, and then there is no consideration, for "the performance of a legal duty is no consideration for a promise"; or it may be for giving favourable evidence either true or false, and then the consideration is vicious.[35] There is nothing in this decision, or in the reasons for it, to invalidate an expert's claim for services rendered in the way of professional investigation, though he may afterwards become a witness for his employer in a litigation arising out of the same facts.

Under the Common Law of England, and presumably under any monogamous law of marriage in a jurisdiction where promises of marriage are actionable, an agreement between a married man and a woman who knows him to be married to marry one another after the wife's death is void as being contrary to morality and public policy.[36] But a promise to marry after a decree *nisi* has been pronounced in divorce proceedings, but before decree absolute, has been held by the House of Lords, after a review of all the authorities on the subject of public policy, not to be void on the ground that after the decree *nisi* nothing but the shell of the marriage was left and the further period of waiting until the decree is made absolute is imposed in the public interest in order to secure full disclosure before the Court.[37]

A loan made for the purpose of teaching singing to *naikins* (dancing girls) has nothing immoral in its object, for although it might be true that most of the *naikins* who sing lead a loose life, singing is a distinct mode of obtaining a livelihood, not necessarily connected with prostitution.[38] And it has been held by the High Court of Allahabad that a suit will lie for arrears of allowance agreed to be paid to a woman for past cohabitation.[39] The Court observed:

"Such a consideration, if consideration it can properly be called, which seems to us more than doubtful, would not be immoral so as to render the contract *de facto* void, but we think the more correct view is to regard the promise to pay the allowance as an undertaking on the part of Bikramajit Singh to compensate the woman for past services voluntarily rendered to him for which no consideration as defined in the Contract Act would be necessary."

It would seem that the High Court thought the case was covered by s. 25(2) of the Act, though the section is not specially referred to. But it is submitted that a consideration which is immoral at the time, and, therefore, would not support an immediate promise to pay for it, does not become innocent by being past; and this is the view lately taken in *Husseinali* v. *Din-*

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33 *Gulabchand* v. *Kudilal* (1966) A.SC. 1734; *Gherulal Parekh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; 1959 A.SC. 781.

34 *Bai Vijli* v. *Nansa Nagar* (1885) 10 Bom. 152; *Mussammat Roshun* v. *Muhammad* (1887) Punj. Rec. No. 46.

35 *Sashannath Chetti* v. *Ramasamy Chetty* (1868) 4 M.H.C. 7; *Collins* v. *Godefroy* (1831) 1 B. & Ad. 950.

36 *Wilson* v. *Carnley* (1908) 1 K.B. 729. C.A., confirming *Spiers* v. *Hunt, ib.* 720. It seems to be still good law that a promise of marriage made by a person who is married and conceals the fact from the promisee is actionable at the suit of the innocent promisee on the ground of the promisor's implied warranty that he can lawfully make and perform the promise: *Milward* v. *Littlewood* (1850) 5 Ex. 775; 82 R.R. 871. Followed by the Court of Apeal in *Shaw* v. *S.* (1954) 3 W.L.R. 265. In *Siveyer* v. *Allison* (1935) 2 K.B. 403. Greaves-Lord J. had expressed *obiter* a contrary opinion. This, however, may be of little importance in India.

37 *Fender* v. *St. John Mildmay* (1938) A.C. 1.

38 *Khubchand* v. *Beram* (1888) 13 Bom. 150.

39 *Dhiraj Kaur* v. *Bikramajit Singh* (1881) 3 All. 787. See also *Man Kaur* v. *Jasodha Kaur* (1877) 1 All. 478. Both these cases were referred to in *Lakshminarayana* v. *Subhadri Ammal* (1903) 13 Mad. L.J.7, where Bhashyam Aiyangar J. said that though it was not necessary to decide whether the view taken in those cases was correct, he did not express any dissent from it; *Kothandapani* v. *Dhanammal,* 1943 A.M. 253; (1943) 1 Mad. L.J. 56.

bai[40] again, in *Kisondas* v. *Dhondu,*[41] it was held that past cohabitation is not good consideration for a transfer of property. These cases were considered by the Patna High Court where a person had agreed to pay a maintenance allowance to his discarded mistress. Courtney Terrell,. C.J. observed that a contract to enter into the relationship of protector and mistress was undoubtedly immoral and unenforceable in law; but the case of a contract to compensate a woman for what she had lost on account of past association with the promisor was not immoral.[42] The English view of such cases is that the alleged consideration is bad simply as being a past consideration not within any of the exceptional rules (so far as such exceptions really exist) allowing past consideration, under certain conditions, to be good. In a later case the same High Court held that, adultery in India being an offence against the criminal law, cohabitation *past* or future, if *adulterous,* is not merely an immoral but an illegal consideration.[43] In an old Madras case.—[44]

the tenants of certain villages engaged the services of the defendant to advocate their cause with regard to assessments made upon the villages, and agreed to pay to him a sum of money subscribed amongst themselves if he succeeded in obtaining a more favourable assessment. A portion of the subscription amount was paid to him in advance, and it was agreed that if he failed in his work he should repay the amount.

In a suit to recover the amount paid to the defendant on the ground that he had failed to perform his part of the contract, it was held that the plaintiffs were entitled to succeed, and that the agreement was not vitiated by illegality. The Court observed:

"The point, then, for consideration is, did the defendant for that purpose undertake, in consideration of the stipulated sum, to induce by corrupt or illegal means, or by the exercise or personal influence, any public servant to do an official act or show any favour? If he did not, the contract cannot be treated as illegal; and we are of opinion that the written agreement does not properly admit of such a construction."

Here the principle was applied (see notes in this section under "unlawful objects," above) that, where it is possible to perform an agreement by lawful means according to its terms, an unlawful intention will not be presumed, and any party alleging such an intention must prove it.

Where money is given to an agent for an illegal contract that amount cannot be recovered by the Principal because what the party himself cannot do, cannot be done through the agent,[45] but betting losses paid by him can be recovered.[46]

Public Policy.—The principle of public policy is this: *ex dolo malo non oritur actio.* Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. Public policy comprehends only the protection and promotion of public welfare. Based on this definition, the Allahabad High Court has held that public policy is that principle of law under which freedom for contract or private dealings are restricted by law for the good of the community. The very meaning of public policy is the interest of persons other than the parties.[47] No court will lend its aid

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40 (1923) 25 Bom L.R. 252; 86 I.C.240; 1924 A.B. 135.

41 (1920) 44 Bom. 542; 57 I.C. 472; *Sabava Yellappa* v. *Yamanappa Sabu,* 1933 A.B. 209; 35 Bom L.R. 345; *Istak Kamu* v. *Ranchod Zipru* (1947) Bom. 206, 1947 A.B. 198, 48 Bom. L.R. 775; *Lilu Ram* v. *Mst. Ram Piyari,* 1952 A. Punj. 293.

42 *Godfrey* v. *Mst. Parbati* (1938) 17 Pat. 308; 178 I.C. 574; 1938 A.P. 502. The distinction may nevertheless be sometimes difficult to draw.

43 *Alice Mary Hill* v. *William Clark* (1905) 27 All. 266. Distinguished in *Rama Rao* v. *Jayamma,* 1953 A.Mys. 33, on the ground that in 27 All. 266 future cohabitation was part of the agreement *Sed qu.* An English case, *Re Wootton Isaacson* (1904) 21 T.L.R. 89. was followed, where the agreement was by deed, and it was held not to be invalidated by the contemplation of future cohabitation but in England adultery is not a crime.

44 *Pichakutty Mudali* v. *Narayanappa* (1864) 2 M.H.C. 243.

45 *Babulal S. Shah* v. *South Satara Merchants Association* (1960) A.B. 548; *Harry Parker Ltd.* v. *Mason* (1940) 4 All E.R. 199; *Krishna Rao* v. *Kodandarama* (1960) A.AP. 190 (Supply of Chillies).

46 *Gherulal Parakh* v. *Mahadevdas* (1959) Supp. 2 S.C.R. 406; (1959) A.SC. 781, 791; *Pringle* v. *Jaffar Khan,* 5 All. 443 approved.

47 *Suresh Chand* v. *Hari Ram & Others* (1976) All. L.J. 465, 469.

to a man who founds his cause of action upon an immoral or an illegal act. If the cause of action.appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted.[48] But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say, a purpose that is illegal, immoral or contrary to public policy... In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the court will not lend its help to such a plaintiff.[49] The consequence of the maxim *ex turpi causa non oritur actio* is that "the Court drives both parties from its presence: *procul este, profani?* No judgment will be given and no order made as to costs. The maxim is in accordance with the doctrine of Civil Law.[50] The adjective *turpis* is thus expanded to cover the three characteristics: (1) illegal, (2) immoral and (3) contrary to public policy. The classic case of *Pearce* v. *Brooks*[51] is the obvious instance of immorality; and when the purpose of the agreement, or the intended use of its subject-matter, is the commission of a crime or the doing of some prohibited act (for example, the infringement of the customs law), the principle is no less obviously invoked on grounds both of illegality and of public policy. The principle no doubt extends further. In *Alexander* v. *Rayson*[52] itself the proved purpose of the plaintiff was to use the instruments, which he entered into with the defendant, in order to deceive and cheat (as he did) the local rating authority: and in *Berg* v. *Sadler and Moore*[53] the plaintiff was shown to have been engaged upon an enterprise of deliberate deception which amounted to a 'false pretence.[54]

This Maxim as applied in India was stated thus by the Supreme Court in *Kedar Nath Motani* v. *Prahlad Rai*.[55]

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiffs conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."[56]

Ex turpi causa not applicable.—*Kedar Nath's case* was this:

A benami settlement by the manager of a Court of Wards without the consent of the Court of Wards as required by the terms of the lease was made known to the Court of Wards but it did not resume the lands. It was also found that fraud though it might have been intended was not perpetrated and the *locus penitentine* was duly used before the expiry of the lease, the illegality was of a trivial character and the plaintiff was not required to prove the illegality as a part of the cause of action, and the benami nature of the transaction had been proved.[57]

In such circumstances the plaintiff cannot be deprived of a judgment against the benamidars.

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48 Lord Mansfield C.J. in *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343 quoted in *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.* (1957) 3 W.L.R. 403, 415, 416; *Harry Parker Ltd.* v. *Mason* (1940) 4 All E.R. 199, 202: refd. to in *Nair Service Society* v. *K.C. Alexander* (1968) A. SC. 1165. 1176; *Kedar Nath* v. *Prahlad Rai* (1960) 1 S.C.R. 861; (1960) A.SC. 213, 217. See also *Waman Shrinivas Kini* v. *Ratilal* (1959) Supp. 2 S.C.R. 217, 226; (1959) A.SC. 689; *Sh. Umar Shivdan Singh* (1958) A.MP. 88; *Kamla Sugar Mills* v. *Ganga Bishan Bhajan Singh* (1978) A.M. 178, 184.

49 *Alexander* v. *Rayson* (1936) 1 K.B. 169, 182; *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton Ltd.* (1957) 3 Weekly Law Reports, 403, 417; *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343.

50 *Harry Parker Ltd.* v. *Mason* (1940) 4 All E.R. 199, 202; D. 2, 14, 27; 1. 3, 20, 24.

51 (1866) L.R. 1 Ex. 213.

52 (1936) 1 K.B. 169.

53 (1937) 2 K.B. 158; 53 T.L.R. 430; (1937) 1 All E.R. 637.

54 (1957) 3 W.L.R. 418-419.

55 *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 873; (1960) A.S.C. 213, 218.

56 Ibid, 873; 218 (A.I.R.); *Bowmakers Ltd.* v. *Barnett Instruments Ltd.* (1945) 1 K.B. 65; & *Bigos* v. *Bousted* (1951) 1 All E.R. 92 refd. to; Hamson: (1949) 10 Camb. L.J. 249 considered.

57 *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 873; (1960) A.S.C. 213, 218.

"The authorities do not go to that length because public policy demands that where fraud might have been contemplated but was not perpetrated, the defendant should not be allowed to perpetrate a new fraud."[58]

In an earlier case, the doctrine of public policy was summarised by the Supreme Court thus:[59]

"Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy."

The doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.[60] The Court is not a legislator; it cannot initiate the principle; it can only state or formulate it if it already exists.[61] Commenting on this the Andhra Pradesh High Court in *Rattanchand Hirachand* v. *Askar Nawaz Jung*[62] has said—

".....in a modern progressive Society with fast changing social values and concepts it becomes more and more imperative to evolve new heads of public policy.... law cannot afford to remain static...."

It applied the judgment of the Court of Appeal's observations in *Nagle* v. *Fielden*[63] where it was said—

"The law relating to public policy cannot remain immutable. It must change with passage of time. The wind of change blows upon it."

Reference was also made to Prof. Winfield[64] according to whom public policy is "a principle of judicial legislation or interpretation founded on the current needs of the community" Hence it was necessarily variable.

The duty of the Court is to expound and not expand public policy and the doctrine should be involved only in clear cases, in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.[65] In *Gherulal* v. *Mahadeodas,*[66] one of the questions raised was that the contracts in dispute were illegal under Hindu law and immoral because of the doctrine of pious obligation of the sons to discharge the fathers debts. It was held that tenets of Hindu law could not be imported to give a novel content to the doctrine of public policy in respect of contracts of gaming and wagering. In *Sreenivasa Rao* v. *Rama Mohana Rao,*[67] Subba Rao J. (as he then was) quoted with approval the following from the 7th Edition of this book[57] (p. 179 of 8th ed.):

"It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy;[68] it has even been said in the

58 Ibid., p.869; 213 (A.I.R.).
59 *Gherulal Parekh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 439; (1959) A.SC. 781, 795; *Wilkinson* v. *Osburne* (1915) 21 C.L.R. 89, 97.
60 Ibid.
61 *Wilkinson* v. *Osburne* (1915) 21 C.L.R. 89, 97; *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484 (Lord Halsbury).
62 (1976) A.AP. 112, 117.
63 (1966) 2 All E.R. 633, 650.
64 Public Policy—The English Common Law (1928) 42 H.L.R. 76. See Public Policy not Immutable, *Infra.*
65 *Fender* v. *Mildmay* (1938) A.C. 1; (1937) 3 All E.R. 402; *Janson* v. *Driefontein Consolidated Mines Ltd.* (1902) A.C. 484.
66 *Gherulal* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 444; (1959) A SC. 781.
67 (1952) A.M. 579, 582. This is at p. 179 of 8th Ed.
68 Lord Halsbury *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, 491. See also *Shrinivasadas Lakshminarayan* v. *Ramchandra Ramrattandas* (1919) 44 Bom. 6; 52 I.C. 546; *Vassandmal Davaldas* v. *Hiromal* (1946) Kar. 380, 227 I.C. 633, A.I.R. 1947 Sind 94; *Fender* v. *Mildmay* (1938) A.C. 1; (1937) 3 All E.R. 402, 407; *Dip Narain Singh* v. *Nageshar Prasad,* 52 All. 338; (1930) A.A. 1 (F.B.) at p. 3. (Scope cannot be widened.)

House of Lords that "public policy is always an unsafe and treacherous ground for legal decision".[69] This does not affect the application of the doctrine of public policy to new cases within its recognised bounds;[70] but the test is always whether the enforcement of the impugned contract leads, or is likely to lead, to injurious action."

The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void.[71]

"Opposed to public policy."—The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. Some of these matters are separately dealt with in the Contract Act (see ss. 26 and 27, below).

Breach of Revenue Law.—A Claim in the case of an insurance against loss including theft of various articles was held unsustainable as the articles included various articles smuggled by the plaintiff without paying duty. It was held that the insurance was not tainted with illegality would be contrary to public policy to help the plaintiff to make good the loss because to do so would be help him to benefit from his infringement of the law.[72]

Public Policy not immutable.—The law relating to public policy must change with the passage of time, it cannot remain immutable.[73] It is to be judged by dominant opinion or what is termed customary morality.[74] The law of maintenance depends upon the question of public policy and public policy is not a fixed and immutable matter. It is conception which if it has any sense at all, must be alterable by the passage of time.[75] A person protected under s. 30 of the Pakistan Displaced Persons (Compensation & Rehabilitation) Act cannot lawfully contract out of the protection as that would be void against public policy.[76] "You must have a general rule, a general tendency to wrong, to which there may be exceptions; but if the contract has to be applied to an act of social or other relations in which there will be generally no tendency to do wrong, though there may be exceptions, the contract will not be avoided".[77] Money promised to two members of the Legislative Assembly who were also carrying on the business of law agents to urge the Government to close a deal of purchase of land as early as possible is an illegal promise and such a bargain cannot stand because "it would encourage those who are appointed to be sentinels of the public welfare to become sappers and miners of the Constitution" which the Court would not hesitate to denounce in the most positive terms.[78]

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69 Lord Davey (1902) A.C. 484 at p. 500; Lord Lindley at p. 507, in very similar words, cited in *Govind* v. *Pacheco* (1902) 4 Bom.L.R. 948.

70 See *Wilson* v. *Carnley* (1908) 1 K.B. 729; *Parduman Chand* v. *Kashmira Singh*, A.I.R. 1943 Lah. 100; *Ranjeetsingh* v. *Ramlal*, A.I.R. 1951 M.B. 113.

71 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 440; 1959 A.SC. 781, 795, 797; *Thacker* v. *Hardy* (1878) 4 Q.B. 685; *Hyams* v. *Stuart King* (1908) 2 K.B. 696. But this was overruled in *Hill* v. *(William) Hill (Park Lane) Ltd.* (1949) A.C. 530; (1959) 2 All E.R. 452, holding that the action was to recover money "won upon a wager."

72 *Geismer* v. *Sun Alliance & London Insurance Ltd.* (1978) Q.B. 383.

73 Per Danckwerts L.J. in *Nagle* v. *Feilden* (1966) 2 W.L.R. 1027, 1037 (discrimination against women). *Kamla Sugar Mills* v. *Ganga Bishan Bhajan Singh* (1978) A.M. 178, 183. *Anand Prakash Om Prakash* v. *Oswal Trading Co.* (1976) A.D. 24, 27.

74 *Associated Cement Co. Ltd.* v. *State of Rajasthan* (1981) A.Raj. 133, 137.

75 *Martell* v. *Consett Iron Co.* (1955) Ch. 363; (1954) 3 All E.R. 339 (Law of maintenance); appd. in *Hill* v. *Archbold* (1967) 2 W.L.R. 1218, 1225, 1227.

76 *E.A. Evans* v. *Muhammad Ashraf*, PLD (1964) 1 S.C. 536 (Pak.).

77 *Fender* v. *St. John Mildmay* 1938 A.C. 1.

78 *Wilkinson* v. *Osborne* (1915) 21 C.L.R. 89; *Gulabchand* v. *Kudilal* (1966) A.S.C. 1734 (bribing a committee of investigation was held illegal but question of immorality not decided). *Narayana Rao* v. *Ramachandra Rao* (1959) A.A.P. 370, 377 (immoral). *Amresh Chandra* v. *Kalyanmal Dharam Narain* (1972) A.A. 130 (A case of bribe to an M.L.A. for getting a Government agency); *Debenham* v. *Ox* (1749)1 Ves. Sen. 276; *Higgins* v. *Hill* 56 L.T. 426 (to use undue influences to get a legacy); *Ratanchand Hirachand* v. *Askar Nawaz Jung* (1976) A.AP. 112, 120; (to use influence with ministers

An agreement with the State Government by which it was to keep certain area—of the company—out of municipal bounds or limits was held unenforceable as being opposed to public policy and is inconsistent with the constitutional provision in Art. 40 read with item 5 of List II in Sch. VII.[79] Quere:- Would not the doctrine of promissory estoppel apply to such a case?

If *B*, as agent or trustee of *A*, is paid money by *C*, which is pursuant to an illegal contract between *A* and *C*, *A* can recover that money from *B* even though he could not have recovered from *C*. That is because public policy requires that rule of *ex turpis causa* shall be excluded by the more important and imperative rule that agents and trustees must faithfully perform the duties of their office.[80]

A defendant Association acting as a clearing house received on behalf of plaintiff, one of its members, a sum of money on account of turmeric transactions which he entered into with another co-member. Such transactions were prohibited by law and were illegal.

It was held to be liable to pay the amount to the plaintiff as an agent and the maxim *ex turpi causa* was held inapplicable.[81] No one can stipulate for inequity. This is based on the broad rule of public policy that no one can claim indemnity or reparation for his wilful and culpable crime. He is under a disability precluding him from imposing a claim. But this disability will not affect an injured third party.[82] Therefore, a security officer trying to stop a stolen van can claim damages if injured during the process.

There is no confidence as to the disclosure of inequity.[83] Therefore, the implied obligation of a servant not to disclose information or documents received in confidence does not extend to any misconduct of such a nature that it ought, in the public interest, be disclosed to one who had a proper interest to receive it, e.g. a national newspaper.[84]

"As a general rule, then, a contract cannot be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy—if it be either *contra bonos mores*, or forbidden by the law."[85]

Where goods were supplied by the seller to the buyer in black market and price to be paid was to consist of black money (unaccounted money) the transaction is not one hit by s. 23, (Contract Act) because it was a transaction involving purchase of goods against price being paid in cash, which in itself cannot be said to be opposed to public policy. The tainted part, the manner in which the contract was to be carried out by the parties, was severable.[86]

Public Policy—Sex discrimination.—The practice of refusing a trainer's licence to women might be void as contrary to public policy.[87] In *Nagle's case*

Mrs. Nagle a well-known race horse trainer, applied for a licence from the Jockey Club of England which was refused because of the practice of refusing to grant licences to females. This she challenged by action as being void against public policy.

The Court found that there was no contract. But under the rule of common law relief could be given against an unreasonable restraint upon an individual's right to work to which he has not agreed and which a group with no authority seeks capriciously to impose upon him and the practice of refusing trainer's licence to a woman might be void as contrary to public

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of Government); *N.V.P. Pandian* v. *M.M. Roy* (1979) A.M. 42, 46 (money paid to get a seat in a Medical College. Suit for refund not maintainable).

79 *Associated Cement Co. Ltd.* v. *State of Rajasthan* (1981) A. Raj. 133, 137; *Equitable Life Assurance Society of U.S.* v. *Reed* (1914) A.C. 587; *Maharaja Shree Lmaid Mills Ltd.* v. *Union of India* (1960) A. Raj. 92; *Rederiktiebolayet Amphituite* v. *The King* (1921) 3 K.B. 500. (Government cannot fetter its future executive of action. This is contrary to S.C. judgment in *M.P. Sugar Mills* v. *State of U.P.* (1979) A.SC. 621.

80 *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 871; (1960) A.SC. 213; quoting Salmond & William on Contract, page 352 (2nd Edn.) & Williston on Contract, Vol. VI, page 5069, para 1785, *Babulal S. Shah* v. *South Satara Merchants Association,* 1960 A.B. 548.

81 *Babulal S. Shah* v. *South Satara Merchants Association,* 1960 A.B. 548.

82 *Hardy* v. *Motor Insurers Bureau* (1964) 3 W.L.R. 433, 441 (Lord Denning M.R.).

83 *Gartside* v. *Outram* (1857) 26 L.J.Ch. 113, 114.

84 *Initial Services Ltd.* v. *Putterill* (1967) 3 W.L.R. 1032, 1037, 1038 (C.A.).

85 Per Lord Kenyon in *Kirkman* v. *Shawcross,* 6 T.R. 14, at p. 16.

86 *Anand Prakash Om Prakash* v. *Oswal Trading Co.* (1976) A.D. 24.

87 *Nagle* v. *Feilden* (1966) 2 W.L.R. 1027, 1034; (Had the Jockeys Club been a registered trade union.

policy.[88] The rule that the Courts will not interfere even if the Benchers of an Inn acted capriciously in refusing to admission to membership[89] may not longer be good law.[90]

It is against public policy for a married person while the marriage is intact to promise marriage to a third party but it is not against public policy if by a decree nisi there has already been an inchoate dissolution.[91]

Cases illustrative of Public Policy.—Any infringement of a clause in a contract with the Government prohibiting its assignment or sub-letting does not make the transaction taking partners as illegal on the ground of public policy.[92]

In a contract for the sale of jute bags at a price mentioned the port of delivery was Genoa (Italy). The sellers could not under the Law of India export without a licence but there was no condition precedent in the contract of seller's obtaining a quota or a licence for export. The sellers did not export and the dispute was referred to arbitration.

It was decided that there was no implied condition precedent of obtaining a quota and licence and there was no agreement express or implied that the sellers should export in contravention of the Law of India relating to quota and licence. Therefore, neither the agreement nor the award could be said to be against public policy.[93] To instigate the breach of a contract of service which amounts to serfdom and therefore against public policy is not actionable.[94] A partnership with a person holding a licence to deal in cloth with another person is illegal being opposed to public policy as the cloth control order is in furtherance of public policy and not merely for the protection of revenue. The licence is a personal privilege of the licence-holder which cannot be extended to others.[95] It would be contrary to public policy to refuse to assist an African to eject a non-African in illegal occupation of the African's land, even though, the African committed an illegality in permitting the non-African to enter on the land.[96]

An agreement the object of which is to use the influence with the Ministers of Government to obtain favourable decision is destructive of all sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial if persons intended to be influenced are not amenable to such recommendations (Montefoire's case).[97]

An export price fixed by another country—Pakistan—a breach of which according to Pakistan Law is contrary to public policy is not binding in India.[98] A condition in a laundry receipt that only half the price will be paid in case of loss of garments given to it for washing is opposed to public policy and is therefore void.[99] For an insurer to insist that the assured should be defended by a Solicitor appointed by the insurer is contrary to public policy.[1]

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the common law rule would not have been applicable: *Faramus* v. *Film Artistes Association* (1965) A.C. 941). *Rex* v. *Benchers of Lincoln Inn* (1825) 4 B. & C. 855, 107 E.R. 1277 (considered).

88 *Nagle* v. *Feilden* (1966) 2 W.L.R. 1027; (1966) 1 All E.R. 689. Quere—whether training of horses is a "vocation" within Sex Disqualification (Removal) Act, 1919.

89 *Rex* v. *The Benchers of Lincoln Inn* (1825) 4 B. & C. 855; 107 E.R. 1277.

90 *Nagle* v. *Feilden* (1966) 2 W.L.R. 1027, 1038; (1966) 1 All E.R. 689, 699.

91 *Psaltis* v. *Shultz* (1948) 76 C.L.R. 547, 561; *Fender* v. *St. John Mildmay* (1938) A.C. 1; (1937) 3 All E.R. 402 (H.L.) on app. agt.; (1936) 1 K.B. 111.

92 *Meikole* v. *Periasami* (1967) A.M. 449

93 *Pratabmull Rameshwar* v. *K.C. Sethia,* 1960 A. Cal. 702; 64 C.W.N. 616. See (1950) 1 All E.R. 61 (C.A.) & (1951) 2 All E.R. 352 (H.L.). See *Peter Cassidy Seed Co.* v. *Osuustukkuk-Auppa* (1957) 1 W.L.R. 273; & Brayer & Co. v. *James Clark Ltd.* (1952) 2 All. E.R. 497 reld. on.

94 *Sitaram Deokaram* v. *Baldev Jairam,* 1958 A.MP. 367; *South Wales Miners Federation* v. *Glamorgan Coal Co.* (1905) A.C. 259; (1904-7) All E.R. Rep. 211; & Lumley v. *Gye.* 118 E.R. 749 dist.

95 *Basayya* v. *Kotayya,* 1964 A.A.P. 145; *Velu Padayachi* v. *Sivasooriam,* 1950 A.M. 444 folld.

96 *Amar Singh* v. *Kulubya* (1963) 3 W.L.R. 513 (P.C.).

97 *Ratanchand Hirachand* v. *Askar Nawaz Jung* (1976) A.AP. 112, 120; *Montefoire* v. *Menday Motor Component Co. Ltd.* (1918) 2 K.B. 241 applied; *Hopkins* v. *Prescott* (1847)4 C.B. 573, 576; *N.V.P. Pandian* v. *M.M. Roy* (1979) A.M. 42, 46.

98 *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522, 529. But see *Tool Metal Co. Ltd.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 688 (reasonable price fixed at the instance of foreign concern not against public policy).

99 *Lily White* v. *Manuswami* (1966) A.M. 13.

1 *Barrett Bros. (Taxis) Ltd.* v. *Davies* (1966) 1 W.L.R. 1334; (1966) 2 All E.R. 972.

An agreement having two clauses one vesting in the sellers the right to accept or reject orders booked by their representatives and the other authorising that a higher price could be demanded by them under certain conditions cannot be held to be void as opposed to public policy.[2]

Agreement by a wife not to claim any maintenance in consideration of a lump sum payment by the husband is not opposed to public policy.[3]

Where the consideration for a promise is an existing contractual duty to a third party which is otherwise a valid consideration, it is not invalidated as being against public policy in the absence of proof of duress merely because the promise had been secured by a threat to repudiate the existing contract or by unfair use of a dominating bargaining position. Where businessmen are negotiating at arms' length it is unnecessary for the achievement of justice to invoke the principle, for what justice required is that a businessman be held to his bargain unless his consent to it could be shown to have been vitiated by fraud, mistake or duress.[4]

Public Interest.—A Royalty Collection Contract under R. 34 of Rajasthan Mineral Rules cannot be terminated on the ground of "public interest" under condition 16 of the contract without showing a nexus between "public interest" and such termination which is justiciable. The ground that the State is losing lakhs in revenue is not such interest and the termination is not valid.[5]

Where a Royalty Collection contract is terminated and the breach is alleged on the ground of there being no nexus between the termination and "public interest", the mere large profits made by the contractor is not such "public interest", the contractor can sue for damages for the unexpired period and accounts for the unexpired period.[6]

Tenancy—Breach of law and contract.—There is a difference between a case where the plaintiff seeks the assistance of the Court to evict a tenant guilty of a breach of a provision of law and a case where the plaintiff seeks to enforce an agreement the object of which is to do an illegal act. The former is enforceable and the latter is not.

The defendant cannot be permitted to plead an agreement to sublet which is contrary to the provisions of a Statute as this would be opposed to public policy; and if public policy demands it even an equal participant in an illegality may be allowed relief by way of restitution or recession though not on the contract.[7] A Statutory provision cannot be struck down on the ground of being opposed to public policy.[8]

Agreements tending to injure public service are illegal and void as being opposed to public policy.[9] To abridge the rights of a landlord as given in the Rent Acts is not opposed to public policy.[10] An agreement imposing restrictions on a borrower which reduces him to the position of a slave is against public policy.[11]

Public policy.—In *Hyman* v. *Hyman*[12] there was a covenant in the separation deed providing that the wife would not apply to the Divorce Court for maintenance and it was held that it was void as being contrary to public policy. On the basis of this it was argued in a later case that a wife's covenant not to invoke the jurisdiction of the Divorce Court in respect of

2 *Kamla Sugar Mills* v. *Ganga Bishen Bhajan Singh* (1978) A.M. 178, 184.
3 *Muniammal* v. *Raja* (1978) A.M. 103, 108. *Muhammad Moinuddin* v. *Jamal Fatima* 43 All. 650; (1921) A.A. 152 reld. on.
4 *Pao On* v. *Lau Yiu* (1979) 3 All E.R. 65, 77-78. American Law as stated in Corbin on Contract (1963 Ed) Vol. 1A, Chap. 7. s. 171 commented on.
5 *Pusha Ram* v. *Modern Construction Co.* (1981) A. Raj. 47; *Varlagadda China Rattaya* v. *Donepuddi Venkataramayya* (1959) A.AP. 551 reld. on; *Juggilal Padampat* v. *Pratapmal Rameshwar* (1978) A. SC. 389 refd. to. (1978) 2 SCR 219.
6 *Pusha Ram* v. *Modern Construction Co.* (1981) A. Raj. 47.
7 *Waman Srinivas Kini* v. *Ratilal & Co.* (1959) A.S.C. 689; (1959) Supp. 2 S.C.R. 217.
8 *Suddha* v. *Sankappa Rai,* 1963 A. Mys. 245.
9 *Venkatareddi* v. *Venkatachallam* (1964) A.A P. 465.
10 *Raja Chetty* v. *Jagannathadas* (1950) A.M. 284.
11 *Horwood* v. *Millar's Timber & Trading Co.* (1917) 1 K.B. 305. See also: *A. Schroeder Music Publishing Co. Ltd.* v. *Macaulay* (1974) 3 All E.R. 616; (1974) 1 W.L.R. 1308.
12 1929 A.C. 601; (1929) All E.R. Rep. 245.

maintenance for the child and herself was wholly void.[13] But it was held that the covenant ousting the jurisdiction of the Court was void but the rest of the agreement could be enforced.

Doing a useless and unnecessary thing—Waiver.—Law does not compel a person to do that which is useless and unnecessary.[14] A condition in an insurance policy that the insured shall as soon as possible give to the insurer full particulars of an accident and immediately forward any notice of intended prosecution is no bar to a claim for compensation by the insured if notice of accident is given to the insurer by the Solicitor of the other party to the accident and information about intended prosecution is given by the police.[15] Even if the insurers were entitled according to conditions of a policy to conduct the defence in case of an accident, it was against public policy to compel the insured to be so defended and he was entitled to have a Solicitor of his choice. If the insurer, in enquiring of an insured why he had not notified him of the intended prosecution, did not demand the notice by the police, the insurer was held to have waived the condition requiring the notice to be forwarded.[15]

In Pari Delicto.—The onus to prove a transaction to be *benami* is on the person who alleges it.[16] The maxims *"in pari delicto"* and *"ex dolo malo"* and *"in turpi causa"* are all allied; similarly operative and are convergent, the focal point being the refusal to lend assistance of the Court to enforce illegal or immoral transactions. The true meaning of the maxim *"in pari delicto potior est conditio posidentis"* is that where the circumstances are such that the Court will refuse to assist either party, the consequence must, in fact, follow that the party in possession should not be disturbed. It must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them.[17] The maxims *"in pari delicto"* and *"ex dolo malo non oritur actio"* are limited in their application. They apply to illegal or immoral transaction or those opposed to public policy.[18] No person can found a cause of action upon his illegal or immoral act.[19] The Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to the agreement or fraud: *"in pari delicto potier est conditio defedentis"*,[20] e.g. money paid to a charitable institution on a promise that the Secretary will secure the plaintiff a kinghthood which never materialised.[21] But there are exceptional cases where a man will be relieved of the consequences of an illegal contract.[22] They are:

(a) Where the illegal purpose has not yet been substantially carried out before it is sought to recover the money paid or goods delivered in furtherance of it;
(b) where the plaintiff is not *in pari delicto* with the defendant;
(c) where the plaintiff has not to rely upon the illegality to make out his claim.

Where parties are not *in pari delicto* the less guilty party may be able to recover money paid or property transferred under the contract. This possibility may arise in three situations[22]:

First, the contract may be of a kind made illegal by Statute in the interests of a particular class of persons of whom the plaintiff is one.[23]

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13 *Bennett* v. *Bennet* (1952) 1 K.B. 249, (1952) 1 All ER 413.
14 *Barrett Bros. (Taxis) Ltd.* v. *Davies* (1966) 1 W.L.R. 1334; *Plasticmonde Societe Per Azioni* v. *Davidson (Manchester) Ltd.* (1952) 1 L 1. Rep. 527, 539 (per Lord Denning M.R.) reld. on.
15 *Barrett Bros. (Taxis) Ltd.* v. *Davies* (1966) 1 W.L.R. 1334 (C.A.).
16 *Surasaibalini* v. *Phanindra Mohan* (1965) 1 S.C.R. 861; (1965) A.S.C. 1364, 1372.
17 *Waman Shriniwas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 223; (1959) A.S.C. 689.
18 *Sk. Umar* v. *Shivdan Singh* (1953) A.M.P. 88.
19 *Shaw* v. *Shaw* (1965) 1 W.L.R. 537, 539; *Berg* v. *Sadler & Moore* (1937) 2 K.B. 158; (1937) 1 All E.R. 637 (C.A.); *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C 294; (1962) 2 W.L.R. 548; (1962) 1 All E.R. 494 P.C.
20 *Sita Ram* v. *Radhabai* (1968) A.SC. 534; *Kunju Collieries* v. *Jharkhand Mine* (1974) A.S.C. 1892 (a suit for refund of money paid for a mining lease illegally given to plaintiff); *N.V.P.Pandian* v. *M.M. Roy* (1974) A.M. 42, 47 (money paid to get admission into a Medical College. Both parties equally guilty).
21 *Parkinson* v. *College of Ambulance Ltd.* (1925) 2 K.B. 1. See Grodecki (1955) 71 L.Q.R. 254.
22 *Sita Ram* v. *Radhabai* (1968) A.S.C. 534, 537, Shah, J. quoting Anson: Law of Contracts (22nd Edn.) page 343.
23 *Gray* v. *Southouse* (1949) 2 All E.R. 1019 (Recovery of illegal premium); *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192, 204 (Recovery of premium paid to secure a tenancy).

Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure.[24]

Thirdly, a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property or to refuse to account for moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction.[25] where the plaintiff Society, was only a financier, the management being in the hands of the defendant firm through Budh Ram, it was entitled to ask for accounts, the relationship between the parties being that the defendant firm stood in fiduciary relationship to the plaintiff Society.[26] No claim founded on illegal contract will be enforced by the Court but as a general rule, a man's right to possession of his own property will be enforced against one who, without any claim, is in possession thereof provided the plaintiff does not found his claim on an illegal contract or has to plead its illegality in order to support his claim.[27] The plaintiff sent money from Malayasia to the defendant through non official channels in contravention of the Foreign Exchange Act. The money was used by the defendant to erect a rice mill for the plaintiff on a plot of land also purchased with that money. The plaintiff on return to India obtained a licence for the mill and took possession and was in possession but the defendant took possession in the absence of the plaintiff of the mill and the account books there. A suit by the plaintiff for declaration of ownership and for permanent injunction was held maintainable as the plaintiff did not have to rely on the illegality of the channel of sending of the money but was merely claiming his own property to which the maximum *inpari delicto potior est conditio defendetis* did not apply.[28] Where a party seeks to enforce his rights under a statute the opposite party cannot be permitted to assert in a Court of justice any right founded upon or growing out of an illegal transaction.[29] The Privy Council in *Petherpermal Chetty* v. *Muniandi Servai,*[30] drew a distinction between a claim to property by assertion of title where only an attempt to evade a statute or to commit fraud has taken place and cases where evasion or the fraud has succeeded and the impermissible object has been achieved. It is in the latter case that the fraudulent grantor loses the right to claim the aid of law. The Supreme Court in a later case drew the same distinction in a similar case. In that case the object of the transaction was the circumvention of service rules and not the evasion of the Income-tax Act, although it resulted in the payment at a lower rate.[31]

In that case, one *P,* a servant of the Court of Wards, carried on business in the name of one *G* to whom he entrusted the management during his absence due to illness. In a suit for possession of his business, *P,* did not allege invalidity of the transaction. He merely relied on his title to the business and entrustment thereof to *G* and *G*'s refusal to deliver possession when demanded. On proof of his ownership of the business, *P* was held entitled to enforce his title, there being no taint attached to entrustment. The Court also found that the object of the parties at the time of transaction was entered into was not to defeat the provisions of the Income-tax Act but to circumvent service rules and as a consequence of it, *P* obtained the benefit of paying a lower rate, his personal income not being subject to income-tax.[32]

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24 *Reynell* v. *Sprye* (1852) 1 De. G.M. & G. *Hughes* v. *Liverpool Victoria Legal Friendly Society* (1916) 2 K.B. 482.

25 *Ree Thomas* (1894) 1 Q.B. 742; *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C. 294 (P.C.). *Budhram Balakram* v. *Dhuri Cooperative Societies* (1973) 2 Punj. 67; (1962) A. Punj. 185, 188.

26 *Budhram Balakram* v. *The Dhuri Co-operative etc. Society* (1973) 2 Punj. 677; (1972) A. Punj. 185, 188.

27 *Bowmakers* v. *Barnet Instruments* (1945) K.B. 65; (1944) 2 All E.R. 579; dist. in *Thomas Brown & Sons Ltd.* v. *Fazal Deen* (1962) 108 C.L.R. 391, 411; considered in *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 873; (1960) A.SC. 213, 218; *Waman Shrinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 223; (1959) A.S.C. 689. *Abdul Jabbar* v. *Abdul Muthaliff* (1982) A.M. 12. See *Gascoigne* v. *Gascoigne* (1918) 1 K.B. 223 (Plaintiff cannot maintain action by setting up his own fraudulent design). But see *Moody* v. *Cox & Hatt* (1917) Ch. 71 (C.A.).

28 *Abdul Jabbar* v. *Abdul Mutalift* (1982) A.M. 12; *Sita Ram* v. *Radha Bai* (1968) 1 S.C.R. 805; (1968) A.S.C. 534 reld on. *Waman Srinivas Kini* v. *Ratilal* (1959) Supp. 2 S.C.R. 217; (1959) A.SC. 689; *Surjan Singh* v. *Sardara Ali* (1960) A.C. 167 (P.C.); *Palaniappa Chettiar* v. *Arunachalam Chettiar* (1962) A.C. 294; *Pettupa Chettiar* v. *Muniandi Seervai,* 55 I.A. 98 Refd to.

29 *Waman Shrinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 223; (1959) A.SC. 689; *Gibbs & Street Manufacturing Co.* v. *Brucker,* 111 U.S. 597; 28 L.Ed. 534.

30 35 I.A. 98, 103

31 *Smt. Surasaibalini* v. *Phanindra* (1965) 1 S.C.R. 861; (1965) A.S.C. 1364.

32 Ibid, *Pethermal Chetty* v. *Muniandi Servai,* 35 I.A. 98.

There is a distinction between a claim to the property transferred to or held out in the other party's name in which a party has to rely upon a conspiracy to effectuate an illegal or fraudulent purpose in support of his claim and claims, in which the unlawful or unworthy object was fulfilled; the property was owned by the claimant and the claimant sought the assistance of the court not to effectuate his unlawful purpose but to enforce by a plea of detenue under a transaction which was not tainted by illegality.[33] *Palaniappa Chettiar* v. *Arunasalam Chettiar*[34] illustrates the former and *Sajan Singh* v. *Sardara Ali*[35] the latter. In the former case, the Court refused to assist a claimant who had of necessity to rely on his disclosure of deceit on the public administration by transferring his property to his son in order to avoid a regulation on the size of Rubber Estate holdings.[36] Said Lord Mansfield in *Holman* v. *Johnson*.[37]

"no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

In *Sajan Singh* v. *Sardara Ali*[35]

as a result of an unlawful contract, a lorry was sold to the plaintiff and was in his possession and was used by him although the permit was in the name of the defendant because the former could not and the latter could get a licence for a lorry. The defendant removed the lorry and the plaintiff sued to recover possession.

The plaintiff succeeded in recovering property of which he was wrongfully dispossessed even though the title of the property was acquired by the plaintiff by an unlawful transaction between the plaintiff and the defendant. This was because he could sue without relying on the unlawful contract between the parties.[35]

In a more recent case[38] the rule in *Bowmakers*[39] case was applied by the Privy Council. There, the plaintiff, an African, was allowed to successfully sue against a non-African for possession of his property leased out to the non-African without the approval of the Governor which was required under the law. The plaintiff was, therefore, acting in contravention of the law and was committing an offence. But, so was the defendant who could not show any right to the property in view of the terms of the legislative provisions, nor could he assert any right to occupation. As a non-African, he had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease. The defendant therefore was not and never had been in lawful occupation. The defendant could not rely on an illegal agreement as justifying any right or claim to remain in possession and without doing so, he could not defeat the plaintiff's case. The plaintiff on the other hand required no aid from the illegal transaction to establish his case. It was sufficient for him to show that he was the registered proprietor of the land, and the defendant was a non-African in occupation without the formalities under the statute and accordingly had no right to occupy. In such circumstances, the plaintiff was no *in pari delicto* with the defendant. It may be pointed out that in that case the relevant legislation was intended for the protection of the Africans as a class.[38] It was held by the Privy Council that it would be contrary to public policy to refuse to assist an African to eject a non-African in illegal occupation of the land even though the African might have committed an illegal act in permitting the non-African to enter on the land.[38]

Similarly, where a landlord received a premium, fair or extortionate, and the receipt was contrary to the provisions of the Uganda Ordinance, the Privy Council held the premium recoverable by the tenant and the plea of *in pari delicto* was not entertained because the or-

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33 *Smt. Surasaibalini* v. *Phanindra*, 1965 A.S.C. 1364, 1368; (1965) 1 S.C.R. 861; *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C. 294; (1962) 2 W.L.R. 548; *Sajan Singh* v. *Sardara Ali* (1960) A.C. 167; (1960) 1 All E.R. 269.

34 (1962) A.C. 294; (1962) 2 W.L.R. 548.

35 (1960) A.C. 167; (1960) 1 All E.R. 269 both refd. to in *Smt. Surasaibalini* v. *Phanindra* (1965) A.S.C. 1364; (1965) 1 S.C.R. 861; *Shanta Agarwal* v. *Baldota Bros.* (1974) 76 Bom. L.R. 156.

36 *Palaniappa Chettiar* v. *Arunasalam Chettiar*, 1962 A.C. 294; (1962) 3 W.L.R. 548; *Thomas Brown & Sons* v. *Fazal Deen* (1962) 108 C.L.R. 391; 412. See *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343.

37 *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343.

38 *Mistry Amar Singh* v. *Serwano Wofunira Kalubya* (1963) 3 W.L.R. 513 (P.C.).

39 *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (1945) K.B. 65; *Amar Singh* v. *Kulubya* (1963) 3 W.L.R. 513 (P.C.).

dinance was for the protection of tenant from exploitation and the law imposed penalty on the landlord and not on the tenant, the duty of observing the law being on the shoulder of the landlord. The absence of a remedy under the Ordinance did not affect the tenants rights.[40]

The dictum of Lord Ellenborough in *Langton* v. *Hughes* that "what is done in contravention of an Act of Parliament cannot be made the subject-matter of an action"[41] has no application to cases where a party is seeking to recover money paid under an illegal transaction.[42] If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract but not afterwards. This is on the principle that so long as the transaction has not been fully executed and carried out, the courts would allow suits for recovery of money or property transferred.[43] But as soon as the illegal transaction has been fully executed and carried out the Courts will not entertain a suit for recovery,[44] unless it appears that the parties were not *in pari delicto*.[45] The claim of the vendor for the balance of the purchase money remaining unpaid was dismissed and so was the claim for the return of instalments of purchase price paid by the purchaser on the ground that for money to be recoverable there must be an element of duress or oppression or fraud so that parties are considered not to be *in pari delicto*.[46] (Contract illegal for contravention of statute.)

A tenant under a tenancy governed by the Bombay Hotel & Lodging Houses Rates Control Act, 1947, was allowed by the landlord "to keep sub-tenants", although sub-letting was prohibited by section 15 of that Act. Another provision gave a landlord the right to evict his tenant for sub-letting. In a suit for ejectment the tenant pleaded that the parties were *in pari delicto* and that the landlord had waived his right of ejectment. *Non obstante* clause in section 15 of the Act provided that "notwithstanding anything contained in any law it shall not be lawful ... for any tenant to sub-let the whole or any part of the premises..."

Money paid to a person to get a boy admitted into a Medical College cannot be recovered when both parties are equally guilty and the maxim *in pari delicto potior est canditio possidentis* applies. Therefore money paid by a person to another to get his son admitted into a Medical College and the boy does not get admitted cannot be recovered by suit.[47]

The word "law" in the clause was held to apply to a contract because all contracts would fall under the law relating to contracts—the Contract Act, and an agreement in contravention of section 15 would be unenforceable under section 23 of the Contract Act as being prohibited under the express provision of the Act. It is not permissible to any person to rely upon a contract the making of which the law prohibits.[48] Where both parties do not show any conspiracy

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40 *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192; (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.)

41 *Langton* v. *Hughes* (1813) 1 M. & S. 593, 596.

42 *Kiriri Cotton Co. Ltd.* v. *Ranchhoddas Dewani* (1960) 2 W.L.R. 127, 131 (P.C.); (1960) A.C. 192; (1960) 1 All E.R. 177. Dicta of Lord Mansfield on *Lowry* v. *Bourdieu* (1780) 2 Dough. K.B. 468, 472 and in *Browning* v. *Morris* (1778) 2 Cowp. 790, 792 applied.

43 *Kiriri Cotton Co. Ltd.* v. *Ranchhod Das Dewani* (1960) 2 W.L.R. 127, 132; (1960) A.C. 192; *Hastelow* v. *Jackson* (1828) 8 B. & C. 221, 226; *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291 appd. in *Petherparmal Chetty* v. *Maniandi Servai* (1908) 35 I.A. 98.

44 *Herman* v. *Jeuchner* (1885) 15 Q.B.D. 561; *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192, 203; (1960) 1 All E.R. 177; (1960) 2 W.L.R. 127 (P.C.).

45 *Lowry* v. *Bourdieu* (1780) 2 Dough. K.B. 468, 472; *Kiriri Cotton Mills Ltd.* v. *Dewani* (1960) A.C. 192, 203.

46 *George* v. *Greater Adelaide Land Development Co. Ltd.* (1929) 43 C.L.R. 91, 99, 101; *Petherpermal Chetty* v. *Muniandi Servai*, 35 I.A. 98, 103; *Harse* v. *Pearl Life Assurance Co.* (1904) 1 K.B. 558 (C.A.) relied on. Statement in Halsbury, Vol. 7, para 846 (2nd Ed.) not appd. (that money is recoverable in an illegal contract so long as contract remains executory and substantial part of the contract has not been performed). But see Vol. 8 (3rd Ed.) p. 150 where it is stated that the money can be recovered provided the claimant has repented and withdrawn from the contract before the illegal purpose has been substantially performed and notice of repudiation is given before the action is brought.

47 *N.V. Pandian* v. *M.M. Roy* (1979) A.M. 42, 46; *Sitaram* v. *Radhabai* (1968) A.SC. 534, 537; *Kuju Collieries* v. *Jharkhand Mine* (1974) A.SC. 1892 folld.

48 *Waman Shrinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 221; (1959) A.SC. 689.

to defraud a third person or to commit any illegal act, the maxim *in pari delicto* can "hardly be applicable".[49] Where regulations were intended to regulate the relations of Government and persons but had no bearing upon the relations between persons claiming to be in possession; and further the penalty was a fine for wrongful occupation and in no sense a punishment for crime, the illegality of the possession was not a criminal act and the regaining of lost possession cannot be described as an action to take advantage of one's own illegal action.[50] If a plaintiff does not have to rely upon his own illegality then although the possession had begun in trespass a suit can be maintained for restitution of possession. Otherwise the opposition party can make unjust enrichment although his own possession is wrongful against the claimant.[51]

S. 23 not concerned with motive.—S. 23 is not concerned with motive. It is confined to the object of transaction and not to the reasons or motive which prompted it. '*B*' borrowed a certain amount of money from '*A*' in order to bribe a certain officer. After the bribing was done. '*B*' obtained a loan from '*C*' in order to pay off '*A*' and executed a mortgage in favour of '*C*'. It was held that the object of the mortgage was not to effect an illegal purpose as such illegal purpose had already been effected, and, therefore, the mortgage transaction was not contrary to public policy.[52]

In a suit by the plaintiffs against defendants for recovery of an amount, the plaintiff alleged that the amount which he had advanced to the defendants had not been disclosed to the Income Tax Authorities and, therefore, escaped income tax, that the defendants knew that they had not been disclosed and that income tax had not been paid on them. The defendants pleaded that the agreement was illegal and void *ab initio* as the consideration or the object was to conceal or keep concealed fraudulently the undisclosed monies suppressed by the plaintiffs from the Income Tax Authorities. It was held that it was not open to the Court to draw any inference from the averments in the plaint. It was further held that the object of the agreement as pleaded in the plaint was not to evade payment of the income tax and the agreement was not against public policy.[53]

Before the time of performance of an illegal contract one of the guilty parties is allowed a *locus penitentiae* but after the time of performance has passed the repentance of one is of no avail.[54]

1. Trading with enemy.—Detrimental contracts are those which tend either to benefit an enemy country or to disturb the good relations of a country with a friendly country.[55] Agreements alleged to amount to trading with an enemy or otherwise to operate in the enemy's favour in time of war do not appear to have come before the Courts of British India before the war of 1914. It is long settled law that all trade with public enemies without licence of the Crown is unlawful. "The King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King, without the King's licence".[56] This includes shipping a cargo from an enemy's port even in a neutral vessel.[57] As a consequence of this, "no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government".[58] If the performance of a contract made in time of peace is rendered unlawful by the outbreak of war, the obligation of the contract is suspended or dissolved according as the intention of the parties can or cannot be substantially

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49 *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 868; (1960) A.S.C. 213.
50 *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165, 1176.
51 Ibid; *Holman* v. *Johnson* (1775) 1 Cowp. 341; 98 E.R. 1120 refd. to.
52 *Kashinath and another* v. *Bapurao & others* (1940) A.N. 305, 311, 312; *Kalikumari* v. *Manomohinee* (1935) A. Cal. 748 disting.; *Fender* v. *Mildmay* (1938) A.C.1; (1937) 3 All E.R. 402 refd. to.
53 *Shanta Agarwal* v. *M/s Baldota Bros.* (1974) 76 Bom. L.R. 156.
54 *Harry Parker Ltd.* v. *Mason* (1940) 4 All E.R. 199, 202; *Kedar Nath Motani* v. *Prahlad Rai* (1960) 1 S.C.R. 861, 873; (1960) A.SC. 213.
55 *Furtado* v. *Rogers* (1802) 3 Bob. & P. 191, 198.
56 Lord Macnaghten, *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, at p. 499.
57 *Potts* v. *Bell* (1800) 8 T.R. 548; 5 R.R. 452; *Esposito* v. *Bowden* (1857) 7 E. & B. 763; 110 R.R. 822.
58 Lord Macnaghten, *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, at p. 499.

carried out by postponing the performance till the end of hostilities.[59] In such a case a contracting party is not bound to perform a part of his undertaking which remains possible and lawful in itself, but would be useless without the rest.[60] The recent development of cases of this class is dealt with under s. 56 below. The rules under this head become applicable only when an actual state of war exists. They cannot be made to relate back to a time before the war, though war may have been apprehended. A contract of insurance made before war cannot be vitiated, as regards a loss by seizure also before any act of public hostility, by the fact that war did break out shortly afterwards.[61]

During the first and second Great Wars these principles have been confirmed and in some directions developed; and the matter has been the subject of special legislation, always growing more drastic, passed after the outbreak of hostilities. One question found to need further definition was who is an enemy for the purpose of the rule, and especially how the friendly or hostile character of an incorporated company is to be tested. The seat of a man's business is of more importance than is domicile in the technical sense or even nationality (for an enemy) subject allowed to remain here under the protection of the State is not a commercial enemy, and enemy subjects residing in friendly countries need not be); and in the case of a corporation the jurisdiction in which it is registered does not conclusively determine its character, nor yet the nationality of its individual shareholders, and it must be considered by whom and in what interest its affairs are in fact controlled.[62]

An executory contract between parties of whom one becomes an alien enemy is thereby suspended or dissolved according to the nature of the case. It is dissolved if it contemplated a continuous performance which in the state of war would entail intercourse with enemy, or if the continuance of duties to be performed after the war would assist the enemy's trade, or if the maintenance of the contract is otherwise against public policy, or if suspension of the current execution would substantially be imposing a new contract on the parties. An express suspensive condition in general terms is in no way conclusive. It may not be applicable to the event of war, or it may be contrary to public policy.[63] On the outbreak of the war a contract between a German Company and a British Company is suspended and not abrogated if it is wholly executed and involves no intercourse between subjects and alien enemies or increase of enemy resources. Law allows payment in Germany to a German agency and in German marks from one person in Germany to another. It does not increase the resources of the enemy.[64]

2. Stifling prosecution.—Agreements for stifling prosecutions are a well-known class of those which the Courts refuse to enforce on this ground. The principle is "that you shall not make a trade of a felony";[65] or, as it was expressed in a Calcutta case, "no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the judges and put it in the hands of private individuals". [66] In England the compromise of any public offence is illegal. If the accused person is "innocent, the law (is)

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59 *Esposito* v. *Bowden* (1857) 7 E. & B. 763; 110 R.R. 822.

60 *Geipel* v. *Smith* (1872) L.R. Q.B. 404.

61 *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, followed in *Wolf & Sons* v. *Dadyba Khimji & Co.* (1920) 44 Bom. 631; 58 I.C. 465.

62 *Porter* v. *Freudenberg* (1915) 1 K.B. 857; *Diamler Co.'s case* (1916) 2 A.C. 307; *Re Badische Co.* (1921) 2 Ch. 331. It is not practicable to go into details here, and the reader must be referred to specialised works on the subject, of which there are many.

63 *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1918) A.C. 260; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (1918) 1 K.B. 331, affirmed very shortly (1918) 2 K.B. 486; *Zinc Corporation* v. *Hirsch* (1916) 1 K.B. 541, C.A.; *Arab Bank* v. *Barclays Bank* (1955) 1 All E.R. 226. We deal elsewhere with the effects of war conditions on contracts to which there is not an enemy party, see Notes on s. 56.

64 Claim by *Helbert Wagg & Co. in re* (1956) 2 W.L.R. 183, 202; *Schering Ltd.* v. *Stockholms Enskilda Bank* (1946) A.C. 219; (1946) 1 All E.R. 36.

65 Lord Westbury, *Williams* v. *Bayley* (1866) L.R. 1 H.L. 200, 220.

66 *Sudhindra Kumar* v. *Ganesh Chandra* (1939) 1 Cal. 241, per Mukherjea J. at p. 250; 1938 A. Cal. 840; 179 I.C. 210; *Mohanlal Jagannath* v. *Kashiram* (1950) Nag. 105, 1950 A. Nag. 71; *Narasimharaju* v. *Gurumurthy Raju* (1963) A.SC. 107, 110; (1963) 3 S.C.R. 687 (arbitration of a criminal complaint); *Malka* v. *Sardar* (1929) A.L. 394; *Ahmad Ullah* v. *Hafiz Ullah* (1961) A.A. 173; *Kamini Kumar* v. *Birendra Nath*, 51 I.A. 117; (1929) A.PC. 109 (case of arbitration).

abused for the purpose of extortion; if guilty, the law (is) eluded by a corrupt compromise screening the criminal for a bribe".[67] It is not necessary to prove that there was any express threat of prosecution if the transaction in fact amounted to a bargain not to prosecute, and if the Court thinks the defence of illegality a disreputable one to raise in the circumstances, the only way in which it can give effect to its opinion is in dealing with the costs.[68] But the English common-law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, if such a contract is permitted by the law of that country, and this whether the contract is entered into there or in British territory. A suit would, therefore, lie in British India on a bond passed to the plaintiff in consideration of his withdrawing a prosecution for theft instituted in the French Court at Pondicherry, the agreement being permissible by the French law.[69] It would have been difficult, indeed, to hold that the compromise of a French law suit in a manner allowed by French law could have been injurious to the administration of justice in British India.

There are two Supreme Court cases that are dealing with the question of stifling prosecution.

In the first one, in a pending criminal proceeding against the accused under sections 420, 465, 468, 477 read with sections 107 and 120B of the Indian Penal Code, some of which were non-compoundable, the parties entered into an agreement on the date of hearing of the criminal case to refer their dispute to arbitration in consideration of the complainant withdrawing the criminal case and the dispute was actually referred.

The arbitration agreement was held to be invalid as being opposed to public policy, on the ground that if a person sets the machinery of the criminal law into motion on the allegation of the commission of a non-compoundable offence and by the use of its coercive machinery he compels the opponent to enter into an agreement, the agreement will be invalid as being opposed to public policy.[70] In the second case *Ouseph Poulo's* case,

the plaintiff had pledged certain goods to the defendant Bank as security for the Bank. The goods were found to be of a much smaller value. The Bank thereupon filed information resulting in police investigation. The plaintiff and his relations then executed mortgages and hypothecation bonds and the pledged goods were "surrendered" to the Bank. Thereafter the proceedings in the police department were dropped.

The Supreme Court held that it was not proved that the party had executed the document in consideration of the withdrawal. The Supreme Court stressed the fact that the sequence of events may tend to obliterate the real difference between the motive for the agreement and the consideration for it.[71]

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67 *Keir* v. *Leeman* (1844) 6 Q.B. 308; 66 R.R. 392; 9 Q.B. 371, 392; 72 R.R. 298; *Windhill Local Board* v. *Vint*. (1890) 45 Ch.D. 357.

68 *Jones* v. *Merionethshire Building Society* (1892) 1 Ch. 178, C.A.; *Bhowanipur Banking Corporation* v. *Durgesh Nandini Dasi* (1942) 1 Cal. 1 (Lord Atkin); 196 I.C. 463; 1941 A.P.C. 95; 44 Bom. L.R. 1; *Mohanlal* v. *Kashiram* (1950) Nag. 105; (1950) A.N. 71; S. 19. Central Provinces & Berar Act 15 of 1938; *Pannalal* v. *Thansing*, 1952 A.N. 195.

69 *Subraya Pillai* v. *Subraya Mudali* (1867) 4 M.H.C. 14. Reference was made in the course of the judgment to the rule of private international law that "the law of the place of a contract" governs its validity. That expression, however, is ambiguous. The local law governing the substance of a contract may, according to the circumstances, be that of the place where it was made, or of that where it is to be performed; and these are only auxiliary tests for ascertaining the intention of the parties as to what law is to prevail: *Hamlyn & Co.* v. *Talisker Distillery* 1894 A.C. 202; Dicey, Conflict of Laws, 7th ed., pp. 738 *sqq*. *Kaufman* v. *Gerson* 1904 1 K.B. 591, C.A., looks at first sight *contra;* but the Court seems to have been influenced by peculiar facts, and it is far from clear that the decision was intended to lay down any general rule of law. And see notes on s. 1, "choice of law governing contract", above.

70 *Narasimharaju* v. *Gurumurthy Raju* (1963) 3 S.C.R. 687; (1963) A.SC. 107, 109, *Smt. Sumitra Devi* v. *Smt. Sulekha Kundu* (1976) A.Cal. 196, 205, *Deb Kumar* v. *Anath Bandhu* (1931) A.Cal. 421 disting.

71 *Ouseph Poulo* v. *Catholic Union Bank Ltd.* (1964) 7 S.C.R. 745; (1965) A.SC. 166.; *Mahendra Singh* v. *Achal Trust, Agra* (1971) 2 All. 94, 111.

An employee of a Company pilfered goods from his employer's premises and sold them to defendants 1and 2. When the Company wanted to take legal proceedings the defendants 1 and 2 voluntarily executed a pronote for the value of the goods and as a mode of payment gave four cheques in the name of defendant 3 who undertook to cash the cheques and pay the money to the Company. Only one cheque was cashed and the rest were dishonoured and the Company brought a suit. The defence was coercion and intimidation by threatening criminal proceedings and therefore the transaction was void under s. 23, Contract Act.

The High Court on appeal decreed the suit holding that the property in the goods had not passed to the two executants and they had to return the goods,: & as they could not do so, they chose the impugned method of payment in discharge of their liability at a time when the Company had not decided what action to take; so there was no illegality in accepting the mode of payment adopted. It also held that the consideration for the pronote was not to stifle prosecution. There is a difference between a motive for the agreement and consideration for it. There being nothing illegal or opposed to public policy within section 23 of the Contract Act, the pronote was legal and the motive for the pronote was to avoid a legal proceeding & the consideration was valid—the price of the goods.[72]

A compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful.[73] This perhaps is of no importance in Indian practice, where we have a statutory list of compoundable offences.[74] "The criminal law of this country makes a difference between various classes of offences. With regard to some, it allows the parties to come to an agreement and either not to take proceedings or to drop the proceedings after institution in a few instances even without the leave of the Court, and, in other instances, with the leave of the Court. But there are other instances which cannot be compounded or arranged between the parties. If the offence (is) compoundable and (can) be settled in or out of Court without the leave of the Court, there seems no reason why (a compromise) should be regarded as forbidden by law or as against public policy, the policy of the criminal procedure being to allow such a compromise in such cases".[75] Thus where *A* agreed to execute a *kabala* of certain lands in favour of *B* in consideration of *B*'s abstaining from taking criminal proceedings against *A* with respect to an offence of simple assault which is compoundable, it was held that the contract was not against public policy and that the same could be enforced.[76] So a promise to pay a sum of money as compensation for the abduction of a woman is enforceable, provided the abduction does not constitute a non-compoundable offence.[77] Likewise, money paid to compromise a charge of adultery may be recovered back, if the party to whom the money is paid proceeds with the prosecution of the charge, adultery being a compoundable offence.[78] Where the offence is compoundable with leave of the Court, and such leave is obtained, the composition cannot fall within the mischief of the section.[79] But where the offence is non-

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72 *R. Sivaram* v. *T.A. John & others* (1975) A. Ker. 101.

73 *Fisher & Co.* v. *Appollinaris Co.* (1875) L.R. 10 Ch. 297, as qualified by *Windhill Local Board* v. *Vint* (1890) 45 Ch.D. 351. Cp. *Birendra Nath Basu* v. *Basanta Kumar Basu,* 1926 A.Cal. 519; 91 I.C. 624, where the criminal complaint, though nominally of forgery, was merely an incident in a dispute about property: *Tek Chand* v. *Harjas Rai-Arjan Das,* 1929 A.Lah. 564; 117 I.C. 74.

74 See s. 345, Criminal Procedure Code, 1898; see also Penal Code, ss. 213, 214. But even as to a non-compoundable offence the withdrawal of a petty charge, as an incident in a fair compromise, does not avoid the compromise: *Onkar Mal* v. *Ashiq Ali* (1927) 49 All. 540; 100 I.C. 499; 1927 A.A. 318. Also there must be better evidence of compounding than the mere withdrawal of a complaint: see *Sadho Kandu* v. *Jhinka Kuer,* 1929 A.A. 456; 116 I.C. 749: *Harjas Rai-Arjan Das* v. *Tek Chand,* 1927 A.L. 465; 101 I.C. 786; *Shanti Sarup* v. *Lal Chand,* 1927 A.L. 530; 103 I.C. 444; 28 P.L.R. 388; 9 Lah.L.J. 319. The Court cannot act on a mere surmise that the acts of the parties were in substance one transaction. It is a distinct question, not relevant here, whether the use of criminal process to procure satisfaction of substantially civil claims is proper.

75 Per *Cur. Amir Khan* v. *Amir Jan* (1898) 3 C.W.N. 5, followed in *Ahmed Hassan* v. *Hassan Mahomed* (1928) 52 Bom. 693; 112 I.C. 459; 1928 A.B. 305.

76 Ibid.

77 *Shah Rahman* v. *Ismail Khan* (1904) Punj. Rec. No. 82.

78 *Hosein Shah* v. *Nur Ahmed* (1875) Punj. Rec. No. 81.

79 *Meenakshi Sundarammal* v. *Subramania Ayyar,* 1955 A.M. 369; *Ramachandra* v. *Mst. Bhanwari Bai* (1973) A.Raj. 260.

compoundable, an agreement made for the purpose of compounding it or stifling a prosecution in respect of it is unenforceable and cannot be sued on.[80] An agreement to stifle a prosecution is invalid where it is supported by prohibited consideration, e.g. reparation made as a consideration to give up criminal prosecution which would be an abuse of the right of private prosecution.[81] If the agreement to abandon a prosecution is part of the consideration for the payment of the debt, the reality of the debt is irrelevant.[82] A mortgage executed for a sum of money embezzled by the mortgagor's son and as a compromise for withdrawing a prosecution is void under section 24.[83] Even if the prosecution is proceeded with by the authorities, in spite of the agreement to withdraw it, the agreement is void.[84] And, further, if the accused was induced to pay money to the complainant in order that a criminal prosecution for an offence which was not compoundable should not be proceeded with, the accused is entitled to recover back the money as paid under "coercion" within the meaning of s. 72 below. In such a case the parties cannot be said to be *in pari delicto,*[85] But if there is no evidence of pressure or coercion, the money cannot be recovered back, because in such a case the parties will be deemed to be *in pari delicto.*[86] Four Police Constables threatened to take possession of uncustomed articles unless they were paid £6,500 out of which £1,000 was paid. The constables did not make any report or initiate proceedings. The plaintiff sought to recover the £1,000. He was held not entitled to recover because buying off a threatened prosecution even though brought about by express threats to prosecute unless money is paid is a violation of the general law of public policy.[87] In a Madras case, where the plaintiffs agreed to relinquish their right to a religious office in favour of the defendant in consideration of the latter withdrawing a charge of criminal trespass preferred against them, it was stated by Innes J. that the agreement was illegal, as it "would amount to the stifling of a criminal prosecution for an offence which the law does not permit to be compounded." The case was, however, treated as one of "coercion," the charge of trespass being false, and the sole cause for entering into the agreement being "the well-founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings".[88] In *Kessowji* v. *Hurjivan*[89] it was held that a guarantee for the

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80 *Majibar* v. *Syed Muktashed* (1912) 40 Cal. 113; *Mottai* v. *Thanappa* (1914) 37 Mad. 385; *Ghulam Mohiy-ud-Din* v. *Deoki Nand* (1914) Punj. Rec. No. 39, p. 133; *Ahmed Hassan* v. *Hassan Mahomed* (1928) 52 Bom. 693; 112 I.C. 459; 1928 A.B. 305; *Veerayya* v. *Sobhanadri,* 1936 A.M. 656; *Banu Mal* v. *Ratan Deo,* 1937 A.A. 370; (1937) All.L.J. 333; 169 I.C. 533. Withdrawal of proceedings, "an implied term of reference to arbitration": *Kamini Kumar Basu* v. *Birendra Nath Basu* (1930) 57 I.A. 117; 57 Cal. 1302; 123 I.C. 187; 1930 A.P.C. 100; *Gopal Chandra Poddar* v. *Lakshmi Kanta,* 1933 A.Cal. 817; 37 C.W.N. 749; 147 I.C. 492; *Karnidan Sarda* v. *Sailaja Kanta Mitra* (1940) 19 Pat. 715; 192 I.C. 187; 1940 A.P. 683; *Motumal* v. *Ibrahim* (1943) Kar. 390, 212 I.C. 287, 1944 A.S. 80; *Mohanlal Jagannath* v. *Kashiram* (1950) Nag. 105, A.N. 71. Proceedings withdrawn on plaintiff agreeing to convey lands to defendant for a certain sum: *Brahmdeo Narayan* v. *Brajballabh Prasad* (1940) Pat. 424; 188 I.C. 859, 1940 A.P. 573; *Ouseph Poulo* v. *The Catholic Union Bank Ltd.* (1965) A.SC. 166; (1964) 7 S.C.R. 745; *Narasimha Raju* v. *Gurumurthy Raju* (1963) 3 S.C.R. 687; (1963) A.SC. 107; *Bhowanipur Banking Corporation* v. *Durgesh Nandini* (1941) 1 Cal. 1; (1941) A.PC. 95; *Radhakishan* v. *Chapa Bhima* (1963) A.M.P. 139 (a promissory note executed).

81 *Ouseph Poulo* v. *Catholic Union Bank* (1965) A.SC. 166; (1964) 7 S.C.R. 745; *Narasimharaju* v. *Gurumurthy Raju* (1963) 3 S.C.R. 687; (1963) A.SC. 107. (A case of arbitration agreement); *Kamini Kumar* v. *Birendra* (1930) A.PC. 100; 57 Cal. 1302; *Bhawanipur Banking Corporation* v. *Durgesh* (1941) A.PC. 95; (1942) 1 Cal. 1. (Wife mortgaged property for the debt of husband. But mortgage was held illegal as executed in consideration of withdrawal of a criminal case which was opposed to public policy.)

82 *Bhawanipur Banking Corporation* v. *Durgesh Nandini* (1941) 1 Cal. 1; 1941 P.C. 95; *Jones* v. *Merionithshire Permanent Building Society* (1891) 2 Ch. 587.

83 *Eastern Mercantile Bank* v. *Philip* (1960) A.Ker. 194.

84 *Shripad* v. *Sanikatta Salt Sale Society* (1945) Bom. 208, 46 Bom. L.R. 745, 1945 A.B. 82.

85 *Muthuveerappa* v. *Ramaswami* (1917) 40 Mad. 285; 34 I.C. 401; 1917 A.M. 607; *Trikamdas* v. *Bombay Corporation,* 1954 A.B. 427; *Dy. Commissioner Rae Bareli* v. *Har Narain* (1956) A.A. 205.

86 *Amjadennessa Bibi* v. *Rahim Buksh* (1915) 42 Cal. 286; 28 I.C. 713; *Bindeshari Prasad* v. *Lekhraj Sahu* (1916) 1 Pat. L.J. 48, 60, 61; 33 I.C. 711.

87 *Callaghan* v. *O'Sulliyan* (1925) V.L.R. 664; *Atkinson* v. *Denby* (1862) 7 H. & N. 934 (parties are not *in pari delicto* where there is coercion) dist.

88 *Pudishary Krishnen* v. *Karampally Kunhunni* (1874) 7 M.H.C. 378; *Sanaulla* v. *Kalimullah,* 1932 A.L. 446; 137 I.C. 790; *Karnidam Sarda* v. *Sailaja Kanta Mitra, supra,* note 73.

89 (1887) II Bom. 566; *Shib Charan Lal* v. *Lachmi,* 1951 A.A. 613; *Das* v. *Jai Kishen Das* (1900) 22 All. 230. But application for leave to withdraw a prosecution already commenced does not of itself amount to stifling the prosecution: *Dwijendra Nath Mullick* v. *Gopiram Gobindaram* (1925) 29

payment to creditors of debts due to them in consideration of the creditors abstaining from taking criminal proceedings against the debtor is void, as being against public policy. But it must be noted, as observed in that case, that "a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, and such an agreement will not be inferred from the creditor's using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties".[90] Following this principle, it has been held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor and a third party as security for the debt is not void under this section.[91] But on reparation being made or promised by the offender or his friends, it would be a public mischief if on mercy being shown reparation is sought to be avoided. It is the duty of an offender to make reparation and he should be encouraged to do so.[92] On the other hand, to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution.[92] If a third party alone provides the security, an agreement not to prosecute is more likely to be inferred from the circumstances.[93] So also where the nature of previous dealing is substantially altered with a view to terminate the criminal proceedings.[94] But in weighing the different considerations, the court must enquire 'did one party to the transaction make his promise in exchange or part exchange of promise not to prosecute'.[94] The agreement usually has to be inferred, as such bargains are seldom set out on paper.[95]

In *Bhavanipur Banking* case,

> the husband and some of his relations were prosecuted for conspiracy to cheat. The question of liability of the accused was referred to arbitration and an award against the accused was made. In order to pay off that sum, certain arrangements were arrived and one of the terms was the mortgage by the wife of her property and in consideration thereof the prosecution was withdrawn.

This mortgage was held illegal by the Privy Council.[96] In a Patna case,

> as a result of a prosecution, a compromise was entered into, whereby two widows, who were under the Hindu Widows Right to Property Act entitled to a widow's estate, accepted an area of land to be enjoyed by them during life without a right of alienation and the prosecution was withdrawn.

This was held to be illegal under section 23 of the Contract Act.[97] A contract the consideration for which is the stifling of a prosecution for a non-compoundable offence is void;

C.W.N. 855; 89 I.C. 200; in *Rameshar Marwari* v. *Upendranath Das Sarkar*, a case reported, 29 C.W.N. 1029; 90 I.C. 463; 1926 A. Cal. 455, there was no credible evidence of any prosecution at all. *Sudhindra Kumar* v. *Ganesh Chandra* (1939) 1 Cal. 241; 1938 A. Cal. 840; 179 I.C. 210; *Mt. Haliman* v. *Mohd. Manir* (1971) A.P. 385 (agreement to give up share of inheritance to save one's son from prosecution).

90 This statement of the law is largely based upon the English case of *Flower* v. *Sadler* (1882) 10 Q.B.D. 572, which was cited with approval by the P.C. in the *Bhowanipur Banking Corporation Case* (1942) 1 Cal. 1.

91 *Jai Kumar* v. *Gauri Nath* (1906) 28 All. 718; *Nanak Chand* v. *Durant* (1906) Punj. Rec. No.9; *Sukhdeo Das* v. *Mangalchand* (1917) 2 Pat. L.J. 630; 41 I.C. 812; to same effect *Narasimhalu Naidu* v. *Naina Pillai* (1929) 115 I.C. 156; 1929 A.M. 7; *Widya Wanti* v. *Jai Dayal* (1931) 13 Lah. 356; 140 I.C. 220; 1932 A.L. 541; *Deb Kumar* v. *Anath Bandhu*, 1931 A. Cal. 421; 35 C.W.N. 26; 131 I.C. 133; *Shaikh Gafoor* v. *Hemanta*, 1931 A. Cal. 416; 35 C.W.N. 28; 131 I.C. 574; *Chandanmal* v. *Ramakrishnayya* (1941) 2 M.L.J. 827; 1942 A.M. 173; *London & Lancashire Insurance Co.* v. *Binoy Krishna*, 945 A. Cal. 218, 220 I.C. 379 (threat of prosecution does not avoid the contract). *Ramchandra Laxman* v. *Bank of Kolhapur* (1952) Bom. 715, 1952 A.B. 315.

92 *Bhawanipur Banking Corporation* v. *Durgesh* (1941) A.P.C. 95; (1942) 1 Cal. 1; *Ouseph Poulo* v. *Catholic Union Bank* (1965) A.S.C. 166, 169; (1964) 7 S.C.R. 745.

93 *Flower* v. *Sadler* (1882) 10 Q.B.D. 572, 576; *Sudhindra Kumar* v. *Ganesh Chandra* (1939) 1 Cal. 241; *Ouseph Poulo* v. *Catholic Union Bank Ltd.* (1964) 7 S.C.R. 745; (1965) A. SC. 166.

94 *Ouseph Poulo* v. *Catholic Union Bank Ltd.* (1965) A.SC. 166; (1964) 7 S.C.R. 745.

95 *The Bhowanipur Banking Corporation Case* (1942) I Cal. 1, 4; *Mohanlal Jagannath* v. *Kashiram* (1950) Nag. 105.

96 *Bhowanipur Banking Corporation* v. *Durgesh Nandini* (1941) 1 Cal. 1; (1941) A.PC. 95.

97 *Mt. Dhanwantia* v. *Deonandan* (1957) A.P. 477; *Bhowanipur Banking Corporation* v. *Durgesh Nandini* (1941) 1 Cal. 1; (1941) A.PC. 95.

and it makes no difference if only a complaint has been filed and no process has issued.[98] As a suit will not lie on an agreement to stifle a prosecution so an agreement of this class will not avail as a defence to a suit.[99] Thus, where in a suit for damages for wrongful arrest and confinement the defendant pleaded an agreement under which the plaintiff was to give up all claims against the defendant for his arrest and confinement in consideration of the defendant withdrawing charges of criminal trespass and being a member of an unlawful assembly preferred against the plaintiff, it was held that, the latter offence being non-compoundable, the agreement could not be set up as an answer to the suit.[1] But the mere fact that *A* makes an agreement with *B*, who intends, by means of something to be obtained or done under it, to effect an unlawful or immoral purpose, will not render the agreement illegal unless *A* knows of that purpose. Thus, if *B* sells his house to *A* for the purpose of raising money to be given to certain third persons as a bribe to induce them to withdraw a charge of criminal breach of trust which they had preferred against *B*, the sale is not illegal unless it be proved that *A* was aware of the unlawful object.[2]

Criminal complaint and arbitration.—A criminal complaint cannot be referred to arbitration; an agreement to refer would be void.[3] The onus of proving the agreement to be opposed to public policy is on the party challenging its validity.[4]

3. "Champerty and maintenance."—Maintenance was thus defined by Lord Haldane in *Neville* v. *London Express Newspapers Ltd.*[5]

"...it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence."

"Champerty" is a species of maintenance of a dispute for a share of the proceeds or to have by agreement part of the subject matter of the suit.

The practices forbidden under these names by English law (partly by old statutes which it is needless to specify here, and which are said to be only in affirmance of the common law) may be summarily described as the promotion of litigation in which one has no interest of one's own. Maintenance is the more general term; champerty, which in fact is the subject of almost all the modern cases, is in its essence "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action".[6] Agreements of this kind are equally illegal and void whether the assistance[7] to be furnished consists of money, or, it seems, of professional assistance, or both.[8] They are in practice often found to be also disputable on the ground of fraud or undue influence as between the parties.[9] The law of Champerty and maintenance extends the proceedings to establish proof in liquidation of a company and to any contentious proceedings where property is in dispute which becomes the subject of an agreement to share the proceeds.[10] A solicitor is not debarred from acting and

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98 *Ghulam Mujtaba* v. *Allah Bachaya,* PLD, (1961) 5 B.J. 271.
99 *Srish Chandra Nandi* v. *Supravat Chandra* (1940) 1 Cal. 372; 190 I.C. 295; 1940 A. Cal. 337.
1 *Dalsukhram* v. *Charles de Bretton* (1904) 28 Bom. 326.
2 *Rajkristo Moitro* v. *Koylash Chunder* (1881) 8 Cal. 24, citing Pollock on Contract, p. 342, 2nd ed. (366, 11th ed.); *Iqbal Ahmed* v. *Mohammed Hanif,* 1952 A. Bho. 32. It need hardly be mentioned that, when *A* promises to remunerate *B* in consideration of *B* undertaking to use his influence over *C* so as to effect a compromise of a civil dispute between *A* and *C*, the consideration or object of the agreement is not unlawful: *Syed Mahomed* v. *Shah Vazirul Huq* (1911) 16 C.W.N. 480.
3 *Malka* v. *Sardar,* 1929 A.L. 394; *Ahmadullah* v. *Hafizullah,* 1961 A.A. 173; *Narasimharaju* v. *Gurumurthy Raju,* 1963 A. SC. 107, 110, (1963) 3 S.C.R. 687 (Arbitration); *Kamini Kumar* v. *Birendra Nath,* 57 I.A. 117; (1930) A.PC. 109 (Case of arbitration).
4 *Ouseph Poulo* v. *Catholic Union Bank Ltd.* (1964) 7 S.C.R. 745; (1965) A. SC. 166.
5 (1919) A.C. 368, 390; (1918-19) All E.R. Rep. 61, 71.
6 *Hutley* v. *Hutley* (1873) L.R. 8 Q.B. 112, per Blackburn J.; and see per Chitty J.; *Guy* v. *Churchill* (1888) 40 Ch. D. at p. 488.
7 There must be something more than simply communicating information: *Rees* v. *De Bernardy* (1896) 2 Ch. 437, 446.
8 *Stanley* v. *Jones* (1831) 7 Bing 369, 33 R.R. 513, may be considered the leading modern case; *Re Attorneys and Solicitors Act* (1875) 1 Ch.D. 573.
9 E.g., *Rees* v. *De Bernardy* (1896) 2 Ch. 437; *U pe Gyi* v. *Maung Thein Shin* (1923) 1 Rang. 565; 77 I.C. 372; 1924 A.R. 48; *Lucy Moss* v. *Mah Nyein May,* 1933 A.R. 418.
10 *In re Trepca Mines Ltd.* (1962) 3 All E.R. 351.

recovering his costs merely because of his knowledge of the client's champertous agreement. But if he actively participates by stipulating for a percentage or by doing a positive act to assist in the implementation of the unlawful agreement, he will be debarred; for by rendering positive assistance he becomes guilty of aiding and abetting; e.g. by drawing up the champertous agreement or to secure the sharing of the proceeds in accordance therewith.[11]

There is no rule of law to forbid the purchase of property of which the title is or may be disputed, but the law does not, therefore, sanction mere speculative traffic in rights of action.[12] To which class a given transaction belongs, in a case where doubt is at first sight possible, seems to be a question of fact rather than of law.

The specific rules of English law against maintenance and champerty have not been adopted in India,[13] and a champertous agreement is not *per se* void in India[14] neither are substantially similar rules applicable in any other way,[15] but the principle, so far as it rests on general grounds of policy, is regarded as part of the law of "justice, equity, and good conscience" to which the decisions of the Court should conform. The leading judgment to this effect is in *Fischer* v. *Kamala Naicker,*[16] an appeal from the *Sudder Dewanny Adawlut,* Madras. There the Privy Council observed:

"The Court seem very properly to have considered that the champterty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary."[17]

Adverting to these observations in a later case,[18] the Privy Council said:

"It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there."

In *Bhagwat Singh* v. *Debi Dayal Sahu,*[19] their Lordships of the Privy Council clearly laid it down that an agreement champertous according to English law was not necessarily void in India; it must be against public policy to render it void here. A present transfer of property for consideration by a person who claims it as against another in possession thereof, but who has not yet established his title thereto, is not for that reason opposed to public policy.[20] Nor is it opposed to public policy merely because the payment of the major part of the consideration is made to depend on the transferee's success in the suit to be brought by him to recover the property.[21] Similarly agreements to share the subject of litigation if recovered in consideration of supplying funds to carry it on are not in themselves opposed to public policy.[22]

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11 *In re Trepca Mines Ltd.* (1962) 3 All E.R. 351, 356, reversing (1962) 2 W.L.R. 800, where mere awareness of the terms of such agreement was held to make the contract void.

12 See the Transfer of Property Act, 1882, s. 6(e). By the customs of the Kachins, a tribe on the north-east frontier of Burma, claims for unliquidated damages are or were freely assignable; see L.Q.R. ix. 97.

13 *Chedambara Chetty* v. *Renja Krishna* (1874) 1 I.A. 241; 13 B.L.R. 509; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) 4 I.A. 23, 2 Cal. 233; other judgments where the law is merely mentioned as well settled are purposely not cited, but for an example see *Banarsi Das* v. *Sital Singh* (1929) 121 I.C. 295.

14 *Venkataswami* v. *K. Nagi Reddy,* 1962 A.AP. 457 (a case of champerty); *Ram Sarup* v. *Court of Wards,* 67 I.A. 50; (1940) Lah. 1; (1940) A.PC. 19; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee,* 4 I.A. 23, 47; 2 Cal. 233; *Raghunath* v. *Nilkanth,* 20 I.A. 112; 20 Cal. 848; *Ratanchand Hirachand* v. *Askar Nawaz Jung* (1976) A. AP. 112, 121.

15 *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (1907) 35 I.A. 48, 56; 35 Cal. 420.

16 (1860) 8 M.I.A. 170, where it was stated that an assignment by an agent to his principal of his interest in an agreement entered into in his name, but on behalf of the principal, was not champertous.

17 8 M.I.A. 187.

18 *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee, supra,* note 6.

19 (1908) 35 I.A. 48; 35 Cal. 420.

20 *Achal Ram* v. *Kazim Hussain Khan* (1905) 32 I.A. 113; 27 All. 271; as explained in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu, supra,* note 8.

21 *Bhagwat Dayal Singh* v. *Debi Dayal Sahu, supra.*

22 *Kunwar Ram Lal* v. *Nil Kanth* (1893) 20 I.A. 112; *Indar Singh* v. *Munshi* (1920) 1 Lah. 124; 56 I.C. 272; 1920 A.L. 123; *Dara Shahpurji* v. *Askarai Begum,* 1954 A. Hyd. 98.

"A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression that a suitor who had a just title to property and no means except the property itself should be assisted in this manner. But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought to be given to them."[23]

But though the Courts will not give effect to agreements "got up for the purpose merely of spoil or of litigation" they may in a proper case award compensation for legitimate expenses incurred by the lender to enable the borrower to carry on the law suit.[24] Thus where, in consideration of the plaintiff agreeing to defray the expenses of prosecuting the defendant's suit to recover a certain property, the defendant agreed to transfer to the plaintiff, in one case nine annas share of the property;[25] in another two annas share,[26] and in a third eight annas share,[27] it was held that the agreement was extortionate and inequitable, and the plaintiff was awarded the expenses legitimately incurred by him with interest. The quantum of the share which the financier would get under the agreement is an important matter to be taken into consideration in judging the fairness or otherwise of the agreement. A three-sixteenth share to the financier is not a fair gain.[28] Where the claim was of a simple nature and in fact no suit was necessary to settle it, an agreement to pay Rs. 30,000 to the plaintiff for assisting in recovering the claim was held to be extortionate and inequitable.[29] An agreement in a pre-emption case, that the respondent would file the appeal in the name of the appellant and in case of success the appellant would pay half the costs to the respondent and half the purchase price, and share the property half and half is champertous and opposed to public policy and therefore void.[30] But mere inadequacy of consideration is not of itself sufficient to render a transaction champertous.[31] An agreement for the purchase of a property *pendente lite* which entitled the purchaser to cancel the agreement in the event of the suit being decided against the vendor so as to leave the vendor no interest in the property is not champertous.[32] Similarly an assignment for a second time by the mortgagor of his equity of redemption previously assigned to another by an unregistered document is not champertous, though the transaction may be one not commendable in conscience.[33] A sale for Rs. 50 of property worth Rs. 150 which the vendor had

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23 *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) 4 I.A. 23; 2 Cal. 233; *Baldeo Sahai* v. *Harbans* (1911) 33 All. 626; II I.C. 932; *Ramanamma* v. *Viranna,* 1931 A.P.C. 100; 35 C.W.N. 633, 33 Bom.L.R. 960; 131 I.C. 401; *Pannalal* v. *Thansing,* 1952 A.N. 195. The point actually decided in *Ram Coomar Coondoo's* case was that a suit cannot lie at the instance of a successful defendant in a former suit to recover the costs of that suit from a party who advanced funds for the prosecution of the suit to the plaintiff therein, even though the advances may have been made under an agreement champertous and unconscionable in its nature, and though that party was the real actor and had an interest in that suit. *Gopalan* v. *Chinnayya,* 1958 A.A.P. 630; *Raghunath* v. *Nilkanth,* 20 I.A. 112; 20 Cal. 848.

24 *Kunwar Ram Lal* v. *Nil Kanth* (1893) 20 I.A. 112; *Dhallu* v. *Jiwan Singh* (1894) Punj. Rec. No. 79; *Stewart* v. *Ram Chand* (1906) Punj. Rec. No. 26; *Alopi Parshad* v. *Court of Wards,* 1938 A.L. 23; *Gopalan* v. *Chinnayya,* 1958 A.A.P. 630; *Raghunath* v. *Nilkanth,* 20 I.A. 112; 20 Cal. 848.

25 *Kunwar Ram Lal's case, supra,* note 17

26 *Raja Mohkam Singh* v. *Raja Rup Singh* (1893) 20 I.A. 127; 15 All. 352, in appeal from *Chunni Kaur* v. *Rup Singh* (1888) 11 All. 57.

27 *Hussain Baksh* v. *Rahmat Husain* (1888) 11 All. 128. See also *Harivalabhdas* v. *Bhai Jivanji* (1902) 26 Bom. 689.

28 *Venkataswami* v. *Nagi Reddy* (1962) A.AP. 457, 458; *Ram Sarup* v. *Court of Wards,* 1940 Lah. 1, 12 (P.C.); 67 I.A. 50; (1940) A.PC. 19 folld.; *Ram Coomar Coondoo* v. *Chander Canto Mookerjee,* 4 I.A. 23, 47; 2 Cal. 233; *Zainab Begum* v. *Khurshid Begum* (1963) Rat. A. AP. 370; *Ratanchand Hirachand* v. *Askar Nawaz Jung* (1976) A.AP. 112, 121.

29 *Harilal Nathalal* v. *Bhailal Pranlal,* 1940 A.B. 143; 188 I.C. 217; 42 Bom. L.R. 165.

30 *Suganchand* v. *Balchand,* 1957 A. Raj. 89.

31 *Gurusami* v. *Subbaraya* (1888) 12 Mad. 118; *Siva Ramayya* v. *Ellamma* (1899) 22 Mad. 310.

32 *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (1884) 8 Bom. 323, 333, 334.

33 *Gopal Ramchandra* v. *Gangaram* (1889) 14 Bom. 72, followed by the High Court of Madras in the case of a similar transaction in *Ramanuja* v. *Narayana* (1895) 18 Mad. 374.

previously transferred by way of gift to another person is not champertous.[34] And where a *patnidar,* having a claim against the defendant for Rs. 13,099, sold fourteen annas share of his claim to another for Rs. 4,000, it was held in a suit by the *patnidar* and his assignee to recover Rs. 13,099 from the defendant that the sale was not champertous.[35] But where the liquidator of a company compromised a claim of the company amounting to Rs. 1,61,500 for a tenth part of its amount on the representation of the debtor's friends that he could not pay more, and after about ten years assigned the same claim to a third person who was neither a creditor nor shareholder of the company, but a complete outsider as regards all matters connected with the company, it was held in a suit brought by the assignee to have the compromise declared void on the ground of fraud that the suit was not maintainable, as the assignment was effected with a view to litigation, and was, therefore, champertous in its nature.[36] Sargent J. said:

"The case is, therefore, the simple one of a stranger officiously interfering for reasons of his own, and in no way at the request or even suggestion of the company or liquidator, in a matter in which he has no connection whatever, with the sole object of enabling himself to dispute transactions which occurred ten years, ago, and in which, independently of the assignment of those claims, he has no interest whatever, so far at least as appears on the plaint."

In a Privy Council case, *A* claimed to be entitled to a *taluq* by succession, of which *B* had entered into possession. Not having money to establish his title to the *taluq* by suit, *A* sold a moiety of the *taluq* to *R* for Rs. 1,50,000. In the sale deed it was stated that a lakh of rupees had been paid down by *R,* and that the balance of Rs. 50,000 was to remain on deposit with *R,* to be expended in prosecuting the proposed suit and in paying Rs. 50 every month to *A* and Rs. 20 to his mukhtar. A suit was then brought by *A* and *R* as co-plaintiffs against *B. A* afterwards compromised with *B,* and withdrew from the suit. Then arose the question whether *R* could sue alone, and it was held that he could. It was contended on behalf of *B* that the statement in the sale deed that one lakh had been paid to *A* was not true, and that the sale to *R* was void as being champertous. Their Lordships, after observing that the statement as to the payment of one lakh was not in accordance with the fact, said:

"Of course, at the first blush, the untrue statement throws suspicion upon the whole transaction. But after all, so long as the deed stands, it is no concern of *B* that *A* may have a grievance against *R* on the score of a misstatement in an instrument to which *B* is no party. *A* himself has taken no steps to impeach the deed. On the contrary, in the course of the two years that elapsed between the date of the deed and the institution of the suit, *A* more than once affirmed the transaction... Apart from the untrue recital in the sale deed there seems to be no flaw in the transaction. Without assistance *A* could not have prosecuted his claim. There was nothing extortionate or unreasonable in the terms of the bargain. There was no gambling in litigation. There was nothing contrary to public policy. Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by *A* of one moiety of his interest in the estate, giving a good title to *R* on which it was competent for him to sue."[37]

In *Raja Bhagvat Dayal Singh* v. *Debi Dayal Sahu,*[38] a Hindu widow sold to one *X* certain properties which she had inherited from her son. The sale, it was alleged, was without legal necessity. On the death of the widow the reversioners who were refused possession by *X* executed a sale deed in favour of one *R* by which they purported to sell their rights in the properties, which were worth Rs. 3,00,000 to *R* for Rs. 52,600 of which, however, only Rs. 600 was paid down, the balance being left on deposit with *R* "on this condition, that the vendors

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34 *Siva Ramayya* v. *Ellamma* (1899) 22 Mad. 310.

35 *Abdool Hakim* v. *Doorga Proshad* (1879) 5 Cal. 4. See also *Tarachand* v. *Suklal* (1888) 12 Bom. 559. "Champertous transactions are in their essence speculative, and the fairness or otherwise of a particular bargain is almost always open to some debate. It is essential to have regard not merely to the value of the property claimed, but to the commercial value of the claim. This has to be estimated by the parties in advance of the result.... Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial, and if the financier must needs risk losing his money, he may well be allowed some chance of exceptional advantage": per Sir George Rankin in *Lala Ram Sarup* v. *Court of Wards* (1939) 67 I.A. 50, at p. 62; (1940) Lah. 1; 185 I.C. 590; 1940 A.P.C. 19. See also *Unnao Commercial Bank Ltd.* v. *Kailash Nath,* 1955 A.A. 393, 396.

36 *Goculdas* v. *Lakshmidas* (1879) 3 Bom. 402.

37 *Achal Ram* v. *Kazim Hussain Khan* (1905) 32 I.A. 113; 27 All. 271.

38 (1908) 35 I.A. 48; 35 Cal. 420.

should get the whole of the consideration in case the whole of the property should be recovered, and in the event of recovery of a portion of the property sold, a portion of the consideration money in proportion thereto." In a suit by *R* against *X* for possession of the property, it was held by the High Court of Calcutta that the sale was void as being champertous, that no title passed to *R*, and that he was not therefore entitled to maintain the suit.[39] On appeal it was held by the Privy Council that though the agreement was of a generally champertous character, it was not void on that account, nor was it opposed to public policy and void by reason of the stipulation relating to the payment of the consideration. As to *X*'s contention that the assignment by the reversioners to *R* was unfair and unconscionable, it was held that, *X* not being a party to the assignment, it was not open to him to question the transaction on that ground. In the course of the judgment their Lordships said:

"For the respondents it was bodly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases, *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee,*[40] *Kunwar Ram Lal* v. *Nil Kanth,*[41] *Lal Achal Ram* v. *Raja Karim Husain Khan,*[42] before this Board, a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which certainly would have been void if champerty avoided transaction in India. It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase-money by the first appellant to the second and third. The purchase-money was fixed at Rs. 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally. It was further said, and this was relied upon in the Courts of India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present action. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail."

In a suit to recover money for financing litigation the burden is on the plaintiff to prove that the litigation is just and the agreement to finance it just and equitable.[43]

Agreements between legal practitioners subject to the Legal Practitioners Act, 1879, and their clients making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained are illegal as being opposed to public policy.[44]

4. Interference with course of justice.—It needs no authority to show that any agreement for the purpose or to the effect of using improper influence of any kind with judges or officers of justice is void.[45] Various agreements not open to objection on the ground of champerty, nor always obviously wrong in themselves, have been held void as attempting to interfere with the powers and discretion of the regular Courts in administering justice. Thus an agreement whereby one person agreed to assist another in carrying out litigation for the purpose of delaying execution of a decree was held to be unenforceable.[46] So much of this doctrine as it was thought proper to preserve in India will be found in s. 28, below.

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39 See *Debi Doyal Sahoo* v. *Thakurai Bhau Pertap* (1903) 8 C.W.N. 408.
40 (1876) 4 I.A. 23; 2 Cal. 233.
41 (1893) 20 I.A. 112.
42 (1905) 32 I.A. 113; 27 All. 271; 9 C.W.N. 477.
43 *Babu Ram* v. *Ram Charan,* 1934 A.A. 1022; 151 I.C. 969.
44 *Ganga Ram* v. *Devi Das* (1907) Punj. Rec. No. 61; *In the matter of Mr. G.* 1954 A.S.C. 557.
45 A promise of reward by a Moslem litigant to a Hindu devotee in consideration of offering prayers for the success of his suit is not against public policy: *Balasundara Mudaliar* v. *Mohammed Oosman* (1929) 118 I.C. 65; 1929 A.M. 812; 57 M.L.J. 154; *Bapuji* v. *Natranjan,* 1925 A.N. 119; 31 N.L.R. 229. Otherwise where the reward was to be a commission on the money recovered in the suit: *Soti Bhagwan Dat Shastri* v. *Raja Ram* (1927) 25 All.L.J. 518; 100 I.C. 1040; 1927 A.A. 406. A promise to withdraw a *caveat* and to get certain costs from the executor, if the will is proved, is, if fairly made, in no way contrary to public policy: *Pashupati Mukherji* v. *Shitalkumar Sarkar* (1930) 58 Cal. 699; 133 I.C. 327; 1931 A. Cal. 587.
46 *Nand Kishore* v. *Kunj Behari Lal* (1933) All. L.J. 85; 145 I.C. 756; 1933 A.A. 303.

5. **Marriage brocage contracts.**—Agreements to procure marriages for reward[47] are undoubtedly void by the common law, on the ground that marriage ought to proceed, if not from mutual affection, at least from the free and deliberate decision of the parties with an unbiased view to their welfare. In England, however, this topic is all but obsolete. It is nearly a century since any case of the kind, except that which is cited in the last note, has been reported in England or Ireland.[48] But such questions have come before Indian Courts in several modern cases, with not quite uniform results. In all those cases, it will be observed, the parties to the suit have been Hindus, a community in which the consent of the marrying parties has rarely, until quite recent years, anything to do with the marriage contract, which is generally arranged by the parents or friends of the parties before they themselves are of an age to give a free and intelligent consent.[49] The consent of parties not being an essential condition in the Hindu marriage contract, and the Asura form of marriage being still recognised as a valid form, it has been held by the High Courts of Allahabad and Orissa,[50] following an earlier decision of the Madras High Court,[51] that every agreement to pay money to the father or guardian of a girl in consideration of his consent to the marriage of the girl is not unlawful, and that each case must be judged by its own circumstances. "Where the parents of the girl are not seeking her welfare, but give her to a husband, *otherwise ineligible,* in consideration of a benefit to be secured to themselves, an agreement by which such benefit is secured is, in our opinion, opposed to public policy and ought not to be enforced".[52] On the other hand, it has been held by the High Courts of Bombay[53] and Calcutta,[54] and also by a Full Bench of the Madras High Court,[55] that an agreement to pay money to the parent or guardian of a minor, in consideration of his consenting to give the minor in marriage, is void as being opposed to public policy, and the same view has been taken in the Punjab.[56] If such an agreement is void, it follows that if the defendant refuses in breach of the agreement to give his daughter in marriage to the plaintiff's son, the plaintiff cannot recover the stipulated sum from the defendant as damages for breach of the contract, even if the amount has been described in the agreement as *peheramni* to be given to the bridegroom's father.[57] And it also follows that if the marriage is performed, and the defendant fails to pay the agreed amount, the plaintiff cannot maintain a suit to recover it from the defendant,[58] even though the defendant has executed a promissory note in favour of the plaintiff.[59] But where the agreed sum or a portion thereof has been paid by the plaintiff in advance and the suit is brought to recover back the amount on failure of the

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47 Whether general or specific: *Hermann* v. *Charlesworth* (1905) 2 K.B. 123, C.A., reversing the judgment of a Divisional Court who had held that only agreements to procure marriages with specified persons were illegal.

48 In *Hurwitz* v. *Taylor* (1926) T.P.D. 81, a Transvaal Court held such an agreement to be contrary to public policy. See an interesting article by Raphael Powell in 1953 Current Legal Problems, 254.

49 Cp. *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1896) 21 Bom. 23, where it is laid down that the contract for the marriage of Hindu children under Hindu law is made exclusively by the parents. It is settled (following the analogy of English law) that specific performance of a Hindu parent's or guardian's contract to give him a child in marriage will not be granted; the only remedy is in damages. See *Re Gunput Narain Singh* (1875) 1 Cal. 70; *Khimji* v. *Lalji Karamsi* (1941) Bom. 211; 196 I.C. 858; 1941 A.B. 129.

50 *Baldeo Sahai* v. *Jumna* (1901) 23 All. 495; *Girdhari Singh* v. *Neeladhar Singh* (1912) 10 All. L.J. 159; 16 I.C. 1504; *Tihadi* v. *Gokhei Panda,* 1954 A. Or. 17.

51 *Visvanathan* v. *Saminathan* (1889) 13 Mad. 83.

52 23 All. 495, at pp. 496, 497. See also *Mst. Sonphula Kuer* v. *Gansuri,* 1937 A.P. 330; 169 I.C. 901.

53 *Dholidas* v. *Fulchand* (1897) 22 Bom. 658; *Dulari* v. *Vallabdas* (1888) 13 Bom. 126.

54 *Baldeo Das* v. *Mohamaya* (1911) 15 C.W.N. 447.

55 *Kalavangunta Venkata* v. *Kalavangunta Lakshmi* (1908) 32 Mad. 185.

56 *Wazarimal* v. *Ballia* (1889) Punj. Rec. No. 128; *Hira* v. *Bhandari* (1892) Punj. Rec. No. 112; *Kundan Lal* v. *Nathu* (1880) Punj. Rec. No. 116. See also *Abbas Khan* v. *Nur Khan* (1920) 1 Lah. 574; 58 I.C. 167.

57 *Dholidas* v. *Fulchand* (1897) 22 Bom. 658. See also *Dulari* v. *Vallabdas* (1888) 13 Bom. 126; *Kalavangunta Venkata* v. *Kalavangunta Lakshmi* (1908) 32 Mad. 185; *Raunekbal Singh* v. *Harihar Singh* (1962) A.P. 343 (payment of tilak money punishable under Bihar Dowry Restraint Act of 1950).

58 *Baldeo Das* v. *Mohamaya* (1911) 15 C.W.N. 447; *Baldeo Sahai* v. *Jamna Kunwar* (1901) 23 All. 495. The case of *Ranee Lallun* v. *Nobin Mohan* (1876) 25 W.R. 32, was peculiar, the agreement in that case having been acted on for fifty years.

59 *Narayanan Nambudri* v. *Partticharavoor,* 1945 A.M. 165, 221 I.C. 584. The contrary view in *Childambara Iyer* v. *Ananthakrishna,* 1954 A.T.C. 231 is not sustainable, as there must be consideration for a promissory note, and the consideration must not be illegal.

defendant to give the bride in marriage, the plaintiff is entitled to a decree for the same.[60] And it has been held by the High Court of Madras that a marriage brocage agreement being unlawful, a plaintiff who has paid money in advance is entitled to recover it back from the defendant though he himself may have broken the contract by refusing to give the bride in marriage.[61] The same view has been taken by the Patna High Court,[62] even though the plaintiff has assigned no reason for the refusal.[63] There is absolutely no doubt that if any present of ornaments has been made by the father or the guardian of the bridegroom to the bride, the same could be recovered by the former if the father of the bride, in breach of the contract, gives away the girl in marriage to another,[64] or if the bride or bridegroom dies before the marriage.[65]

Contract against Public Policy cannot be the basis of a criminal charge—Receiving money for marriage.—A contract for receiving pecuniary gain either by the father of the groom or of the bride in consideration of giving his son or daughter in marriage is opposed to public policy and repugnant to morals. Such a contract is hit by s. 23, Contract Act, and is not enforceable in a Civil Court. Hence it cannot form the basis of a charge of cheating in a criminal Court. It is submitted that the proposition is too broadly stated about criminal liability.[66]

The Madras High Court holds that there is no distinction in principle between an agreement between *A* and *B* that *B*'s daughter shall marry *A* 's son on payment of a sum of money by *A* to *B* and an agreement between *A* and *B* that *B*'s daughter shall marry *A*'s son and that, if she fails to do so, *B* shall pay a sum of money to *A*. In such case *B* has a pecuniary interest in bringing about the marriage. In the one case, if the event takes place, he receives money. In the other case, if the event does not take place, he has to pay money. If the former agreement is void as being contrary to public policy as held in the Full Bench case cited above, the latter agreement, it was held, is equally so.[67]

It has been held in the Punjab that a family arrangement of inter-marriages of sons and daughters of various families known as *bil mawaza* amongst persons of the same class, by which the family *A* gives a girl to be taken as a wife on equal terms into family *B*, and a girl of the family *B* is at the same time given as a wife into family *A*, stands on a totally different footing from what is really a sale of the girl, and is not therefore void as opposed to public policy. Where a girl, therefore, of a family *A* is given as a wife in family *B* in virtue of such an arrangement, but family *B* refuses to give a boy of the family as a husband in family *A*, a suit will lie for damages for breach of the contract. But since such arrangements are not held in very high repute, the Court will not award heavy damages.[68]

There is absolutely no doubt that where the agreement is by a person to pay money to a stranger hired to procure a wife for him, it is opposed to public policy and will not be enforced

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60 *Juggessur* v. *Panchcowree* (1870) 14 W.R. 154; *Ram Chand* v. *Audaito Sen* (1884) 10 Cal. 1054; *Gulabchand* v. *Fulbai* (1909) 33 Bom. 411, where the marriage could not take place because of the death of the plaintiff's son; *Jiwana* v. *Malak Chand* (1919) 54 P.R. 113; *Ganpat* v. *Lahana* (1927) 106 I.C. 803; 1928 A.N. 89; *Alsidas* v. *Punamchand* (1944) Nag. 535, 1944 A.N. 159, 214 I.C. 168; *Bhan Singh* v. *Kaka Singh,* 1933 A.L. 849; *Sadhusing Fatehsing* v. *Jhamandas,* 1937 A.S. 211; 171 I.C. 1005; see *contra Girdhari Singh* v. *Neeladhar Singh* (1912) 10 All. L.J. 159.

61 *Srinivasa* v. *Sesha* (1918) 41 Mad. 197; 41 I.C. 783.

62 *Gopi Krishna* v. *Janak Prasad,* 1951 A.P. 519, reversing *Janak Prasad* v. *Gopi Krishna,* 1947 A.P. 132, 225 I.C. 177.

63 *Dharnidhar* v. *Kanhji Sahay,* 1949 A.P. 250.

64 *Rambhat* v. *Timmayya* (1892) 16 Bom. 673; *Girdhari Singh* v. *Neeladhar Singh* (1912) 10 All. L.J. 159; 16 I.C. 1004; *Cohen* v. *Sellar* (1926) 1 K.B. 536. But if the proposed marriage is in fact solemnised, and gifts of this kind made over, they cannot be recovered back; *Ram Sumran Prasad* v. *Gobind Das* (1926) 5 Pat. 646; 99 I.C. 782; 1926 A.P. 582.

65 *Rajendra Bahadur* v. *Roshan,* 1950 A.A. 592.

66 *Ramji Lal* v. *State of Haryana State* (1965) 1 Punj. 398; 403; *A. Suryanarayan Murthy* v. *P. Krishna Murthy and another* (1957) A.O. 124; *Emperor* v. *Jani Hira* 13 Cr. L.J. 521 (1912); *Jamadar Rai and others* v. *Emperor* (1930) A.P. 504 reld. on.

67 *Devarayan* v. *Mutturaman* (1914) 37 Mad. 393; 18 I.C. 515; followed in *Fazal Rahim* v. *Nur Mohammad,* 1935 A. Pesh. 121; 157 I.C. 736.

68 *Amir Chand* v. *Ram* (1903) Punj. Rec. No. 50.

by any of the Indian Courts.[69] An agreement by *A* to pay money to *B* if *B* induces his daughter to take *A* in adoption is as much against public policy as a marriage brocage contract, and *B* is not entitled to recover on the agreement.[70] It has, however, been held that a promise to pay a sum of money to a bride or bridegroom in consideration of the marriage is valid and not opposed to public policy.[71]

5A. Contract in restraint of marriage and marriage agreements against public policy.—A contract in general restraint of marriage is unenforceable on the ground of public policy, whether it contains an express undertaking that the subject will not marry, or whether it is merely a contract which on financial or other grounds tends to discourage a subject from marrying.[72] A deed of settlement by a married Hindu in favour of a lady consenting to be his second wife executed prior to the marriage gifting certain properties to her for life with "vested remainder" to the children of marriage is void as being an illegal or unlawful consideration.[73] The gift over to the children of marriage suffers from the same defect and is also void.[74]

A seventy-year-old man living apart from his wife promised a sixty-five-year old woman that he would leave her his house and everything and would marry her "when I will be ready"; and she continued living with him after she discovered he was married.

She was held to have no claim in contract or on a *quantum meruit* to his house and land.[75]

An agreement to marry is illegal as against public policy if at the time it is made one of the parties, to the knowledge of the other, is married. This is so even though the agreement is to marry when the existing marriage ends by death or a decree of court; and it makes no difference that the existing marriage may be an empty shell and there are grounds for immediate divorce. But an enforceable agreement can be made after the decree *nisi*.[76] But the contract is enforceable if at the time the contract was made one of the parties was unaware of the fact[77] or if a decree *nisi* obtained was capable of being made absolute in a short time (2 or 3 weeks).[78] A divorce deed between a husband and wife with a provision of maintenance till remarriage irrespective of whether the husband succeeded in proving a plea of the wife living in adultery is void under s. 23 as being opposed to public policy.[79]

A petition for divorce under s. 8 of Bombay Hindu Divorce Act was withdrawn and divorce under custom with a provision for maintenance for life or till marriage was made by the husband.

This agreement was held to be subject to the provisions of the Act that the wife shall remain chaste.[80] A marriage custom which allows dissolution of marriage at the will of either spouse is not against public policy.[81] It may not be difficult to see the difference between this case and the Bombay case *Keshav* v. *Bai Gandi*.[82] In a latter case, a caste custom allowing either spouse to divorce the other against the other's wish out of mere caprice, sole condition being the fixing of money compensation by the caste was held opposed to public policy under s. 23. Money paid by a person to obtain a divorce by another is money paid for an illegal or immoral purpose.[83]

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69 *Vaithyanathan* v. *Gungarazu* (1893) 17 Mad. 9; *Pitamber* v. *Jagjiwan* (1884) 13 Bom. 131.
70 *Kothanda* v. *Thesu Reddiar* (1914) 27 Mad. L.J. 416.
71 *Narayanan Nambudri* v. *Patticharavoor*, 1945 A.M. 165, 221 I.C. 584.
72 *In re Michelham's Will Trusts* (1963) 2 W.L.R. 1238, 1244.
73 *Marayee Ammal* v. *Nalluswamy* (1965) 2 M.L.J. 329; *Maneshaw* v. *Motishaw* (1956) S.C.R. 639 dist
74 *Marayee Ammal* v. *Nalluswamy* (1965) 2 M.L.J. 329.
75 *Lazarenko* v. *Borowoky* (1966) 57 D.L.R. (2nd) 577.
76 *Fender* v. *St. John-Mildmay* (1938) A.C. 1; (1937) 3 All E.R. 402; *Dobersek* v. *Petrizza* (S. C. Wellington, 16th Oct. 1967); *Spiers* v. *Hunt* (1908) 1 K.B. 720; *Wilson* v. *Carnley* (1908) 1 K.B. 729; *Skipp* v. *Kelly*, 42 T.L.R.258 (1926); *Siveyer* v. *Allison* (1935) 2 K.B. 403.
77 *Wild* v. *Harris* (1849) 7 C.B. 999; 157 E.R. 395; *Millward.* v. *Littlewood* (1850) 5 Ex. 775; 155 E.R. 339.
78 *Psaltis* v. *Shultz* (1948) 76 C.L.R. 547, 563-4 (Two or three weeks' time); *Fender* v. *St. John Mildmay* (1938) A.C. 1 refd. to.
79 *Audambar* v. *Sonubai*, 1962 A.B. 35.
80 *Audambar* v. *Sonubai*, 1962 A.B. 35.
81 *Suddha* v. *Sankappa Rai* (1963) A.My. 245; *contra Keshav* v. *Bai Gandi*, 39 Bom. 538 dist.
82 39 Bom. 538; 1915 A.B. 107.
83 *Thanki* v. *Bajirao*, 1956 A.N. 160.

6. Agreements tending to create interest against duty.—One of the reasons suggested for not enforcing agreements to reward parents for giving their children in marriage is that such agreements tend to a conflict of interest with duty. The same principle is applied by the Common Law to dealings of agents and other persons in similar fiduciary positions with third persons.[84] An agent must not deal in the matter of the agency on his own account without his principal's knowledge. In the present Act the rules on this head are embodied in the chapter on Agency,[85] and will accordingly be considered in that place. Certain rules which we shall find in the chapter on Indemnity and Guarantee[86] rest on similar grounds of equity. There are conflicting opinions as to the legality of an agreement by a *Patwari* or *Kanungo* in Government service for the purchase of land situated within his circle or for the acquisition of any other interest therein. Allahabad decisions that such an agreement created an interest which would conflict with his duty[87] have been overruled by the Bench of the same Court;[88] but the Lahore High Court does not follow this, at any rate as to agricultural land.[89] The Bombay[90] and the Madras[91] High Courts agree with the Full Bench decision of the Allahabad High Court. If a person enters into an agreement with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with public duty, the agreement is void.[92]

6A. Transfer of parental authority.—There is no difference between Hindu Law and English Law in regard to guardianship. The father is the natural guardian of his minor children but the guardianship is in the nature of a sacred trust and he cannot during his lifetime substitute another to be the guardian. He may, in his discretion, as guardian entrust the custody and education of his children to another. But the authority is essentially a revocable one and if the welfare of the children require it, he can notwithstanding any contract to the contrary take such custody and education in his own hands.[93] If, however, the authority has been acted upon in such a way as, in the opinion of the court, to create associations or give rise to expectations on the part of the infants, which it would be undesirable in their interests to disturb or disappoint, such court will interfere to prevent its revocation.[94] In *Besant* v. *Narayaniah,*[93] the question of validity of the contract was not specifically decided but the decision shows how far the agreement acted upon will be enforced.

In English Law, a contract by a parent to transfer parental rights and religious education is void.[95] as against public policy. Thus a father cannot by contract bind himself to give up the control of the religious education of his children[96] or their custody.[97] But it may be a valid condition in a deed of separation unless the court is of opinion that it is not in the interests of the children. If so the contract will not be enforceable.[98] Similarly the mother of an illegitimate child cannot by contract transfer the obligation imposed on her by law to another person. But there may be circumstances in which such a contract may, for good consideration, be enforced.[99]

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84 *Manikka Mooppanar* v. *Peria Muniyandi,* 1936 A.M. 541; 164 I.C. 31.
85 Ss. 215, 216.
86 Ss. 133, 137.
87 *Shiam Lal* v. *Chhaki Lal* (1900) 22 All. 220; *Sheo Narain* v. *Mata Prasad* (1904) 27 All. 73; 1 A.L.J. 412.
88 *Bhagwan Dei* v. *Murari Lal* (1917) 39 All 51; 36 I.C. 259; 14 A.L.J. 962 (F.B.); *Kamala Devi* v. *Gur Dayal* (1917) 39 All. 58; 36 I.C. 319; 14 A.L.J. 969. In *Sharan Behari Lal* v. *Kanhaya Lal,* 1953 A.A. 276, a mortgage to an advocate by his client was held not to be void.
89 *Abdul Rahman* v. *Ghulam Muhammad* (1926) 7 Lah. 463; 98 I.C. 673; 1927 A.L. 18.
90 *Dharwar Bank* v. *Mahomed Hayat,* 1931 A.B. 269; 133 I.C. 241; 33 Bom.L.R. 250.
91 *Manuel Lobo* v. *Nicholas Britto* (1897) 7 Mad.L.J. 268.
92 *Sitarampur Coal Co. Ltd.* v. *Colley* (1908) 13 C.W.N. 59. It is not easy to see what the party's knowledge has to do with it. The rule is for the protection of the public interest.
93 *Besant* v. *Narayaniah,* 41 I.A. 314.
94 *Besant* v. *Narayaniah,* 41 I.A. 314; 1914 A.PC. 41; *Lyons* v. *Blenkin* (1821) Jacob 245 per Lord Eldon quoted in *Andrews* v. *Salt* (1873) 8 Ch. App. 622, 640.
95 Chitty: On Contracts (23rd Ed.), para 860: (24th Ed.) Para 960.
96 *Andrews* v. *Salt* (1873) 8 Ch. App. 622, 636.
97 *Re Andrews* 8 Q.B. 153; See now Adoption Act (1958).
98 Chitty: On Contracts (23rd Ed.), para 860: (24th Ed.) Para 960.
99 *Humphreys* v. *Polak* (1901) 2 K.B. 385, 388.

In the case of Hindus, the Law of Guardianship has been now codified by the Hindu Minority and Guardianship Act, 1956, and by s. 6 the law has been declared in terms of the Hindu Law as administered in India and it is no different from what it was before the new Act.[1] But in the case of guardianship under sec. 13 of the Act, the first and paramount consideration is the welfare of the minor.[2]

An ante-nuptial agreement between husband and wife of different religious persuasions that boys should be brought up in the religion of the father and girls in the religion of the mother is not binding as a legal contract. No damages can be recovered and it cannot be enforced by a suit for specific performance. The decision of the question would depend upon what is for the benefit of a child.[3]

7. Sale of public offices.—Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons; and such sales are forbidden in England by various statutes said to be in affirmance of the common law.[4] In *Parkinson* v. *College of Ambulance, Ltd.*,[5] the secretary of the defendant charity fraudulently represented to *P* that the charity could procure a knighthood for him, if he made an adequate gift to the charity. *P* paid £3,000/- to the charity, but sought in vain to recover his money when no title was forthcoming. The cases in India on this branch of the subject have arisen principally in connection with religious offices. The sale of the office of a *shebait* has been held invalid by the High Court of Madras.[6] The High Court of Bombay, while affirming the invalidity of an alienation of the office to a stranger, upholds an alienation made in favour of a member of the founder's family standing in the line of succession.[7] Similarly the office of *mutwali* of a *wakf* is not transferable,[8] nor land which is the emolument of a religious office.[9] A custom allowing the sale of the office of *uralar* (trustee) of a Hindu temple for the pecuniary advantage of the trustee, even if it was established, would be bad in law.[10] These decisions are based upon the principle that the interest of the public might suffer if bargains relating to public offices are upheld, as their effect is to prevent such offices being filled by the best available persons. Where, however, the claimants to the office of *ojha* (high priest) of the temple of Baidyanath were members of a family group, and one claimed the office on the ground that it was elective, and the other that it was hereditary, the High Court of Calcutta held that a compromise by which one of the claimants relinquished his claim in favour of the other in consideration of an annual payment out of the *charao* offerings to the idol was not against public policy.[11] The transfer of a village barber *inam* by some of the office holders, not being a transfer within section 5 of Madras Hereditary Offices Act, is not prohibited.[12] But the office of *Vettis* is not transferable as unlike the office of barbers it is not heritable but is an appointment by the Collector.[13] (See Transfer of Property Act, 1882, s. 6(f).)

An agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void under this section.[14] In the language of the English law, such an agreement is an office

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1 Act 32 of 1956.
2 Chitty on Contracts (23rd Ed.), para 860: (24th Ed.) Para 960. Also see Mulla: Hindu Law (14th Edn.); sec. 17 of Guardians and Wards Act 1890, *Bose* v. *Brown* (1951) A. Punj. 338, 340.
3 *Andrews* v. *Salt* (1873) 8 Ch.App. 622, 636; *In re Meades*, Ir.L.R. 5 Eq. 98; *Hill* v. *Hill*, 10 W.R. 400.
4 See Pollock, Contract, 13th ed., pp. 306-7. The statute 49 Geo. III, c.126, s.3, is still in force in the Presidency towns.
5 (1925) 2 K.B. 1.
6 *Narasimma* v. *Anantha Bhatta* (1881) 4 Mad. 391; *Kuppa Gurukal* v. *Dora Sami* (1882) 6 Mad. 76. See also *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (1876) 4 I.A. 76; 1 Mad. 235; *Ghanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1900) 27 I.A. 69; 23 Mad. 271.
7 *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298.
8 *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732.
9 *Anjaneyalu* v. *Sri Venugopala Rice Mill Ltd.* (1922) 45 Mad. 620; 70 I.C. 466.
10 *Rajah Vurmah Valia* v. *Ravi Varmah Kunhi, supra,* note 95.
11 *Girijanund* v. *Sailajanund* (1896) 23 Cal. 645.
12 *Venkatareddi* v. *Venkatachalam* (1964) A.A.P. 465.
13 Ibid.
14 See also *Venkataramanayya* v. *J. M. Lobo,* 1953 A.M. 506.

brocage agreement invalid as opposed to public policy[15] (see illustration (f) to the section, above). So too a promise to make an annual payment to a person on condition that he withdraws his candidature for a public office in favour of the promisor is unenforceable.[16] Where money is paid under such an agreement, it cannot be recovered back from the defendant, though he has failed to carry out his promise to procure employment for the plaintiff in public service.[17]

8. Agreements tending to create monopolies.—Agreements having for their object the creation of monopolies are void as opposed to public policy.[18] An arrangement which is designed to keep up prices (as in a minimum price arrangement) is not necessarily disadvantageous to the public. It may operate to the public benefit.[19] A provision reasonable as between parties which restricts the trade of a British Company is not *prima facie* against public policy merely because it is imposed at the instance of a foreign business concern.[20]

8A. Airlines.—A clause in an exemption agreement excluding liability of an airline carrier is not opposed to public policy and to s. 23.[21]

9. Agreement by client to remunerate his pleader's clerk.—An agreement by which a litigant binds himself to pay a sum of money to his pleader's clerk for giving special attention to his legal business which the pleader is bound to see to in consideration of his fee is opposed to public policy, and consequently cannot be enforced.[22]

10. Agreement not to bid.—An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful,[23] as being in restraint of trade. *Harrop* v. *Thompson* (1975)2 All E.R. 94, 96, but it may be so if the purpose is to defraud a third party.[24] Or prevent the realisation of fair price of to damp the sale which will be against public policy. *Lachhmandas* v. *Hakim Sita Ram* (1975) A.D. 159, 164.

11. Suicide.—In England suicide by a sane person is *felo de se,* and it has accordingly been held that the heirs or assignees of an assured, who has committed suicide, cannot enforce the insurance policy, even though on its true construction the insurers had agreed to pay in such an event.[25] This was on the ground that suicide was a crime, and it would be against public policy to enforce such a contract of insurance. In India, however, suicide is not a crime,

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15 *Saminatha* v. *Muthusami* (1907) 30 Mad. 530; *Karuppiah* v. *Ponnuchami,* 1933 A.M. 768; 65 M.L.J. 532; 145 I.C. 972.

16 *Puttu Lal* v. *Raj Narain* (1931) 53 All. 609; 132 I.C. 419; 1931 A.A. 428; *Parsons* v. *Thomson,* 2 R.R. 773; *Kurrupiah* v. *Ponnuchami Pillai,* 1933 A.M. 768; *Saminatha Aiyar* v. *Muthusami Pillai,* 30 Mad. 530.

17 *Ledu* v. *Hiralal* (1916) 43 Cal. 115; 29 I.C. 625. See this case commented on in *Srinivasa* v. *Sesha Ayyar* (1918) 41 Mad. 197, at pp. 200, 202; 41 I.C. 783. *Parkinson* v. *College of Ambulance* (1925) 2 K.B. 1. In *Ranjeetsingh* v. *Ramlal,* 1951 A.M.B. 113, it was held that offering money to a jobber in a mill to give employment was against public policy.

18 *Somu Pillai* v. *The Municipal Council Mayavaram* (1905) 28 Mad. 520; *Mackenzie* v. *Rameshwar Singh* (1916) 1 Pat.L.J. 37; 34 I.C. 754 (a case which ought not to have been reported at all); *Devi Dayal* v. *Narain Singh* (1927) 100 I.C. 859; *Maharajadhiraja Sir Kameshwar Singh* v. *Yasin Khan* (1937) 17 Pat. 255; 179 I.C. 431; 1938 A.P. 473; *District Board, Jhelum* v. *Hari Chand,* 1934 A.Lah. 474; 153 I.C. 39.

19 *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1914) A.C. 461, 473; (1914-15) All E.R. Rep. 752 (per Lord Haldane, L.C.).

20 *Tool Metal Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 688. But see *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 529 (Export price fixed by another country is contrary to public policy).

21 *Indian Airlines Corporation* v. *Sm. Madhuri Chaudhary* (1965) A.Cal. 252; *Rukmanand Ajitsaria* v. *Airways (India) Ltd.* (1960) A.Assm. 71.

22 *Suryanarayana* v. *Subbayya* (1917) 41 Mad. 471; 42 I.C. 911.

23 *Mohomed Meera* v. *Savvasi Vijya* (1900) 23 Mad. 227; 27 I.A. 17; *Hari* v. *Naro* (1894) 18 Bom. 342; *Doorga Singh* v. *Sheo Pershad* (1889) 16 Cal. 194, 199; *Maung Sein Htin* v. *Chee Pan Ngaw* (1925) 3 Rang. 275; 92 I.C. 270; 1925 A.R. 275; *Nand* v. *Bhagat Singh,* 1932 A.L. 32; 134 I.C. 101; *Mohafazul* v. *Babulal* (1948) Nag. 431, 1949 A.N. 113; *Ramalingaiah* v. *Subbarami,* 1951 A.M. 390; *Mohomed Isack* v. *Sreeramalu,* 1946 A.M. 289, 226 I.C. 37; *M. Mohammad* v. *Narayana Rao* (1973) A. Ker. 266, 267; *Lachhmandas* v. *Hakim Sita Ram* (1975) A.D. 159, 164.

24 *Ram Lal Misra* v. *Rajendra Nath* (1932) 8 Luck. 233; 142 I.C. 595; 1933 A.O. 124, where the authorities are reviewed. Followed in *Hutchegowda* v. *H. M. Basaviah,* (1954) A.Mys. 29. 31.

25 *Beresford* v. *Royal Insurance Co. Ltd.* (1938) A.C. 586.

nor is it against public policy to enforce a contract of insurance where the assured has committed suicide.[26]

12. Contract not to revoke a Will.—A man may validly bind himself or his estate to make certain dispositions by his will.[27] A breach cannot be prevented by injunction but a suit for damages will lie if broken otherwise than by marriage. Such an agreement would not necessarily be void as being in restraint of marriage, although marriage would revoke the will.[28] A convenant not to revoke a will or alter it does not amount to a covenant not to marry. The covenant should be confined to acts of revocation performed as such and does not extend to revocation following as a matter of law.[29]

Waiver of illegality.—Agreements which seek to waive an illegality are void on grounds of public policy.[30] "Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys".[31]

Public Policy.—Court must take up on noticing illegality.—If a court of first instance or of Appeal is satisfied that there has been an illegality, it is bound to take the point of its own motion. In such a case it must apply the overriding basic principle of public policy that the courts will not assist a plaintiff by enforcing an illegal contract.[32] Even if a contract is not *ex facie* illegal, but if the illegality is disclosed in evidence the court must take notice of it although it is not pleaded.[33]

If by enforcing a contract contrary to an enactment the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of the parties. the contract will not be enforced by a court, as

"waiver in derogation of a statutory right is not favoured and waiver will be inoperative and void... if it would be against public policy or morals...."[34]

A plea of waiver cannot be given effect to if the consequence is the enforcement of an agreement in contravention of a statutory provision and produce the very result which the statute provides and makes illegal.[35] If unlawfulness or illegality is even indirectly connected

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26 *Scottish Union & National Insurance Co.* v. *Roushan Jahan* (1945) 20 Luck. 194, 1945 A.O. 152.

27 Chitty: On Contract 24th Ed. para 959; Theobald: On Wills (11th Ed.) p. 74 See also *In re Brookmans Trust* (1869-70) 5 Ch.A. 182, 192; *Hammersley* v. *De Biel* 8 E.R. 1312 (H.L.); *Synge* v. *Synge* (1894) 1 Q.B. 466; (1881-4) All E.R. Rep. 1164. Both these cases were cases where the consideration was marriage which took place after such agreement. *Robinson* v. *Ommancy* (1883) 23 Ch.D. 285; (1881-5) All E.R. Rep. 265.

28 Theobald: On Wills (11th Ed.) p. 74; *Robinson* v. *Ommancy* (1883) 23 Ch.D. 285; (1881-5) All E.R. 265.

29 *In re Marsland, Lloyds Bank Ltd.* v. *Marsland,* 1939 Ch. 820; (1939) 3 All E.R. 148.

30 *Dhanukdhari* v. *Nathima* (1907) 11 C.W.N. 848; *La Banque* v. *La Banque* (1887) 13 App. Ca. 111.

31 Per Field J. (Supreme Court, U.S.), in *Oscanyan* v. *Arms Co.,* 103 U.S. 261; *Hall* v. *Capell,* 7 Wallace 542.

32 *Snell* v. *Unity Finance Co. Ltd.* (1963) 3 W.L.R. 559, 569; See *North Western Salt Co.* v. *Electrolytic Alkali Co. Ltd.* (1914) A.C. 461, 477; (1914-15) All E.R. Rep. 752; *Montefiore* v. *Menday Motor Components Co. Ltd.* (1918) 2 K.B. 241, 244; *Ratanchand Hirachand* v. *Askar Nawaz Jung* (1976) A.AP. 112, 120; *Anand Prakash Om Prakash* v. *Oswal Trading Agency* (1976) A.D. 24, 27; *Connally* v. *Consumers Cordage Co.* (1908) 89 L.T. 347 (P.C.).

33 *Surasaibalini* v. *Phanindra* (1965) A.S.C. 1364; (1965) 1 S.C.R. 861; *Montefiore* v. *Menday Motor Components Co. Ltd.* (1918) 2 K.B. 241, 244; *Narayanrao* v. *Ramachandra Rao* (1959) A.A.P. 370, 376; *Scot* v. *Brown Doering McNab & Co.* (1892) 2 Q.B. 724; *Nixon* v. *Albion Marine Insurance Co.* (1867) 2 Ex. 338; *Surajmull Nagoremull* v. *Triton Insurance Co.* 52 I.A. 126; *Waman Srinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 224, 225; (1959) A.S.C. 689.

34 *Waman Shrinivas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 225, 226; (1959)A.S.C. 689, 694 (a case of tenancy); *Dhanukudhari* v. *Nathima Sahu,* 11 C.W.N. 848, 852; *Corpus Juris Secundum,* Vol. 92, 1098; *Ratanlal* v. *Mangilal* (1963) A.M.P. 323; *Stackhouse* v. *Barnston,* 32 E.R. 321; *Mytton* v. *Gilbert,* 100 E.R. 91.

35 *Waman Srinivas Kini* v. *Ratilal Bhagwandas* (1959) A.S.C. 689, 693; (1959) Supp. 2 S.C.R. 217, 224; *Surajmull Nagoremull* v. *Triton Insurance Co.,* 52 I.A. 126; *Corpus Juris Secundum,* Vol. 92, 1098; *Nixon* v. *Albion Marine Insurance Co.* (1867) 2 Ex. 338; Mulla's Contract Act, page 198, 8th Ed., quoted with approval.

with a perfectly innocent and legal contract, the contract is rendered unlawful or illegal, the court would refuse to enforce it. This would include a collateral or an earlier illegality.[36]

If public policy demands it even an equal participant in an illegality may be allowed relief by way of restitution or rescission though not on the contract. This was in a case of a tenant guilty of breach of a law relating to Landlord and Tenant.[37]

Pleadings.—The facts showing illegality must be pleaded, but when the illegality appears from the plaintiff's own evidence, or is otherwise duly brought to the notice of the Court, it is the duty of the Court to give effect to the fact thus brought to its notice, and to give judgment for the defendant, although the illegality is not raised by the pleadings.[38] See Code of Civil Procedure, O.6, r. 8, and O.8, r.2. English law is similar. In *N.W. Salt Co.* v. *Electrolytic Alkali Co.*,[39] the House of Lords laid down that if an agreement is *ex facie* illegal a Court will not enforce it whether the illegality is pleaded or not. If on the other hand an agreement is on the face of it legal, but unpleaded facts showing illegality have got into evidence, the Court should not declare the agreement illegal unless it is satisfied that the whole of the relevant circumstances are before it.[40]

Other statutory provisions of similar effect: 1. *Trusts Act.*—The provisions of this section as to agreements are strengthened or supplemented by some other enactments. The Indian Trusts Act, 1882, provides by s. 3 that all expressions used therein, and defined in the Contract Act, shall be deemed to have the meanings respectively attributed to them by the Contract Act. S. 4 provides that a trust may be created for any lawful purpose, and that the purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy. The section further enacts that every trust whose purpose is unlawful is void.

2. *Transfer of Property Act, 1882.*—S. 6(h) of this Act provides that no transfer can be made of property of any kind for an 'illegal purpose.''

3. *Indian Evidence Act, 1872.*—Where the consideration or object of an agreement is alleged to be unlawful, oral evidence may be adduced to prove the same though the agreement is reduced to the form of a document (s. 92, proviso (1)).

4. *Specific Relief Act, 1963.*—As to judicial rescission under s. 27 (1)(b), see the special commentary on that section.

Void Agreements

Agreements void, if considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful.

Entire or divisible agreements.—This section is an obvious consequence of the general principle of s. 23. A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration

36 *Ratan Lal* v. *Mangi Lal Mathura Lal* (1963) A.M.P. 323.
37 *Waman Srinivas Kini* v. *Ratilal & Co.* (1959) Supp. 2 S.C.R. 217; (1959) A.S.C. 689.
38 *Alice Mary Hill* v. *William Clarke* (1905) 27 All. 266; *Ko Pa Tu* v. *Azimulla*, 1940 A.R. 73; 187 I.C. 269; *Iqbal Ahmed* v. *Mohammed Hanif*, 1952 A.Bho. 32; *Mohanlal Jagannath* v. *Kashiram* (1950) Nag. 105, 1950 A.N. 71; *Abdula Saheb* v. *Guruvappa & Co.*, 1944 A.M. 387; *Liladhar Dariyana* v. *Chimman Ram, 1955 A.V.P. 31: Naraini* v. *P. Mohan* (1972) A.Raj. 25; *Surasaibaline Debi* v. *Phanindra* (1965) 1 S.C.R. 861; (1965) A.SC. 1364; *Appa Rao* v. *Ramalinga*, (1962) 3 S.C.R. 739.
39 (1914) A.C. 461.
40 Discussed in *Edler* v. *Auerbach* (1950) 1 K.B. 359.

which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."[41] Further specific reference to English cases where the rule has been recognised would be of no practical use for Indian purposes.[42] For severability of void and illegal contracts see below.[43]

In Bengal an agreement between a *zamindar* and his tenant for the payment of an enhanced rent which exceeds the rent previously paid by the tenant by more than two annas in the rupee has been held void,[44] as it directly contravenes the provisions of the Bengal Tenancy Act, 1885. The Court will not in such a case sever the good part from the bad, and pass a decree for the good part, that is for so much of the enhanced rent as does not exceed the two annas in the rupee.[45] To do so would be to create a new agreement between the parties. An agreement with a pleader to pay a fee of Rs. 500 if he wins the suit and also to transfer to him part of the property in dispute, is not severable and is wholly void.[46]Similarly, where a part of a consideration for an agreement was the withdrawal of a pending criminal charge of trespass and theft, it was held that the whole agreement was void.[47] Upon the same principle a suit will not lie upon a promissory note for an amount which included an item in respect of lotteries prohibited by law[48] or an amount in respect of gambling losses.[49] Where *A* promised to pay Rs. 50 per month to a married woman *B*, in consideration of *B* living in adultery with *A* and acting as his house-keeper, it was held that the whole agreement was void, and *B* could not recover anything even for services rendered to *A* as house-keeper.[50] Where, in consideration of *A* agreeing to procure a divorce from her husband and marrying *B*. *B* advanced to *A* Rs. 300, of which part was alleged by *B* to have been paid for expenses of procuring the divorce and part for *A*'s ornaments, it was held that on *A*'s failure to perform the contract *B* was not entitled to recover from *A* any part of the money advanced.[51] Similarly, a suit will not lie to recover money advanced as capital for the purposes of a partnership which is partly illegal: *A* holds a licence for the sale of opium and *ganja*. The *ganga* licence contains a condition prohibiting *A* from admitting partners into the *ganga* business without the permission of the Collector. No such condition is embodied in the opium licence. *B*, who is aware of the prohibition, enters into a partnership agreement with *A* both in the opium and *ganja* business without the leave of the Collector and pays *A* Rs. 500 as his share of the capital. Disputes arise between *A* and *B*, and *B* sues *A* for dissolution of partnership and for a refund of his Rs. 500. *B* is not entitled to recover Rs. 500 or any part thereof, one of the objects of the agreement being to carry on *ganja* business in partnership. In such a case "it is impossible to separate the contract or to say how much capital was advanced for the opium and how much for the *ganja*".[52]

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41 Willes J. in *Pickering* v. *Ilfracombe Ry. Co.* (1868) L.R. 3 C.P. at p. 250.

42 *The English cases will be found reviewed in Ramaswamy Chettyar* v. *Nachiappa Chettyar*, 1940 A.R. 45; 186 I.C. 709 (Roberts C.J.).

43 (1978) 52 A.L.J. 60.

44 *Kristodhone Ghose* v. *Brojo Gobindo Roy* (1897) Cal. 895.

45 Citing *Pickering* v. *Ilfracombe Ry. Co.*, L.R. 3 C.P. 235, 250; and *Baker* v. *Hedgecock*, 39 Ch.D. 520.

46 *Kathu Jairam Gujar* v. *Vishwanath Ganesh Javadekar* (1925) 49 Bom. 619; 89 I.C. 199.

47 *Srirangachariar* v. *Ramasami Ayyangar* (1894) 18 Mad. 189; *Bindeshari Prasad* v. *Lekhraj Sahu* (1916) 1 Pat. L.J. 48, 60; 33 I.C. 711; *Bani Ramchandra* v. *Jayawanti* (1918) 42 Bom. 339; 45 I.C. 566; *Nand Kishore* v. *International Mercantile Corporation*, 1953 A. Cal. 415.

48 *Joseph* v. *Solano* (1872) 9 B.L.R. 441.

49 *Balgobind* v. *Bhaggu Mal* (1913) 35 All. 558; 21 I.C. 878.

50 *Alice Mary Hill* v. *William Clarke* (1905) 27 All. 266.

51 *Mussammat Roshun* v. *Muhammad* (1887) Punj. Rec. No. 46; *Bai Vijli* v. *Nansa Nagar* (1885) 10 Bom. 152.

52 *Gopalrav* v. *Kallappa* (1901) 3 Bom. L.R. 164.

Where a part of the consideration was expenditure for the marriage of a girl below 14 years of age and the rest was for other purposes, the whole contract is void under s. 24; the marriage being prohibited by Child Marriage Restraint Act.[53]

A stands bail for *B*, who is charged with an offence, and as an indemnity for the bail takes from *B* a sale deed of *B*'s house and also a rent-note whereby *B* agrees thenceforward to occupy the house as *A*'s tenant and to pay rent to him. *A* cannot sue *B* on the rent-note. "The sale deed and the rent-note are part and parcel of the same transaction," and "the rent-note is tainted with the same illegality which affects the sale deed".[54] Different consequences, however, may follow when a part of the consideration or "object" of an agreement is not illegal, but merely void in the sense that it is not enforceable in law. In such a case actual performance of such part may be a good consideration, though a promise to perform it would not have been. Thus a bond passed by a judgment-debtor to the holder of a decree against him in consideration of the latter refraining from execution of the decree is void under s. 257A of the Civil Procedure Code, 1882, but not illegal. The decree-holder, therefore, on performing his part of the agreement, was held entitled to recover on the executed consideration,[55] being in itself a voluntary lawful forbearance, though not upon the executory agreement. If the promise to postpone execution of the decree were illegal the whole bond would be tainted with illegality, and the judgment creditor would then have no right to enforce payment of the bond. But when the parties themselves treat debts void as well as valid as a lump sum, the Court will regard the contract as an integral one, and wholly void. Thus where a judgment-debtor agreed to pay in a lump sum interest not awarded by a decree in addition to the sum decreed, without the sanction of the Court, it was held that, the promise to pay such interest being void under s. 257A of the Civil Procedure Code, 1882, the whole agreement was void.[56] In a Bombay case[57] the Municipal Corporation agreed to give for a lump sum a contract for recovering tax from pilgrims and levying a toll on vehicles and animals. It was beyond the powers of the Municipality to grant the right to collect fees from pilgrims. The Court held that as the transaction was void and tainted with illegality, it could not be enforced. In a Nagpur case[58] a share in the village was sold and the ex-proprietary rights in *sir* land appertaining to that share were surrendered. Although the surrender of exproprietary rights was invalid, the sale of the share in the village was upheld as the transactions were separable. In a Rangoon case[59] a person had obtained a licence under the Electricity Act, 1910, and transferred it to his partners, the partnership having been formed after the grant of the licence. By s. 9. sub-s. 3 of the Electricity Act any agreement by which a licence is transferred is void. In a suit for partnership accounts it was held that no part of the partnership agreement was separable from the rest and it was therefore void. In the case of a mortgage of an occupancy holding, the High Court at Allahabad, taking the view that the mortgage was illegal under the Agra Tenancy Act, 1901,[60] refused to enforce the personal covenant to repay;[61] but this decision seems open to question, the personal covenant being clearly separable.[62] In a later case in the same Court it was held that the Act made the mortgage only inoperative and not illegal, and that no objection could be taken in any case to the enforcement of the personal covenant.[63]

The provisions of this section must be distinguished from those of s. 57 below. In a Bengal case a Mahomedan husband agreed by a registered document that he would pay over to his wife whatever money he might earn, and that he would do nothing without her permission, and that if he did so she would be at liberty to divorce him. In a suit by the wife to

53 *Maheshwar Das* v. *Sakhi Dei* (1978) A.Or. 84, 86.
54 *Laxmanlal* v. *Mulshankar* (1908) 32 Bom. 449.
55 *Bank of Bengal* v. *Vyabhoy Gangji* (1891) 16 Bom. 618.
56 *Davlatsing* v. *Pandu* (1884) 9 Bom. 176. Sec. 257A has been omitted in the Code of 1908.
57 *Saundatti Yellama Municipality* v. *Shripadbhat* (1932) 57 Bom. 278; 35 Bom. L.R. 163; 143 I.C. 331; 1933 A.B. 132.
58 *Dharamchand* v. *Jhamsa*, 1931 A.N. 6; 130 I.C. 91.
59 *Ma Kyin Hone* v. *Ong Boon Hock*, 1937 A.R. 47; 167 I.C. 707.
60 See now the Agra Tenancy Act, 1926.
61 *Har Prasad Tiwari* v. *Sheo Gobind Tiwari* (1922) I.L.R. 44 All. 486; 67 I.C. 793; 29 A.L.J. 318.
62 *Muhammad Khalilur Rahman* v. *Muzammilullah*, 1933 A.A. 468; 1933 All. L.J. 1522; 144 I.C. 373.
63 *Gauri Datt* v. *Bandhu Panday*, 1929, A.A. 394; 119 I.C. 505. See also *Bhagwat Singh* v. *Hari Kishan Das* (1942) 197 I.C. 167; 1942 A.O. 1.

recover from him his earnings it was held that though the latter part of the agreement might be unlawful, the suit was one to enforce the legal part, and the Court gave a decree to the plaintiff for her maintenance at Rs. 12 per month, stating that the fair construction of the agreement was not that the husband was to pay every rupee he earned, but that he was entitled to a reasonable deduction for expenses which he must necessarily incur.[64]

Transfer of property.—When a document transferring immovable property has been once executed and registered, the transaction "passes out of the domain of a mere contract into one of conveyance".[65] It then becomes governed by the Transfer of Property Act, and s. 24 of the Contract Act has no application.[66] A permanent lease by a Mutawalli without the permission of the Waqf Board is not void *ab initio,* it is voidable and till then it is valid. Therefore the lessee has a right to transfer his rights in the lease-hold to another and its consideration was not unlawful under s. 24.[67]

Indian Trusts Act, 1882.—S. 4 of the Act provides that where a trust is created for two purposes of which one is lawful, and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

25. An agreement made without consideration is void, unless—

Agreement without consideration void, unless it is in writing and registered

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents,[68] and is made on account of natural love and affection between parties standing in a near relation to each other,[69] or unless

or is a promise to compensate for something done

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily[70] done something for the promisor, or something which the promisor was legally compellable to do, or unless

or is a promise to pay a debt barred by limitation law.

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.[71]

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation-2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy

64 *Poonoo Bibee* v. *Fyez Buksh* (1874) 15 B.L.R. App. 5.

65 Per Sulaiman J. in *Dip Narain Singh* v. *Nageshar Prasad* (1929) 52 All. 388, at p. 340; 122 I.C. 872; 1930 A.All. 1. (F.B.); *Gapoo Singh* v. *Har Charan,* 1935 A.O. 501; 158; I.C. 267.

66 *Dip Narain Singh* v. *Nageshar Prasad, supra; Gappoo Singh* v. *Har Charan, supra.* But see *Eastern Mercantile Bank* v. *Philip* (1960) A. ker. 194 (a case of mortgage for a sum embezzled by mortgagor's son held void).

67 *Ram Dhani* v. *Janki Raj Singh* (1972) A.A. 553, 554; *Sundaramurthi* v. *Chotti Bibi* (1942) A.M. 641 reld. on.

68 The word "documents" was substituted for the word "assurances" by the Repealing and Amending Act, 1891 (XII of 1891).

69 A Moslem wife's parents stand in a near relation to her husband: *Nisar Ahmad Khan* v. *Rahmat Begum* (1927) 100 I.C. 350; 1927 A.O. 146.

70 Whitley Stokes rightly observes that this should be "otherwise than at the desire of the promisor".

71 It will be observed that an undertaking to keep an offer open is not among the expected cases. As to statutory powers to impose such a condition on tenders for public service, see s. 5, "revocation of offers", above.

of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) *A* promises, for no consideration, to give to *B* Rs. 1,000. This is a void agreement.

(b) *A*, for natural love and affection, promises to give his son, *B*, Rs. 1,000 *A* puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

Promises without consideration.—This section declares long after consideration has been defined (s. 2, sub-s. (d)), that (subject to strictly limited exceptions)[72] it is a necessary element of a binding contract. This has already been assumed in s. 10. The present section goes on to state the exceptional cases in which consideration may be dispensed with. It is curious that the Act nowhere explicitly states the mutual promises are sufficient consideration for one another, though it is assumed throughout the Act, and seems to be involved in the definitions of "agreement" and "reciprocal promises" in s. 2, sub-ss. (e) and (f). According to the Privy Council, S. 25 deals with the question of promises made without consideration.[73] It appears to cover those cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertake to recompense him for it. In such cases the promise does not need a consideration to support it.[74] See the commentary on sub-ss. (e) and (f) of S. 2.[75]

Adequacy of consideration.—The most obvious example of an agreement without consideration is a purely gratuitous promise given and accepted. Such a promise has no legal force unless it comes within the first class mentioned in the present section. But there are other less obvious cases; and they must be all the more carefully noted because neither the text nor the illustrations of this section throw any light on them. It is not enough that something, whether act or promise appears on the face of the transaction, to be given in exchange for the promise. That which is given need not be of any particular value; it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged (see commentary on Explanation 2, below); but it must be something which the law can regard as having some value, so that the giving of it effects a real though it may be a very small change in the promisee's position; and this is what English writers mean when they speak of consideration as good, sufficient, or valuable. In other words, consideration must be real and not illusory even though inadequate; adequacy being a matter purely for the contracting parties to agree upon.[76] The Courts will not inquire into the adequacy of the consideration.[77] Third parties

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72 The rule of the Common Law cannot be properly stated in this way; for the formal contracts of English law, which are binding by their form alone, are older than the doctrine of consideration. Ingenious attempts have been made to treat consideration itself as a matter of form. This is paradoxical, for the essence of consideration is exchange of value regardless of any particular form. But these matters are of no practical importance in India.

73 *Siqueira* v. *Noronha* (1934) A.P.C. 144 quoted in *Bishen Chand* v. *Girdhari Lal*, 61 I.A. 273; 56 All. 376; (1934) A.P.C. 147.

74 *Sindha* v. *Abraham*, 20 Bom. 755, 758; quoted in *Gobindram* v. *Piranditta*, 16 Lah. 546; (1935) A. Lah. 561 (F.B.).

75 This section, it has been observed, is exhaustive: *Indran Ramaswami* v. *Anthappa Chettiar* (1906) 16 M.L.J. 422, at p. 426. This means, we presume, that an agreement made without consideration is either enforceable under this section or not enforceable at all, which hardly seems to need authority.

76 *Kulashekharaperumal* v. *Pathakutty* (1961) A.M. 405. Anson: Law of Contract (22nd Ed.) p. 91; (24th Ed. p. 99), quoted in *Keshub Mohindra* v. *Commr. of Gift Tax* (1968) 70 I.T.R. 1, 23; *Gaumont-British Picture Corpn. Ltd.* v. *Alexander* (1936) 2 All E.R. 1686, 1691.

77 *Hitchcock* v. *Coker* (1837) 6 A.E. 638; 45 R.R. 522; *Gravely* v. *Barnard* (1874) 18 Eq. 518; *L.A.*

cannot challenge the existence or adequacy of consideration.[78] The consideration may be of benefit to the promisor or to a third party or may be of no apparent benefit to anybody by merely a detriment to a third party.[79] The benefit or detriment conferred or suffered may be of the most trifling description provided it is not utterly worthless, i.e. it is of source value in the eyes of law[80] Nor such as shocks the conscience and amounts in itself to conclusive or decisive evidence of fraud. (Per Lord Eldon)[81] But a single consideration may support more than one promise and may move from the promisee or any other person[82] An apparent consideration which has no legal value is no consideration at all.

Whether a consideration is real or not, Sir William Anson has laid down the following tests:[83]

(a) Did the promisee forbear, suffer or promise anything in respect of the promise to him?

(b) Was his act, forbearance, sufferance or promise of any ascertainable value?

(c) Was it more than he was already bound to do, forbear or suffer?

The following are illustrative of consideration:

The author of a trust in respect of a sum of money discharged that liability by transfer of a usufructuary mortgage in his favour.[84]

An oral award though not enforceable is not illegal and where acted upon is a good consideration.[85]

A dispute arose between the original owners of land and their assignees of underground coal and mining rights as to the right to receive way leave rent from the sub-lessee of the mining rights. The sub-lessee agreed to pay rent to the assignees on the latter's executing an indemnity bond.

This was held to be for a lawful consideration and the contract was held valid. The payment was held to be at the desire of the assignees.[86]

Where a party leaves the determination of all matters under a contract in the discretion of the other party that does not in all circumstances constitute a total want of consideration.[87]

"Want of mutuality" was interpreted by Porter J.[88] in a case of a breach of contract by an artiste to mean want of consideration or no real consideration. Mere moral duty to perform a promise given to a party does not constitute consideration.[89] "Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of law moving from the plaintiff".[90]

When a subordinate got nothing in return for his promise—what he got he was entitled to get—the consideration was unreal.[91]

A payment of compensation by a company to an estate agent in pursuance of a contract was the withdrawal of a claim which seemd to have had no legal basis because the consideration, at the most, was

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Schroeder Music Publishing Co. Ltd. v. *Macaulay* (1974) 3 All E.R. 616.

78 *Sivarama Konar* v. *Thiruvadinatha Pillai* (1957) A.TC. 189; *Sudhakar Sahu* v. *Achutananda Patel* (1967) A. Or. 89.

79 *Bolton* v. *Madden* (1873) 9 Q.B. 55, 57; refd. to in *Keshub Mohindra* v. *Commr. of Gift Tax* (1968) 70 I.T.R. 1, 23.

80 Chitty on Contract, Vol. 1 (23rd Ed.), para 120: (24th Ed.), para 143. See also under Explanation 2, *infra*.

81 *Coles* v. *Trecothick* (1804) 9 Ves. 234, 246; (1803-13) All E.R. Rep. 14, 18.

82 *Fazaladdin* v. *Panchanan Das,* 1957 A. Cal. 93, 95 (per Bachawat J.).

83 Law of Contract (21st Ed.). p. 90. See 22nd Ed., p. 92: (24th Ed) pp. 100-102.

84 *Chidambara Iyer* v. *Renga Iyer* (1966) A.SC. 193.

85 *O.P. Verma* v. *Gehrilal* (1962) A. Raj. 231.

86 *Radha Govinda* v. *K. Dharmchand Colliery Co.,* 1963 A.P. 160.

87 *Gaumont-British Picture Corporation Ltd.* v. *Alexander* (1936) 2 All E.R. 1686, 1691.

88 *Gaumont-British Picture Corporation* v. *Alexander* (1936) 2 All E.R. 1686, 1690.

89 *Gopal Co. Ltd.* v. *Hazarilal Co.* (1963) A.MP. 37; *Eastwood* v. *Kenyon* (1840) 11 A. & E. 438; *Lee* v. *Muggeridge* (1813) 5 Taunt. 36; 128 E.R. 599 (where a man is morally bound to pay a debt though not legally bound, a subsequent promise to pay will give a right of action. This was finally rejected in *Eastwood* v. *Kenyon* (1840) 11 Ad. & El. 438.

90 *Thomas* v. *Thomas* (1842) 2 Q.B. 851, 859 (per Patterson J.).

91 *U.P.* v. *J.R. Bhatia* (1956) A.A. 639. See also *Combe* v. *Combe* (1951) 2 K.B. 315; (1951) 1 All E.R. 767 (Case of agreement of maintenance by husband on the basis of which the wife did not ask for maintenance after decree absolute).

a moral claim or it had a nuisance value which was not susceptible of being evaluated. Such a contract is good and the value of consideration is irrelevant. This was a case of income-tax.[92]

The section, however, can only apply where the transaction is contractual in nature. Where a document is in form and substance a gift no consideration is necessary.[93]

A document styled as release deed releasing the releasor's rights without consideration may operate as transfer by way of gift if it clearly shows the intention to do so.[94] A deed of settlement by a husband settling on his wife the right, title and interest in dividends of certain shares for her natural life to which the wife is not a party, is a unilateral document in the nature of a gift.[95]

A resolution of an Insurance Company to donate a sum of money out of shareholders' dividend account and acceptance by the proposed donee does not constitute a contract. There was no consideration because mere willingness to utilise the donation for a particular purpose cannot be regarded as consideration within s. 2(d) of the Contract Act.[96] Payment of the amount is merely gratuitous and acceptance thereof is a gift.

A gift by a karta of a portion of the joint family property to his permanent concubine, past cohabitation being the motive and not the consideration, is invalid even as to his undivided interest as it was motivated by a desire to compensate for past services.[97]

Forbearance and compromise as consideration.—Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time. It may seem at first sight that in all these cases the validity of the promise is doubtful. For the giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration,[98] but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action, does he not really get something for nothing, even if he believes he has a good case? The answer is that abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined[99] is free to bring it before the proper Court, and have the judgment of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not; for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here. That which is abandoned or suspended in a compromise is not the ultimate right or claim of the party, but his right of having the assistance of the Court to determine and, if admitted or held good, to enforce it. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.[1]

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92 *Scott* v. *Ricketts* (1966) 3 All E.R. 791, 796.

93 *Gopal Saran* v. *Sita Devi,* 1932 A.P.C. 34; 36 C.W.N. 392; 34 Bom. L.R. 470; 135 I.C. 753.

94 *Kuppuswami Chettiar* v. *Aramugam Chettiar,* 1967 A.SC. 1395; *T Mammo* v. *K. Ramunni* (1966) A.SC. 337, 340, refd. to.

95 *Provat Kumar Mitter* v. *C.I.T.* (1959) A. Cal. 434; (1959) 37 I.T.R. 91. See also *Gopal Saran Narain Singh* v. *Sita Devi,* 36 C.W.N. 392; (1932) A.PC. 34.

96 *Dr. Lakshamanaswami Mudaliar* v. *Life Insurance Corporation* (1963) A.SC. 1185, 1190; (1963) Supp. 2 S.C.R. 887.

97 *Nagaratanamba* v. *Ramayya* (1968) A. SC. 253; *Istak Kamu* v. *Ranchhod Zipru* (1947) Bom. 206; 1947 A.B. 198 not appd.; *Balo* v. *Parbati* (1940) All. 371; 1940 A.A. 385 appd.

98 *Jagadindra Nath* v. *Chandra Nath* (1903) 31 Cal. 242; *Indira Bai* v. *Makarand,* 1931 A.N. 197; *Vathyam Balarama* v. *Vavilala* (1948) 1 Mad. L.J. 47, 1948 A.P.C. 7; *Seraj-ud-Din* v. *State of Orissa* (1971) A. Cal. 414 (forbearance to proceed with suit by plaintiff and avoidance of adverse decision by defendant).

99 He need not have a positive opinion that it is justified; for its success may depend on facts not within his own knowledge, or on unsettled questions of law, or both. Often times a man who is asked, "Is your cause just?" may quite fairly answer: "I see nothing against good conscience in it; whether it is good in law is exactly what I want the Court to tell me." These refinements, however, are perhaps fitter for the moralist than for the lawyer.

1 Bowen. L.J. in *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch.D. 266, 291. Cp. *Wilby* v. *Elgee* (1875) L.R. 10 C.P. 497; *Radha Rani* v. *Ram Dass,* 1941 A.P. 282; *Vathyam Balarama* v. *Vavilala,*

Forbearance to sue for or demand a merely honorary or customary debt may be a good consideration.[2] But the abandonment of an obviously groundless claim will not make a good consideration "any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum".[3]

The principle thus stated is followed by the Indian Courts.[4] Thus where after the expiration of the time fixed for completion of a mortgage the mortgagee declined to advance the money unless the mortgagor consented to pay interest from the date fixed for the completion, and the mortgagor agreed to do so, it was held that there was a good consideration for the agreement though time was probably not of the essence of the original contract. The mortgagee believed in good faith that he was entitled to rescind at once, and the abandonment of his claim to do so was consideration enough for the mortagor's agreement to his terms.[5] A settlement of a *bona fide* dispute between the parties:[6] is a good consideration. An agreement in the nature of a compromise of a *bona fide* dispute as to the right of succession to a priestly office is not without consideration;[7] nor is a mutual agreement to avoid further litigation invalid on this ground;[8] nor a family arrangement providing for the marriage expenses of female members of a joint Hindu family on a partition between them of the joint family property.[9] In the case of family arrangements, the Court will not look too closely into the quantum of consideration, and an arrangement designed to promote peace and good will among members of a family has been held to be based on good consideration, even in the absence of a dispute or of a claim to property.[10] A promissory note in the nature of a compromise of doubtful litigation passed by a tenant to the *zamindar* during the pendency of a suit brought by the *zamindar* against the tenant to eject him from his holding is not without consideration.[11] A compromise relating to title to land, at a time when it was doubtful, is valid, although subsequently it may be found by judicial decision in another case, that one of the parties to the compromise had a wholly valid title, and the other had no title at all.[12] If at the time of entering into an agreement the parties come to a settlement *bona fide,* the settlement would be binding on them and it cannot be challenged at a subsequent stage on the ground that on close examination by a judicial tribunal it would have been found that one party had nothing to lose.[13] But a pledge

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1948 A.P.C. 7; *Ramaeshar Mistri* v. *Babulal,* 1946 A.P. 97, 225 I.C. 629.

2 *Aya Ram* v. *Sadhu Lal,* 1938 A. Lah. 781. A promise by a book-maker to forbear from posting an unsuccessful punter as a defaulter was held to be good consideration for a fresh promise by the punter to pay a gaming debt, which was otherwise void; *Hyams* v. *Stuart King* (1908) 2 K.B. 696, C.A. But the House of Lords overruled this decision in *Hill* v. *William Hill* (1949) A.C. 530.

3 *Jagaveera Rama Ettappa* v. *Arumugam* (1918) 45 I.A. 195, at p. 203; 48 I.C. 907 (the real question was whether a contract to pay enhanced rent for tenant's improvements could be implied under a Madras Act; in fact there was no forbearance or promise thereof). See also *Rallu* v. *Phalla* (1919) P.R. 137; 53 I.C. 497; *Gopal Sahai-Bichha Lal* v. *Dhani Ram Ram Gopal,* 1929 A.L. 689; 118 I.C. 646; *Wade* v. *Simeon* (1846) 2 C.B. 546; See also *Combe* v. *Combe* (1951) 1 All E.R. 767; (1951) 2 K.B. 315.

4 *Olati Pulliah Chetti* v. *Varadarajulu* (1908) 31 Mad. 474; at pp. 476, 477; *Krishna Chandra* v. *Hemaja Sankar* (1917) 22 C.W.N. 463; 45 I.C. 477 (where the claim was not *bona fide*).

5 *Dadabhoy* v. *Pestonji* (1893) 17 Bom. 457. The plaintiff's right was really, it seems, to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time; see 17 Bom. 457, at p. 465.

6 *Tinsukia Municipal Board* v. *Harikissen* (1957) A. Assam 10; *Mania* v. *Dy. Director* (1971) A.A. 151 (compromise between two sisters, sale deed pursuant thereto good without money consideration).

7 *Girijanund* v. *Sailajanund* (1896) 23 Cal. 645, 665, 666; *Raneshwar Prosad* v. *Lachmi Prosad* (1904) 31 Cal. 111, 131-132; *Bhiwa Mahadshet* v. *Shivaram Mahadshet* (1899) 1 Bom. L.R. 495, 497. Similarly as to property: *Sunder Singh* v. *Haro* (1929) 116. I.C. 719.

8 *Bhima* v. *Ningappa* (1868) 5 B.H.C., A.C.J. 75.

9 *Anantanarayana* v. *Savithri* (1913) 36 Mad. 151; *Sidh Gopal* v. *Bihari Lal* (1928) 50 All. 284; 107 I.C. 247; 1928 A.A. 65.

10 *Latif Jahan Begam* v. *Mahomed Nabi,* 1932 A.A. 174; (1932) All. L.J. 9; 137 I.C. 231; *Kirtyanand* v. *Ramanand,* 1936 A.P. 456; 164 I.C. 220.

11 *Ramkirpal* v. *Gaye Det* (1914) 12 All. L.J. 331; *Callisher* v. *Bischoffsheim* (1870) L.R. 5 Q.B. 449.

12 *United Provinces Government* v. *Church Missionary Trust Association Ltd.* (1947) 22 Luck. 93, 1948 A.O. 54, 229 I.C. 421.

13 *Tinsukia Municipal Board* v. *Harikissen,* 1957 A. Asm. 10; *Poonammal* v. *R. Srinivasarangan* (1956) A.SC. 162 reld. on.

or promise of security for an existing debt is void unless there is some forbearance or undertaking by the creditor (such as not pressing for payment, or accepting a reduced rate of interest) in return for it. Thus where the drawer of a *hundi* became insolvent before it fell due, and the plaintiff, who was the holder, in due course applied to the acceptor to give security for payment at maturity, and the latter executed a mortgage "by way of collateral security bond," it was held that, the plaintiff not having entered into any undertaking whatever, could not recover on the mortgage deed.[14] Two sisters, who were litigating against each other, entered into a compromise and effected a registered sale between themselves but no cash passed. That was held to be immaterial and the sale was valid under section 25(1) Contract Act as the sale was the result of "rapproachment" between the sisters.[15]

Mutuality.—An agreement to reconvey which forms part of the original sale should be regarded as supported by consideration and there is an element of mutuality present in it.[16]

Promise to perform existing duty.—It is well settled in England that the performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise; for such performance is no legal burden to the promisee, but, on the contrary, relieves him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing.[17] Moreover, in the case of the duty being imposed by the general law, an agreement to take private reward for doing it would be against public policy. But before applying this rule we must be careful to ascertain that a legal duty does exist. A promise to remunerate a person named as executor (not out of the estate itself) if he accepts the office and performs the duties of executor is not bad for want of consideration, since it is not a legal duty to accept the office[18] and perform those duties without claiming any remuneration. But a person served with a *subpoena* is legally bound to attend and give evidence in a court of law, and a promise to compensate him for loss of time or other inconvenience is void for want of consideration.[19] A person performing an act of public duty furnishes no consideration by performing or promising to perform that act.[20] Similarly an agreement by a client to pay to his vakil after the latter had accepted the *vakalatnama* a certain sum in addition to his fee if the suit was successful is without consideration.[21] And it has been held by the High Court of Allahabad that a bond passed by a judgment-debtor to the holder of a decree against him for the amount of the decree plus Rs. 3 paid for him for the stamp and registration charges of the bond is without consideration where the decree was made by a Court having no jurisdiction to make it, and the bond was passed to secure the release of the debtor from arrest.[22]

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein, or to perform the duty in some one of several admissible ways—in other words, to forgo the choice which the law allows him—this is a good

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14 *Manna Lal* v. *Bank of Bengal* (1876) 1 All. 309; Contrast *Hyams* v. *Stuart King, supra,* note 87; *Aya Ram* v. *Sadhu Lal, supra,* note 87.

15 *Smt. Mania* v. *Deputy Director of Consolidation U.P.* (1971) A.A.151, 154; *Mst. Ramdee Kounwaree* v. *Baboo Shiv Dayal Singh* 7 Suth W.R. 334; *Kasheenath Chatterjee* v. *Chundy Charn Bannerjee* 5 Suth W. R. 68 Folld.

16 *Kanakasabapathi Chetti* v. *Govindaraiula Naidu* (1964) A.M. 219; 77 Mad. L.W. 322; *Sinnakaruppa Gounder* v. *Kuppuswami Gounder* (1965) A.M. 506; *Dasrath Gayen* v. *Satyanarayana Ghosh* (1963) A. Cal. 325. (Two separate instruments executed on different dates but registered the same day.) *Sitarama Rao* v. *Venkatarama* (1956) A.M. 261; *Ramalingam Reddi* v. *Babanambal Ammal* (1951) A.M. 431 (not appd); Contra *Shreeram* v. *Ratan Lal* (1965) A.A. 83. (It is an offer which becomes effective on acceptance.) See *Hare* v. *Nicoll* (1966) 1 All E.R. 285 (option to be exercised strictly according to conditions).

17 *Combe* v. *Combe* (1951) 2 K.B. 215; (1951) 1 All E.R. 767.

18 *Narayan* v. *Shajani* (1894) 22 Cal. 14. It was also argued, without success, that the agreement was against public policy as making it the executor's interest to prolong the administration of the estate against his duty.

19 *Sashannah Chetti* v. *Ramasamy Chetti* (1868) 4 M.H.C. 7; *Collins* v. *Godefroy* (1831) 1 B. & Ad. 950 (case of a witness subpoenaed to give evidence who performs a public duty).

20 *Collins* v. *Godefroy* (1831) 1 B. & Ad. 950 (a case of a witness subpoenaed to give evidence).

21 *Ramachandra Chintaman* v. *Kalu Raju* (1877) 2 Bom. 362. Cp. *Ganga Ram* v. *Devi Das* (1907) Punj. Rec. No. 61.

22 *Banda Ali* v. *Banspat Singh* (1882) 4 All. 352.

consideration for a promise of special reward,[23] even though it is an act of the same kind as that which he is legally bound to do.[24]

A promise to perform an existing duty or the performance of it should be regarded as good consideration because it is a benefit to the person to whom it is given as to a person who gives it.

Therefore a promise by a father to pay to the mother a weekly sum for the maintenance of their illegitimate child is a binding contract, it being a promise in return for an act, a promise by the father to pay a weekly sum for return for the mother's looking the child who had been living with the father and was handed over to the mother. So long as she looks after the child she would be entitled to the receipt of the weekly sum. This was a case where the circumstances were special.[25]

By desertion a wife does not forfeit her right to maintenance. It is suspended and revives on her genuine offer to return. An agreement between a husband and a deserting wife whereby the husband promised a weekly maintenance and she promised to indemnify him against all debts and not to pledge his credit is an agreement for consideration.[26]

A transfer to a wife of properties by the husband is an alienation for value if the properties are liable for the husband's debt and charged with the maintenance of the husband's mother.[27]

If *A* is already bound to do a certain thing, not by the general law, but under a contract with *Z*, it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by *Z*, who is already entitled to claim performance. For *Z* is none the better thereby in point of law, nor *A* any worse. But what if *M*, a third person not at present entitled to claim anything, offers a promise to *A* in consideration of (a) *A*'s performance of his obligation to *Z*, or (b) *A*'s promise to *M* to perform that obligation? These questions have given rise to great difference of learned opinion in England and America.[28] They do not seem to have been considered by Indian Courts. Such English authority as there is favours the opinion that the performance is a good consideration; but the reasons given are not very clear, and seem to assume that both performance and promise must be good considerations in such a case, or neither.[29] It is submitted, however, that on principle this assumption is not tenable. The test is whether there is any legal detriment to *A*, the supposed promisee. Now *A*'s performance of what he already owes to *Z* is no detriment to him, as has been pointed out; and indeed the resulting discharge of his liability seems rather to be an advantage; and therefore it is no consideration for a new promise by any one. But *A*'s promise to *M* to do something, though he may have already promised *Z* to do that same thing, is the undertaking of a new obligation to a new party. There is no reason why it should not be made binding by *M*'s counter-promise, as in any other case of a contract by reciprocal promises, unless the law forbids the same performance to operate in discharge of two distinct contracts. There is no positive authority for any such rule of law, and when we bear in mind that in a contract by reciprocal promises, the promises are the consideration for each other, and not the performance, no such rule appears to be demanded or warranted by principle.

Whatever resolution of the speculative question may ultimately prevail, the difficulty may be removed, in the case of performance, by the slightest appreciable addition to the performance already contracted for, and, in the case of promise, by *A*'s new undertaking to *M* being or including an undertaking not to rescind or vary, without *M*'s consent, his existing contract with *Z*.

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23 *England* v. *Davidson* (1840) 11 A. & E. 856; 52 R.R. 522 (reward to constable for services beyond duty); *Hartley* v. *Ponsonby* (1857) 7 E. & B. 872; 110 R.R. 867; *Glasbrook Brothers Ltd.* v. *Glamorgan County Council* (1925) A.C. 270. (H.L.).

24 *Glasbrook Bros. Ltd.* v. *Glamorgan County Council* (1925) A.C. 270. (Police authority suing for £2,200 promised by a mining company for whose mine special guard was provided during a strike.) Cf. *Collins* v. *Godefroy* (1831) 1 B. & Ad. 950.

25 *Ward* v. *Byham* (1956) 1 W.L.R. 496, 498; (1956) 2 All E.R. 318; *Hicks* v. *Gregory* (1849) 8 C.B. 378 refd. to. See *Williams* v. *Williams* (1957) 1 W.L.R. 148.

26 *Williams* v. *Williams* (1957) 1 W.L.R. 148; *Goodinson* v. *Goodinson* (1954) 2 Q.B. 118; (1954) 2 W.L.R. 1121; (1954) 2 All E.R. 255 applied.

27 *Kulasekaraperumal* v. *Pathakutty,* 1961 A.M. 405.

28 See Pollock on Contract, 13th ed., 146 *sqq.;* Anson, 22nd ed., 98 *sqq* 24th Ed.pp. 107-108; L.Q.R. xx 9; Harv. Law Rev. xvii 71; Leake, 8th ed., 465 *sqq.;* Camb. L.J. 202; Chitty: On Contracts, 23rd ed., para 131: (24th Ed) p.175.

29 *Shadwell* v. *Shadwell* (1860) 9 C.B.N.S. 159; 127 R.R. 604; but *quaere* whether there was in fact any

Good Consideration.—Differences having arisen between two brothers on the death of the father, the younger brother was contemplating litigation. The mother intervened and gave a letter undertaking to make good the short fall which may result from the elder brother not paying the amount claimed by the younger brother and thus peace in the family was purchased and restored. This was held to be a good consideration which brought about an enforceable agreement.[30]

Consideration—performance of contractual duty—Increase in the amount of letter of credit—Currency revalued.—In a shipbuilding contract the owners agreed to pay the price in U.S. dollars in five instalments but after the payment of the first instalment the dollar was devalued and the builders demanded a corresponding increase in price threatening to otherwise terminate the contract. The builders had to give a letter of credit as security for repayment in the price. The owners agreed to pay the increase demanded without protest and the builders agreed to increase the amount of the letter of credit. It was held that the agreement to carry out the contractual duty to build was no consideration but the increase in the letter of credit was, it being additional obligation or liability to increased detriment.[31]

Transfer of immovable property.—This section has been held to apply to cases of sale and mortgage of immovable property. Thus in *Manna Lal* v. *Bank of Bengal*[32] the Allahabad High Court held a mortgage effected by a duly registered deed to be void for want of consideration under this section. Similarly in *Tatia* v. *Babaji*[33] Fulton J. held that a sale effected by a duly registered deed under which the purchaser had entered into possession was void for want of consideration under this section. Farran C.J., however, was inclined to the opinion that conveyances of land in the *Mufassal* perfected by possession or registration, where the consideration expressed in the conveyance to have been paid had not in fact been paid, could not be put in the same category as agreements void for want of consideration. [34] The first of these two cases was decided before the Transfer of Property Act, 1882 was enacted. As regards the other case, the Act was not yet extended to the Bombay Presidency when the deed of sale was executed. It would seem, however, that the result would be the same under s.54 of that Act read with s.4.The latter section declares that the chapters and sections relating to contracts in that Act shall be taken as part of the Contract Act.

Negotiable Instruments.—The law merchant has almost—but, as it is held by something very near a fiction, not quite—made an exception to the rule of consideration in the case of negotiable instruments, or rather established another and independent rule. The Negotiable Instruments Act, 1881, s. 118, affirming the well-settled general law, enacts that until the contrary is proved, the presumption shall be made that every negotiable instrument was made or drawn for consideration; and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated, or transferred for consideration. The second branch of the above rule stands as illustration (c) to s. 114 of the Evidence Act, 1872.

We now come to the exceptional cases in which consideration is dispensed with.

Registered writing.—The English doctrine that the "solemnity of a deed" is of itself sufficient to make a promise expressed in a sealed writing valid has never been received in India.[35] The Act does not allow any form alone to dispense with consideration, but only writing and

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intention to create a legal obligation at all (see the dissenting judgment of Byles J.); *Scotson* v. *Pegg* (1861) 6 H. & N. 295; 123 R.R. 516, and Pref.

30 *Commissioner of Wealth Tax* v. *Vijayaba Dowger Maharani Saheb Bhavnagar* (1979) A.SC. 982. 983: (1979) 3 S.C.R. 545.

31 *North Ocean Shipping Co. Ltd.* v. *Willicom Charlick Ltd.* (1978) 3 All E.R. 1170, 1176.

32 (1876) 1 All. 309.

33 (1896) 22 Bom. 176, at pp. 181, 182.

34 Ibid, at p. 183. See also *Bai Hiradevi* v. *Official Assignee of Bombay,* 1955 A.B. 122, 125.

35 *Kaliprasad Tewari* v. *Raja Sahib Prahlad Sen* (1869) 2 B.L.R. (P.C.) at p. 122. In England the formal operation of a deed is much older than the doctrine of consideration. It is therefore erroneous to say, as text-books commonly did at one time, that the formality "imports a consideration". On the contrary, the doctrine of consideration was introduced only when informal contracts were made actionable by a series of ingenious fictions; but this is not material for Indian purposes.

registration coupled with the motive of natural love and affection between nearly related parties. The words "near relation" have not been judicially construed. The Courts would, it need hardly be said, have to construe them uniformly without regard to variations in the reckoning of degrees of kindred, for the purposes of inheritance or the like, in different personal laws or customs.[36] A registered agreement between a Mahomedan husband and his wife to pay his earnings to her is within the provisions of cl. 1 of the section.[37] So is a registered agreement whereby *A* on account of natural love and affection for his brother *B*, undertakes to discharge a debt due by *B* to *C*. In such a case, if *A* does not discharge the debt, *B* may discharge it, and sue *A* to recover the amount.[38] But an agreement in writing and registered, whereby a member of an undivided Hindu family, without any valuable consideration, renounces all right to the family property in favour of the remaining coparceners, is void unless it is executed for natural love and affection.[39] It is not to be supposed that the nearness of relationship necessarily imports natural love and affection. Thus where a Hindu husband executed a registered document in favour of his wife, whereby, after referring to quarrels and disagreement between the parties, the husband agreed to pay her for a separate residence and maintenance, and there was no consideration moving from the wife,[40] it was held in a suit by the wife brought on the agreement that the agreement was void as being made without consideration. It was further held that the agreement could not be said to have been made on account of natural love and affection, the recitals in the agreement being opposed to that view.[41] It is difficult to reconcile with the last case the decision of the Bombay High Court in *Bhiwa Mahadshet* v. *Shivaram Mahadshet*.[42] In that case *A* sued his brother *B* upon a registered instrument whereby *B* had agreed to give *A* one-half of certain property. It appeared that *A* had previously sued *B* to recover that share from him, alleging that the property was ancestral, but the suit was dismissed on *B* taking a special oath that the property was not ancestral. It further appeared on the plaintiff's own admissions that the brothers had long been on bad terms. Upon these facts the Subordinate Judge held that the agreement was void for want of consideration and that it could not be said to have been made on account of natural love and affection so as to come within the first exception to the section, and the decision was affirmed by the District Judge. On appeal the High Court held that the agreement must be held to have been made for natural love and affection and that *A* was entitled to a decree. The Court said:

> "The District Judge dismissed it (the suit), holding the document void for want of consideration... The Subordinate Judge had held the same. He said 'there was no consideration for the agreement. The defendant voluntarily agreed to give half of the plaint property to the plaintiff to secure reconciliation with the plaintiff.' It seems to us, however, that this is just the case to which s. 25 (1) of the Contract Act should be held to apply. The defendant had such natural love and affection for his brother that in order to be reconciled to him, he was willing to give him this property."

As natural love and affection cannot be inferred as a fact merely because no other motive for the promise is shown, it would seem that the Court presumed it from the relation of the parties. One would have thought that the presumption, if any, was rebutted by the plaintiff's own admissions. A desire for a reconciliation prompted (as the learned Judge of the High Court thought) by love and affection for the plaintiff is not strongly evinced by the subsequent conduct of the defendant in declining to perform the contract and driving the plaintiff to a suit. But, however this may be, it appears to us anything but safe to hold that a promise by one

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36 *Jafar Ali* v. *Ahmed Ali* (1868) 5 B.H.C., A.C.J. 37, where it was held, before the Act, that the relation of cousins would not support a voluntary agreement, though registered, throws no light on the possible construction of the Act; for by the Common Law, which the Court apparently followed, no degree of kinship, however near, would suffice.

37 *Poonoo Bibee* v. *Fyez Buksh* (1874) 15 B.L.R. App. 5.

38 *Venkatasamy* v. *Rangasamy* (1903) 13 Mad. L.J. 428.

39 *Appa Pillai* v. *Ranga Pillai* (1882) 6 Mad. 71. The facts of the case did not show that the agreement was made on account of natural love and affection.

40 It would, of course, have been different if the facts had disclosed such a state of circumstances as would, under the Hindu law, have justified the wife in obtaining a separate residence and maintenance, such as violence on the part of the husband which would render it unsafe for the wife to continue to live with him, or such continued ill usage as would be termed cruelty in the English Court. There would then have been ample consideration to support the agreement.

41 *Rajlukhy Dabee* v. *Bhootnath* (1900) 4 C.W.N. 488.

42 (1899) 1 Bom. L.R. 495.

brother to another, unsupported by any consideration, and made solely with a view to purchase peace, can be enforced in a Court of law on the bare supposition that the object was reconciliation, and that the reconciliation was prompted by natural love and affection. It is submitted that the Bombay[42] decision is correct and the agreement in the Calcutta[41] case could be supported on the same ground as the Bombay[42] case.

An agreement by sons to pay their father every month a sum of Rs.50/- by way of pocket expenses in consideration of the regard they had for him does not require registration under s. 25. Contract Act.[43]

Compensation for voluntary services.—The second sub-section considerably extends the real or supposed exceptions (for their authority is by no means clear) allowed in the Common Law to the principle that the past consideration is no consideration at all, since the consideration and the promise have to be simultaneous.[44] The language of the Act is quite clear, and must be taken as expressing a deliberate policy; it would therefore be useless to discuss the English rules.

The act voluntarily done must have been done for the promisor.[45] If it is done for any other person, the promise does not come within the provisions of this clause.[46] In an Allahabad case the defendants by a written agreement promised to pay to the plaintiff a commission on articles sold by them in a market established by the plaintiff at his expense. The market was not established at the desire of the defendants, nor was it erected for them, but this was done at the request of the Collector of the place. The only ground for making the promise was the expense incurred by the plaintiff in establishing the *ganj*. The Court held that the promise could not be supported under the present sub-section.[47] Further, the act voluntarily done must have been done for a promisor who was in existence at the time when the act was done. Hence work done by a promoter of a company before its formation cannot be said to have been done for the company.[48] Again, the act done must have been done for a promisor who is competent to contract at the time when the act was done. Hence a promise by a person on attaining majority to repay money lent and advanced to him during his minority does not come within the exception, the promisor not being competent to contract when the loan was made to him. It has been so held by the High Courts of Madras and Allahabad.[49] A different view has been taken by the High Court of Calcutta,[50] and in the Punjab,[51] but it does not appear to be sound law. See notes to s. 11 under the head "Minor's agreement," above. A promise to pay a woman an allowance for past cohabitation has been regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him,[52] but the correctness of these decisions may be doubted. It is true that in English law past cohabitation, though no better in law than any other past consideration, is not an unlawful

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43 *Lalit Mohan Dutta* v. *Basudeb Dutta & another,* 80 Cal. W.N. 774.

44 As to the English law see Anson, Law of Contract, 20th ed., p. 108 (22nd ed., p. 86, 24th ed. p. 94) and cp. notes on s.23, "immoral", above.

45 Not at his request. That case is covered by s. 2(d), above. The enactment now before us "appears to cover cases where a person without the knowledge of the promisor, or otherwise than at his request does the latter some service, and the promisor undertakes to recompense him for it": per Farran C.J.; *Sindha* v. *Abraham* (1895) 20 Bom. 755, at p. 758. But possible future services would be no consideration: *Basanta Kumar Chowdhury* v. *Madan Mohun Chowdhury* (1918-19) 23 C.W.N. 639; 46 I.C. 282; *Gobindram* v. *Piranditta,* 16 Lah. 755, 758; (1935) A.L. 546.

46 The authority of the head of a Hindu family to alienate ancestral or joint property for the payment of antecedent, even time-barred debts depends on peculiar principles of Hindu law: see *Gajadhar* v. *Jagannath,* (1924) 46 All. 775; 80 I.C. 684.

47 *Durga Prasad* v. *Baldeo* (1880) 3 All. 221.

48 *Ahmedabad Jubilee S. & W. Co.* v. *Chhotalal* (1908) 10 Bom. L.R. 141. 143. So it is well settled in England that a company cannot ratify acts of its promoters done before it was formed.

49 *Indran Ramaswami* v. *Anthappa Chettiar* (1906) 16 Mad. L.J. 422; *Suraj Narain* v. *Suraj Ahir* (1928) 51 All. 164; 26 All L.J. 1024; 112 I.C. 159; 1928 A.A. 440.

50 *Musammat Kundan Bibi* v. *Sree Narayan* (1907) 11 C.W.N. 135.

51 *Karm Chand* v. *Basant Kuar* (1911) Punj. Rec. No. 31.

52 *Dhiraj Kuar* v. *Bikramajit Singh* (1881) 3 All. 787; *Marr Kuar* v. *Jasodha Kuar* (1877) 1 All. 478; *Lakshminarayana* v. *Subhadri Ammal* (1903) 13 Mad. L.J. 7, 13. Our doubt is supported by *Husseinali* v. *Dinbai* (1923) 86 I.C. 240, 243, 25 Bom. L.R. 252; 1924 A.B. 135.

consideration[53] so as to make a formal instrument void which is in fact given to secure an allowance therefor. But in order to support the Indian decisions just cited it must be held that cohabitation is at the time such a lawful voluntary service as to be a proper subject for compensation.[54] It is to be noted that the Bombay High Court now holds the contrary,[55] and dissents from these decisions.

The intention of the promisor must have been to compensate the promisee. In *Abdullakhan* v. *Purshottam*,[56] a son had sent money to his father from time to time, not intending to make a loan. Later at a time when the father was heavily indebted, he transferred some immovable property to his son. The transaction was held not to fall within the subsection, as the real intention was not to compensate the son but to defraud the creditors of the father.

It is clear that a case cannot come within this exception unless the act has been done voluntarily.[57] In a Privy Council case, *B* agreed to give his son in adoption, if *A* agreed to advance money to defray the expense of defending any suit challenging the adoption. There was litigation, and *A* advanced money towards the cost. Thereafter *A* died, and *A*'s son advanced money to the adopted son. While the adoption suit was pending before the Privy Council, the adopted son passed a promissory note in favour of *A*'s son, who agreed that if the adopted son was unsuccessful before the Privy Council, the promissory note would not be enforced. The adopted son was successful, and *A*'s son filed a suit on the promissory note. It was held that s. 25(2) was not applicable, because to invoke the aid of that provision, it had to be proved that the payment had been made voluntarily, and this had not been established, it being held that the money was advanced to give effect to the undertaking originally made by *A*, not purely on the request of the adopted son.[58] There must also be a promise in the first instance. A clause in a memorandum or articles of association of a company providing for payment to a promoter of the company does not constitute a promise by the company to the promoter. Hence a claim against a company for remuneration by a promoter of the company cannot be supported under this section, where such a claim is based merely on the provisions of the memorandum and articles of association of the company.[59]

Promise to pay a barred debt.—Sub-s. (3) reproduces modern English law.[60] The reason for upholding these promises was thus stated soon after the Act came into force by Westropp C.J.:[61]

"The general rule of law, no doubt, is that a consideration merely moral is not a valuable consideration such as would support a promise;[62] but there are some instances of promise which it was formerly usual to refer to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to

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53 *Grey* v. *Mathias* (1800) 5 R.R. 48; 5 Ves. 286; *Beaumont* v. *Reeve* (1846) 8 Q.B. 483; 70 R.R. 552. It may perhaps be doubted whether the effect given to the present subsection by applying these authorities to it was contemplated by the framers of the Act.

54 See on s. 23. "immoral" above. At all events adulterous intercourse will not support a subsequent promise of compensation under this clause: *Alice Mary Hill* v. *William Clarke* (1905) 27 All. 266.

55 *Kisandas* v. *Dhondu* (1919) 22 Bom. L.R. 762; 44 Bom. 542; 57 I.C. 472; *Huseinali* v. *Dinbai* (1923) 25 Bom. L.R. 252; 86 I.C. 240; 1924 A.B. 135; *Sabava Yellappa* v. *Yamanappa Sabu*, 1933 A.B. 209; 35 Bom. L.R. 345; *Istak Kamu* v. *Ranchod Zipru* (1946) 48 Bom. L.R. 775, 1947 A.B. 198.

56 (1947) Bom. 807, 1948 A.B. 265, (1947) 49 Bom. L.R. 875.

57 *Kalipada Das* v. *Durgadas Roy* (1923) 27 C.W.N. 769; 73 I.C. 10; 1923 A. Cal. 677; *Krishna Iyer*, v. *Official Liquidator*, 1952 A.T.C. 99—a case of an *ex post facto* bonus declared for servants of a company, after a winding-up petition—held that the section did not apply, as the services had not been rendered voluntarily, but in return for wages. Note that an agreement to pay a bonus in the future is just as enforceable as an agreement to pay wages alone: *Shanmughasundaram* v. *Chidambaram*, 1953 A.M. 433; *Powell* v. *Braun* (1954) 1 W.L.R. 401.

58 *Raja of Venkatagiri* v. *Sir Krishnayya*, 1948 A.P.C. 150, 50 Bom. L.R. 517.

59 *Ahmedabad Jubilee S. & W. Co.* v. *Chhotalal* (1908) 10 Bom. L.R. 141; *Eley* v. *Positive Government Security Life Insurance Co.* (1876) 1 Ex.D. 88.

60 Limitation Act, 1939, s. 23(4). Where applicable s. 25(3) excludes Art. 1 of the Limitation Act of 1963; *Kahan Chand Dula Ram* v. *Daya Ram Amrit Lal* (1929) 118 I.C. 764; (1929) A.L. 263. (A case under 1908 Act).

61 *Tillakchand* v. *Jitamal* (1873) 10 B.H.C. 206, 215.

62 *Eastwood* v. *Kenyon* (1840) 11 Ad. & E. 438; 52 R.R. 400; *Beaumont* v. *Reeve* (1846) 8 Q.B. 483; 70 R.R. 552; *Gopal Co. Ltd.* v. *Hazari Lal & Co.*, 1963 A.M.P. 37.

pay a debt contracted during infancy, and a promise (in writing) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection."

Accordingly this exception applies only where the promisor is a person who would be liable for the debt if not time-barred, and does not cover promises to pay time-barred debts of third persons.[63] Wife's pronote for a barred debt of the husband is not enforceable as it is without consideration and is not covered by section 25(4) of Contract Act.[64] A barred debt is a good consideration for a fresh promise to pay the amount. A debt subsist notwithstanding its recovery being barred by limitation.[65] A Hindu son's agreement to pay his deceased father's barred debt is available only against the joint family property which has come into his hands.[66] But a Karta of a joint Hindu Family cannot promise to pay under s. 25(3) a time barred debt and to thus revive it.[67]

Christian son's pronote for father's debts.—A Christian son has no pious duty to pay the debt of his father. Hence a promissory note executed by the son for the debts due from the father is without consideration and therefore void. This is so even where the debt due from the father is not time barred.[68]

If there is a statement of fact of the promise to pay contained in a letter and it is shown as part of the cause of action the claim can be considered under s.25(3) even if the suit is barred on the original debt. If there is no mention of interest then interest cannot be awarded except from the date of the suit on the principal.[69]

An endorsement on the back of a two barred promisory note to be valid within s. 25 must contain an undertaking to pay. Merely stating that it was valid for three years without expressing promise to pay does not fall within s. 25(3).[70]

Arrears of rent including rent for barred period.—Where in reply to a landlord's demand for arrears of rent including rent for time barred period, the tenant replied asking whether rent should be paid in cash or by cheque without specifying the amount or the period for which it was to be paid and when the suit for arrears of rent was filed for the time barred period, the court held s.25(3) not to be applicable.[71]

In order to invoke the provisions of s. 25(3) the following conditions must be satisfied.

(i) It must refer to a debt which the creditor but for the period of limitation, might have enforced;
(ii) there must be a distinct promise to pay wholly or in part such debt;
(iii) the promise must be in writing signed by the person or by his duly appointed agent.

Section 25(3) of the Contract Act was applied to a renewed mortgage bond to pay two earlier mortgage bonds which, although for consideration, were void because of para 11 of Schedule III, C.P.C., as there was no general incapacity to enter into a contract and the borrower was bound to restore the advantage to a lender under section 65, Contract Act.[72] Section 25(3) would be applicable even in cases where there is no personal obligation but the

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63 *Pestonji* v. *Bai Meherbai* (1928) 30 Bom. L.R. 1407; 112 I.C. 740; 1928 A.B. 539.
64 *Perumayammal* v. *Chinnammal* (1967) A.M. 189; *Pestonji* v. *Bai Meharbai* (1928) A.B. 539 folld; *Tulsabai Nathudas* v. *Narayan Ajabrao Raut* (1974) A.B. 72, 75; *Trilokchand Hindumal* v. *Jitamul Sundaram,* 10 Bom. H.C. reld. on.
65 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1134; (1958) A.SC.; *American Jurisprudence,* Vol. 34, 314; *Corpus Juris Secundum,* Vol. 53, page 922 (Statute of Limitation bars or runs "against the remedy and does not discharge the debt or extinguish or impair the right obligation or cause of action): *Mt. Bhoori* v. *Thakur Gulab Singh* (1958) A. Raj. 10.
66 *Asa Ram* v. *Karam Singh* (1929) 51 All. 983; 119 I.C. 109; 1929 A.A. 586; *Champaklal* v. *Rayachand,* 1932 A.B. 522; 34 Bom. L.R. 1005.
67 *H.K. Dasappa Setty* v. *Vedavathamma* (1972) A. My. 283, 285. Mulla's Hindu Law (13th Ed.) 249 reld. on.
68 *Raghavendrarao Vakil & Co.* v. *B.R. Elevia* (1973) A. Mvs. 203.
69 *Srinivasa Raghvan* v. *Jayaraman & another* (1975) 1 Mad. L.J. 414, 418; *Kasturchand Jiwaji* v. *Manikchand Devchand* (1943) A.B. 477.
70 *Tulsi Ram.* v. *Some Singh* (1981) A.D. 165.
71 *Daulat Ram* v. *Somnath* (1981) A.D. 354, 356.
72 *Lala Babu Ram* v. *Ganga Devi* (1959) A.A. 788.

obligation arises because of accepting a legacy.[73] An offer to pay compensation on certain terms which were not accepted by a party is not a promise under section 25(3) of the Contract Act.[74]

To create a "promise" it is not necessary that there should be an accepted proposal reduced to writing. All that is necessary is that there should be a written proposal by the promisor accepted before action, for a written proposal becomes a promise when accepted.[75] Sinha J. has dissented from this view, holding that the record in writing must come into existence after a proposal has been made and accepted.[76] It is submitted that this decision is erroneous, and that on the facts of the case, where there was a written notice by the defendant to the plaintiff that a pay order had been issued to him, which was accepted by the plaintiff by calling at the specified place for payment, there had been a promise in writing, which, subject to the question of the signature, fell within the ambit of s.25(3), and could be sued upon despite subsequent repudiation by the defendant. S.25(3) applies when there is a fresh agreement or contract between a debtor and creditor to pay a time barred debt. An application by a debtor to a bank for loan to pay to the creditor named and other creditors is not an agreement made between the debtor and creditor.[77]

Equitable mortgage for a barred debt.—An equitable mortgage by deposit of title deeds in lieu of a barred debt is valid. It is not governed by s. 25(3) because it is a payment of the debt itself inasmuch as the mortgage virtually discharged the debt by assigning to the mortgagee an interest corresponding in money value in the property mortgaged.[78]

Account stated.—Where an account has been settled it is immaterial that some of the items were statute-barred. It has not been decided whether the same principle would be applied if all the items were statute-barred.[79] In *Siqueira* v. *Noronha,* the Privy Council pointed out.the distinction between two forms of account stated:

(1) Where it takes the form of a mere acknowledgement of a debt, the existence of which may be rebutted and in that case there would be no consideration and no binding promise.[80]
(2) And the other where the parties between themselves have agreed that the items on one side should be set against the items on the other side and the balance alone should be paid. There is good consideration to pay the balance.[81]
(3) The items on the smaller side are set off and deemed to be paid by the items on the larger side and there is a promise for a good consideration to pay the balance arising from the fact that the items have been so set off and paid.[82]
(4) When the entire claim is barred or all the items are barred an implied promise contained in an account stated may not be sufficient. There must be an express promise under section 25(3) but where only some of the items are barred explanation 2 of section 25 applies.[83]

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73 *Adiraja* v. *Beeranna Rai* (1957) A.M. 14; *Rama Pattar* v. *Vishwanath Pattar,* 45 Mad. 345; (1922) A.M. 23 (dist.) (that was a case of liability of a third party, father's debts after his death). See also *Govinda Nair* v. *Achutan Nair* (1940) A.M. 678.

74 *Union of India* v. *Bikanir Textiles* (1961) A. Raj. 211; *Shyam Sundar* v. *Parlakimedi Municipality* (1964) A. Or. III.

75 *Appa Rao* v. *Suryaprakasa Rao* (1899) 23 Mad. 94, 97, 98,; *George Newnes Book Co.* v. *K.V.S. Iyer* (1940) Rang. 377; 189 I.C. 622; 1940 A.R. 159; *Soore Venkatappayya* v. *Yalavarthi,* 1946 A.M. 72 (plaintiff sought to rely on an offer to pay part of the debts which he had refused).

76 *Sriram* v. *Governor-General in Council,* 1952 A. Cal. 443.

77 *H.K. Dasappa Setty* v. *Vedavathamma* (1972) A. Mys. 283, 285.

78 *Manoj Kumar Saha* v. *Nabadwip Chandra Poddar* (1978) A. Cal. 111, 115; *Jethabai* v. *Putlibai* (1912) 14 Bom. L.R. 1020 reld. on.

79 *Bishun Chand* v. *Girdhari Lal,* 61 I.A. 273; 56 All. 376; (1934) A.P.C. 147, 152.

80 (1934) A.P.C. 144, 146; 38 C.W.N. 813; refd. to in *Tulsiram* v. *Zaboo* (1949) A.N. 229; (1948) Nag. 639.

81 *Siqueira* v. *Noronha* (1934) A.P.C. 144, 146, 38 C.W.N. 813; folld. in *Tulsiram* v. *Zaboo* (1949) A.N. 229; (1948) Nag. 639.

82 *Siqueira* v. *Noronha* (1934) A.P.C. 144, 146; *Gharabaran* v. *Radha Kishan* (1938) A.A. 313.

83 *Chaco Varkey* v. *Thommen Thomas* (1958) A. Ker. 31; *Tulsiram* v. *Zaboo* (1949) A.N. 229. folld; *Ganesh Prasad* v. *Rombalibai* (1942) A. M. 92; *Ethirajulu Naidu* v. *Chinnikrishnan Chettiar* 1975 A.M. 333

Distinction between Acknowledgment and Promise.—The distinction between an acknowledgment under s.18 of the Limitation Act of 1963 and a "promise" within the meaning of this section is of great importance.[84] Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting point of limitation.[85] But while an acknowledgment under the Limitation Act[86] is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation;[87] an implied promise is not sufficient.[88] In a letter the borrower said "I have borrowed large sums of money from you in *Tippa Khata* and slips of paper. As yet I have not been able to pay up all your dues..... I would pay up all your dues..... I request you to grant me three months time to pay off all your dues". There were two other letters in the same strain. They were held to be a promise to pay within s. 25(3) loans some of which were statute barred.[89]

A tenant gave an undertaking to the landlord to pay all arrears of rent a part being time barred. The landlord is entitled to recover the whole amount. The contractual obligation which a debtor enters into under s.25(3) has no reference whatsoever to the debt being within time or not. S.25(3) is far wider in scope than the acknowledgment under s. 18 Limitation Act, 1963. A barred debt is a valid consideration for a promise to pay under s. 25(3) even if the promisor did not know of the debt being barred.[90]

An unconditional acknowledgement is sufficient for the purpose of section 19 because it implies a promise to pay and such implied promise is not equivalent of a "promise in writing".[91] An unconditional acknowledgment to pay has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary.[92] The question occasionally arises whether a writing relating to a barred debt amounts to an acknowledgment or to a promise. Here the Court must consider the language of the particular document before it in every case.[93] If it amounts to an acknowledgment, the writing could not avail the plaintiff

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84 See *Ram Mangal* v. *Achhaibar Prasad,* 1954 A.P. 575; *Tulsiram* v. *Zaboo* (1948) Nag. 639; (1949) A.N. 229, 234.

85 An acknowledgement *in writing* is not the only mode of creating a fresh starting point of limitation in the case of a debt not barred by limitation. An *oral* agreement to extend the time of payment may effect the same purpose: *Shrinivas* v. *Raghunath* (1902) 4 Bom. L.R. 50. *Bhagabat Charan Mohanty* v. *Rao & Sons* (1971) Cut. 1268, 1278.

86 See *Maniram* v. *Seth Rupchand* (1906) 33 I.A. 165, 172; 33 Cal. 1047, 1058: *Maganlal Harjibhai* v. *Amichand Gulabji* (1928) 52 Bom. 521; 112 I.C. 24; 1928 A.B. 319; *Asirvada Nadan* v. *Vedamuthu Nadan* (1924) 86 I.C. 942 (so called oral settlement of time-barred account). *Bhagabat Charan Mohanty* v. *Rao & Sons* (1971) Cut. 1268, 1279, *Ethirajulu Naidu* v. *Chinnikrishnan Chettiar* (1975) A.M. 833, 336.

87 See *Ganga Prasad* v. *Ram Dayal* (1901) 23 All. 502, at p. 504; *Ram Bahadur Singh* v. *Damodar Prasad Singh* (1921) 6 Pat. L.J. 121; 60 I.C. 514; *Deoraj Tewari* v. *Indrasan Tewari* (1929) 8 Pat. 706; 120 I.C. 470: 1929 A.P. 258. distinction fully explained in Patna H.C. S. 25(3) extends to a case of abatement by reason of non-substitution of legal representatives: *Naiz Ahmad Khan* v. *Parshotam.Chandra* (1930) 53 All. 374; 129 I.C. 545; 1931 A.A. 154; *Nur Hossein* v. *Tamijuddin,* 1941 A. Cal. 449. 197 I.C. 321; *Debi Prasad* v. *Bhagwati Prasad,* 1943 A.A. 63.

88 *Mihin Lal* v. *M.B. Dairy Farm,* 1932 A.A. 38; 132 I.C. 420; *Abdul Rafiq* v. *Bhajan* (1932) 53 All. 963; 137 I.C. 243; 1932 A.A. 199; *Girdhari Lal* v. *Bishun Chand* (1932) 54 All. 506. 140 I.C. 783; 1932 A.A. 461; *Mst. Janaka* v. *Kali Charan* (1932) 7 Luck. 313; 135 I.C. 390; 1932 A.O. 49; *Ghulam Murtaza* v. *Fasib-un-nissa Bibi* (1935) 57 All. 434; 152 I.C. 370; 1934 A.A. 129; *Govindan Nair* v. *Achuthan Nair,* 1940 A.M. 678; 193 I.C. 399; (1940) 1 Mad. L.J. 682.

89 *Bhagabat Charan Mohanty* v. *Rao & Sons* (1971) Cut. 1268, 1279.

90 *Sai Kapaleeswarar Temple* v. *Tirunavakarasu* (1975) A.M. 164, 167; *Kasurchand Jiwaji* v. *Manekchand Devchand* (1943) A.B. 447; & *Mrs. C. Simon* v. *M.G. Arogiasami,* 25 I.C. 361; (1915) A.M. 242 appld.

91 *Tulsiram* v. *Zaboo* (1949) A.N. 229, 234; (1948) Nag. 639.

92 *Maniram Seth* v. *Seth Rup Chand,* 33 Cal. 1047, 1058; *In re Rivers Steam Company, Mitchell's Claim,* 6 Ch. App. 822, 828.; *Hiralal* v. *Badkulal* (1953) A.SC. 225, 227 approving *Fateh Mohamed* v. *Gangaram,* 10 Lah, 748; (1929) A.L. 26A & *Nahanchand Dularam* v. *Dayaram Amritlal,* 10 Lah 745; (1929) A.L. 263; *Gulam Murtaza* v. *Fasihunissa Bibi,* 57 All 424; (1935) A.A. 129 not approved. *Sri Karpaleeswarar Temple* v. *Tirunavukarasu* (1975) A.M. 164, 167.

93 *Gobind Das* v. *Sarju Das* (1908) 30 All. 268 (the terms of the document there considered are not clear-

under this section; but it is otherwise where it amounts to a promise. Thus *khata,* or an account stated, has been held to be a mere acknowledgment as distinguished from a promise under this section.[94] Similarly a bare statement of an account is not a promise within the meaning of this section.[95] In the same way the words *baki deva* (balance due) at the foot of a Gujarati account were held not to amount to a promise.[96] Similarly of a *mablaghandi* in Bengal.[97] An agreement to execute a mortgage to pay off a time-barred debt does not amount to a promise to pay the debt.[98] On the other hand, when a tenant wrote to his landlord in respect of rent barred by limitation, "I shall send by the end of *Veyshak* month," it was held that the words constituted a promise under this section.[99] It has been held that an intimation that a pay order has been issued in favour of the plaintiff, coupled with a request to call for payment, is not a promise to pay, on the ground that the authorities say that an implied promise is not sufficient.[1] The learned judge does not specify the authorities he has in mind, and it is submitted that such an intimation is a clear promise to pay. According to the Lahore High Court the words "is payable" or "to be paid" or "to be taken" or "to be given" *"baqi dena" "baqi lena",* etc. almost invariably amount to a promise to pay within the meaning of section 25(3) of the Contract Act.[2] The mention of interest would make an implied promise to pay an express promise.[3] In a Bombay case, a *khata* signed by the defendant ran as follows:

> "Rs. 200 were found due on the account of the previous *khata* having been made up. For the same this *khata* is passed. The moneys are payable by me. I am to *pay* the same, whenever you may make a demand."

It was held that the *khata* was a promise to pay within the meaning of this section.[4] An agreement between a creditor and a debtor entered into before the expiry of the period of limitation, whereby the date of payment is extended beyond the period of limitation, is valid, though verbal, if there is a consideration for the agreement, e.g., payment of interest up to the extended date. Such an agreement is not an acknowledgement within the meaning of s. 19 of

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ly stated, but apparently there were no words of promise); *Prahlad Prasad* v. *Bhagwan Das* (1926) 49 All. 496; 100 I.C. 593; *Sriram* v. *Governor-General in Council,* 1952 A. Cal. 443; *Suraiya Begum* v. *Hamid Ali* (1949) 23 Luck. 47, 1949 A.O. 48; *Tulsiram* v. *Zaboo* (1948) Nag. 639, 1949 A.N. 229. Reports giving no particulars, e.g. *Hanna Ram* v. *Jhanda Singh,* 1929 A.L. 591; 129 I.C. 90; are useless.

94 *Chowksi Himutlal* v. *Chowksi Archrutlal* (1883) 8 Bom. 194; *Jethibai* v. *Putlibai* (1912) 14 Bom. L.R. 1020.

95 *Ramji* v. *Dharma* (1882) 6 Bom. 683; *Debi Prosad* v. *Ram Ghulam* (1914) 19 Cal. L.J. 263; 25 I.C. 89; *Satyaketu Datta* v. *Ramesh Chandra* (1932) 60 Cal. 714; 37 C.W.N. 326; 146 I.C. 834; 1933 A. Cal. 658; *Shivjiram* v. *Gulabchand* (1941) Nag. 144; 194 I.C. 806; 1941 A.N. 100.

96 *Ranchhodas Nathubhai* v. *Jeychand Khushalchand* (1884) 8 Bom. 405; *Balkrishna* v. *Jayashankar,* 1938 A.B. 460; 40 Bom. L.R. 1010; 178 I.C. 174; but where the words *"baki lena"* (balance payable) were used and the signature of the debtor appended, this was held to be a promise to pay: *Fateh Mohammad* v. *Surja,* 1939 A.L. 486; *Gobind Das* v. *Sarju Das* (1908) 30 All. 268; *Ramaswami* v. *Kuppuswami* (1910) 20 Mad.L.J. 656; 1939 A.L. 486, was overruled in *Shiv Ram Punnun Ram* v. *Faiz* (1942) 23 Lah. 282 (F.B.) In *Shadi Ram* v. *Prabhu,* 1953 A. Punj. 28, Weston C.J. held *"baki rahe"* not to be a promise, and the words "balance struck" were held not sufficient in *Ratanchand* v. *Khet Singh,* 1954 A.M.B. II.; *Sarabhai Hathy Singh* v. *Shah Ratilal Nathulal* (1979) A. Guj 110, 111 *(Baki Deva) Amritlal Mansukh* v. *Moniklal Jetha* (1873) 10 Bom. L.R. 375; *Ranchhoddas Nathbhai* v. *Jeychand Khushalchand* (1884) 8 Bom. 408; *Chunilal Rattanchand* v. *Laxman Govind Dube* (1922) A.B. 408 reld on.

97 *Sasi Kanta Acharjee Chowdhury* v. *Sonaulla Munshi* (1929) 121 I.C. 412; 33 C.W.N. 965; 1929 A. Cal. 444.

98 *Allah Baksh* v. *Hamid Khan,* 1931 A.A. 160; (1931) All. L.J. 56; 130 I.C. 702; but a suit for specific performance may lie, or the plaintiff may sue for damages for failure to execute the mortgage; ibid.

99 *Appa Rao* v. *Suryaprakasa Rao* (1899) 23 Mad. 94. See also *Raghoji* v. *Abdul Karim* (1877) 1 Bom. 590; *Chatur Jagsi* v. *Tulsi* (1877) 2 Bom. 230; *Laxumibai* v. *Ganesh Raghunath* (1900) 25 Bom. 373; *Daula* v. *Gonda* (1903) Punj. Rec. No. 35, the last two being cases under the Indian Stamp Act, 1899.

1 Per Sinha J. in *Sriram* v. *Governor-General in Council,* 1952 A. Cal. 443, 446.

2 *Shanti Parkash* v. *Harnam Das* (1938) 19 Lah. 193; 174 I.C. 277; 1938 A.L. 234 (F.B.); *Tulsi Ram* v. *Zaboo* (1948) Nag. 639. 1949 A.N. 229. *Prahlad Prasad* v. *Bhagwan Das* (1926) 49 All. 496.

3 *Shanti Prakash* v. *Harnam Das* (1938) Lah. 193; 1938 A.L. 234, 240, per Din Mohammad J.

4 *Chandraprasad* v. *Varajlal* (1906) 8 Bom. L.R. 644; *Mahbub Jan* v. *Nur-ud-Din* (1905) Punj. Rec. No. 102; *Bhagwan Singh* v. *Munshi Ram* (1917) Punj. Rec. No. 66, p. 246. Cp. *Om Prakash Mitter* v. *Haji Abdul Rahim,* 1929 A.L. 511; 117 I.C. 377 (added term fixing rate of interest, facts obscure). Where an account contained entries on both sides and the parties who have stated the account between them have agreed that the items on one side should be set against those on the other and the balance

the Limitation Act, nor is it a promise to pay a barred debt; it may be enforced at any time within three years from the date on which it was made.[5] "A promise to pay may be absolute or conditional. If it is absolute, if there is no 'but' or 'if', it will support a suit without anything else: if it is conditional, the condition must be performed before a suit upon it can be decreed.[6] Thus in *Watson* v. *Yates*[7] the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment: "I would assure you that I bear the matter in mind, and will do my utmost to repay the money as soon as I possibly can." It was held that this constituted a conditional promise to pay the barred debt, the condition being the ability of the defendant to pay. The plaintiff in the case failed to show that the defendant was able to pay, and it was held that the defendant could not, therefore, be held bound. Similarly, if the promise be to pay a barred debt "within a month," the promisee must wait for a month before he can sue on the promise.[8] If the debtor promises to pay a barred debt out of his share of the profits of the business started by him in partnership with his creditor, the latter cannot recover the debt except in the manner provided in the agreement.[9]

Agent generally or specially authorised in that behalf.—A Collector, as agent to the Court of Wards, is not an agent "generally or specially authorised in that behalf" so as to bind a ward of the Court of Wards by a promise to pay a barred debt.[10] A pleader cannot bind his client unless he is specially authorised in that behalf,[11] nor a minor's guardian the minor.[12] The manager of a joint Hindu family is not competent to bind the other members of the family by a promise to pay a barred debt.[13]

Debt.—The expression "debt" here means an ascertained sum of money. A promise, therefore, to pay the amount that may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within this section.[14] The expression "debt" in this clause includes a judgment debt. A promise, therefore, to pay the amount of a decree barred by limitation does not require any consideration to support it.[15]

It is not necessary to the operation of this clause that the promise should in terms refer to the barred debt. Thus where *A* passed a promissory note for Rs. 325 to *B*, and after the debt was time-barred, passed another note promising "to pay Rs. 325 for value received in cash," it was held that it was open to *B* to show that the amount, though not paid in cash, referred to the debt due under the first note.[16]

An insolvent who has obtained his final discharge is under no legal obligation to pay any debt included therein, and any promise to pay it is accordingly without consideration. Such a

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only should be paid, the case is one of that kind of account stated in which there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid as described; s. 25(3) has therefore no application: So held by the Privy Council in *Siqueira* v. *Noronha*, 1934 A.P.C. 144; 38 C.W.N. 813; 151 I.C. 90. In such a case, a suit can be filed on the account stated, whether certain items in the account were time-barred or not.

5 *Ibrahim Mallick* v. *Lalit Mohan Roy* (1923) 50 Cal. 974; 79 I.C. 489; 1924 A. Cal. 388.

6 *Bindae Dasya* v. *Chota* (1912) 16 C.W.N. 636, at p. 638; *Maniram* v. *Seth Rupchand* (1906) 33 I.A. 165, 172; 33 Cal. 1047, 1058; *Ballapragada* v. *Thammana* (1917) 40 Mad. 701; 35 I.C. 575.

7 (1887) 11 Bom. 580. The English authorities were reviewed by the H.L. in *Spencer* v. *Hemmerde* (1922) 2 A.C. 507.

8 See *Muhammad Abdulla* v. *Bank Instalment Co.* (1909) 31 All. 495, at p. 497.

9 *Bindae Dasya* v. *Chota* (1912) 16 C.W.N. 636.

10 *Suryanarayana* v. *Narendra Thatraz* (1895) 19 Mad. 255; *Anand Behari Lal* v. *Deputy Commissioner* (1939) 15 Luck. 308; 185 I.C. 290; 1940 A.O. 107.

11 *Bansidhar* v. *Babu Lal* (1923) 21 All. L.J. 713; 75 I.C. 309.

12 *Manikya Bewa* v. *Pushpa Charan Majhi*, 1928 A. Cal. 850; 115 I.C. 263; *Narottamdas* v. *Chitta Bhagwansang*, 1939 A.B. 464; 41 Bom. L.R. 896; 186 I.C. 66 (*de facto* guardian).

13 *Nagar Mal* v. *Bajranglal* (1950) 77 I.A. 22, 29 Pat. 272, 52 Bom. L.R. 467, 1950 A.P.C. 15.

14 *Doraisami* v. *Vaithilinga* (1917) 40 Mad. 31 (F.B.); *Sheobachan* v. *Madho Saran*, 1952 A.P. 73, 77.

15 *Heera Lall* v. *Dhunput Singh* (1878) 4 Cal. 500; *Billings* v. *The Uncovenanted Service Bank* (1881) 3 All. 781; *Shripatrav* v. *Govind* (1890) 14 Bom. 390; *Niaz Ahmad Khan* v. *Parshotam Chandra* (1930) 53 All. 374; 129 I.C. 545; 1931 A.A. 154.

16 *Ganapathy* v. *Muniswami* (1909) 33 Mad. 159; 5 I.C. 754; *Sandhura Singh* v. *Kehr Singh*, 1936 A.L. 1016; *Abdullakin* v. *Maung Ne Dun* (1929) 7 Rang. 292; 119 I.C. 738; 1929 A.R. 240 adds nothing; *Muthayee Achi* v. *Sabbiah*, 1951 A.M. 903.

debt is said to be barred by insolvency, and the Contract Act contains no exception in favour of a promise to pay it.[17] It is not clear, however, whether the same principle would apply to a promise without new consideration to pay a debt in respect of which the insolvent has obtained only his personal, and not his final, discharge, and which is included in the judgment entered up against him in favour of the official assignee. In such a case it will be observed that the creditor's remedy is not, strictly speaking, barred, but is transferred to the official assignee, who alone can recover the debt in the manner and subject to the conditions provided by the relevant Insolvency Act. In *Naoroji* v. *Kazi Sidick*[18] the defendant filed his petition and schedule in the Insolvent Debtor's Court, and subsequently obtained his personal discharge. On the same day judgment was entered up against him in the name of the official assignee for the full amount of debts stated in the schedule. After this was done the plaintiff, who was a scheduled creditor for Rs. 5,000, entered into an agreement with the insolvent whereby, in satisfaction of his claim for Rs. 5,000, he agreed to accept from the insolvent a present cash payment of Rs. 800, and either the execution of a conveyance to him of a certain property or the payment of a further sum of Rs. 1,600 in cash (see s. 63, *post*). The creditor sued the insolvent on the agreement, and one of the defences was that there was no consideration. It was held that the defendant's promise was not without consideration, for the plaintiff by the agreement impliedly gave up his right to share in any future rateable distribution under s. 86 of the Insolvent Debtors' Act (the Act which at the time regulated the legal position) and also the right accessory thereto, namely, of opposing the final discharge of the insolvent. The agreement, however, was held to be void as being against public policy within the provisions of s. 23.[19]

Explanation 1 needs no comment. It may be taken as a statement made by way of abundant caution.

Explanation 2 declares familiar principles of English law and equity. First the Court leaves parties to make their own bargains; it will not set up its own standard of exchangeable values. There must be some consideration which the law can regard as valuable,[20] but the fact that a promise is given for a certain consideration, great or small, shows that the promisor thought the consideration worth having at the price of his promise. Hobbes, though not a lawyer and having no love for the Common Law, correctly expressed its doctrine when he said in his "Leviathan": "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contended to give." One or two English examples will suffice. Parting with the possession of goods, even for a very short time, and though it does not appear what advantage the promisor was to have from it, is consideration enough for a promise to return them in the same condition.[21] An agreement to continue, though not for any defined time, an existing service, determinable at will, is a sufficient consideration.[22] If the owner of a newspaper offers the financial editor's advice to readers who will send their queries to a given address, the trouble of sending an inquiry is a sufficient consideration for an undertaking that reasonable care shall be used to give sound advice in answer thereto. It would seem that a contract is concluded as soon as the reader has sent in his inquiry, the general offer being not merely an invitation, but the proposal of a contract (see notes on s. 8, "general offers" above); though it would also seem that only nominal damages would be recoverable if the editor did not answer at all.[23]

Secondly, the fact that a consideration is grossly inadequate may nevertheless be material as evidence of coercion, fraud, or undue influence. The leading modern dictum on this subject will immediately be given as cited in an Indian case by the Privy Council. It must be

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17 Per Cur. in *Naoroji* v. *Kazi Sidick* (1896) 20 Bom. 636, 642, 643.
18 *Supra*.
19 See notes on s. 23, above.
20 Natural love and affection is not a good consideration in the eye of the law, for it is incapable of being valued: *H.P. Banerji* v. *Commissioner of Income-tax* (1940) 20 Pat. 202; 192 I.C. 307; 1941 A.P. 59.
21 *Bainbridge* v. *Firmstone* (1838) 8 A. & E. 734; 53 R.R. 234.
22 *Gravely* v. *Barnard* (1874) L.R. 18 Eq. 518.
23 *De la Bere* v. *Pearson, Ltd.* (1908) 1 K.B. 280, C.A.

remembered that inadequacy of consideration may be evidence that the promisor's consent was not free, but is no more; it is not of itself conclusive. Standing alone, inadequacy, as such, is not a bar even to specific performance.[24]

In a suit[25] to set aside a conveyance on the ground of inadequacy of consideration the Privy Council observed:

"The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent* v. *Tennents* (L.R. 2. H.L.Sc. 6) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: 'The transaction having clearly been a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition."[26]

In a case[27] decided by the Bombay High Court before the enactment of the Contract Act, a mortgage was executed by ignorant and illiterate peasants, who were seeking to raise moneys for tilling their lands, in favour of the plaintiffs, who were moneylenders by profession. The mortgage included, amongst other unusual provisions a covenant to sell the property to the mortgagees at a gross undervalue in certain events. In setting aside the mortgage as fraudulent and oppressive, Westropp C.J. said:

"Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it. Inadequacy of consideration, when found in conjunction with any other such circumstances as suppression of the value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them."[28]

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

The wide and unguarded language of this section is taken from the draft Civil Code of New York (s. 836). There is very little positive authority in England, but it seems probable that a contract limited to not marrying a certain person or any one of a certain definite class of persons would be held good.[29] Apparently such agreements must be held void in India. The Allahabad High Court expressed doubt on the question whether partial or indirect restraint on marriage was within the scope of s. 26.[30]

The general view of English law is that any contract is void which unduly restricts or hampers the freedom of persons to marry when they will or which after marriage tends to encourage in one or both of the parties an immoral mode of life incompatible with their mutual obligations.[31] A contract in general restraint of marriage is unenforceable on the ground of public policy, whether it contains an express undertaking that the subject will not marry, or whether on financial or other grounds it tends to discourage a subject to marry.[32]

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24 Specific Relief Act, s. 20(2) Exp. I, (1963) see below. And so it is now well understood in England, notwithstanding former conflicting opinions, see Pollock, Contract, 13th ed., 496.

25 *The Administrator-General of Bengal* v. *Juggeswar Roy* (1877) 3 Cal. 192, 196.

26 Quoted and followed in *Devji Shivji* v. *Karsandas Ranji*, 1954 A.P. 280.

27 *Kedari Bin Ranu* v. *Atmarambhat* (1866) 3 B.H.C.A.C. 11.

28 3 B.H.C.A.C. at pp. 18, 19. Compare s. 53 of the Transfer of Property Act and ss. 17 & 20(2) Exp. I of the 1963 Specific Relief Act. See to the same effect *Bhimbhat* v. *Yeshwantrao* (1900) 25 Bom. 126. See also under "Adequacy of Consideration", *supra*.

29 Pollock, Contracts, 13th ed., 324-6.

30 *Rao Rani* v. *Gulab Rani*, 1942 A.A. 351.

31 Cheshire & Fifoot: Law of Contract (6th Ed.) p. 321 (9th Ed) p 366. See *In re Michelhoms Will Trusts* (1963) 2 W.L.R. 1238. See Story: *Equity Jurisprudence*, s. 274.

32 *In re Michelhoms Will Trusts* (1963) 2 W.L.R. 1238, 1244. See also under s. 23 "Agreement not to revoke a will", *supra*.

Again, an agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife while the first was living would be void according to the literal terms of this section. It may be doubted whether such a result was ever contemplated by the Legislature. The Hindu law recognise polygamy. This was the Law before the Legislature imposed monogamy and made polygamy illegal and an offence in 1956. As to Mahomedan law a man may have as many as four wives at a time. But neither law binds a man to marry more than one wife. It would seem, therefore, that a provision in a *Kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddat*,[33] see notes on s.23, "Rules of Hindu and Mahomedan law," *ante*.

In an Oudh case a distinction was drawn between restraint on marriage generally and a restraint on remarriage; and a condition in a *wakf* that if the widow of a co-sharer remarried she should forfeit her right to the profits under the *wakf* was accordingly upheld.[34]

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold.

Exception 1[35].—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Agreements in restraint of trade.—This section, like the last, unfortunately follows the New York draft Code, which has been the evil genius of this Act. The first paragraph is taken almost word for word from s. 833 of that production. The original draft of the Indian Law Commission did not contain any specific provision on the subject.

The New York draftsmen were of opinion that "contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent," and deliberately tried to narrow the Common Law. Meanwhile the Common Law has, on the contrary, been widening; the old fixed rules as to limits of space have been broken down, and the Court has only to consider in every case of a restrictive agreement whether the restriction is "reasonable... in reference to the interests of the parties concerned and reasonable in reference to the interests of the public." In determining this the nature and extent of the business to be protected are material elements.[36] The extension of modern commerce and means of communication has displaced the old doctrine that the operation of agreements of this kind must be confined within a definite neighbourhood.[37] But the Indian law has stereotyped that doctrine in a narrower form than even the old authorities would justify. The exception is also taken with slight variations from the New York draft Code.

Although there is no statutory provision proclaiming the right to work, the common law has, for at least three centuries, abhorred monopolies which prohibit any person from working in a lawful trade.[38] A person, according to the common law, is entitled to exercise any

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33 *Maharam Ali* v. *Ayesa Khatun* (1915) 19 C.W.N. 1226; 31 I.C. 562; *Badu Mia* v. *Badrannessa* (1919) 29 C.L.J. 230; 40 I.C. 803. Cf. *Jamila Khatoon* v. *Abdul Rashid,* 1939 A.L. 165; 184 I.C. 105.

34 *Latafatunnissa* v. *Shaharbanu Begum,* 1932 A.O. 208; 139 I.C. 292.

35 Exceptions 2 and 3, which related to partnerships, were repealed by the Indian Partnership Act, 1932. The subject is now dealt with in ss. 11(2), 36(2) and 54 of that Act.

36 *Nordenfelt* v. *Maxim-Nordenfelt Co.* (1894) A.C. 535, 565 (Lord Macnaghten).

37 *Connors Bros. Ltd.* v. *Bernard Connors,* 1941 A.P.C. 75; 196 I.C. 871; (1940) 4 All E.R. 179; 57 T.L.R. 76 (appeal from Canada).

38 *Nagle* v. *Feildon* (1966) 2 W.L.R. 1027; (1966) 1 All E.R. 689, 693; 40 A.L.J. 60 & 355; *Ipswick*

trade or calling as and where he will, and the law has always regarded jealously any interference with freedom of contract as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State. The principle is not confined to restraint of trade in the ordinary meaning of the word trade, but includes restraints on right of being employed.[39] In general, unless a contract is vitiated by duress, fraud or mistake, its terms will be enforced though unreasonable or even harsh or unconscionable but a term in restraint of trade will not be enforced unless it is reasonable.[40] The character and extent of the protection which a covenantee can reasonably and legitimately secure by means of a covenant in restraint of trade depends upon the circumstances of the case. In all such cases the Court must balance as best as it can the public interest in securing that members of the public shall be free to conduct their business in whatever legitimate way they may consider to be most advantageous to them and in so doing to enter into binding contracts, and the public interest in securing that every man shall be free to use his abilities and earn his living in whatever legitimate ways he may from time to time think fit.[41]

Test of restraints of trade validity.—The test of validity of restraint has been thus stated:—

An agreement in restraint of trade to be valid must be reasonable as between the parties and consistent with the interests of the public.[42] For definition of public interest see fn. 43,45,47 below, *A. Schroder Music and Publishing Co. Ltd.* v. *Macaulay* (1974) 1 WLR 1308, 1315: (1974) 3 All E.R. 616 and *Texaco Ltd.* v. *Mulberry Filling Station Ltd.* (1972) 1 All E.R. 513, 524, 528. In *Esso Petroleum case*[43] Lord Reid said that as the doctrine is based on public policy, its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that freedom which is the policy of the law to protect. In the same case Lord Wilberforce[44] observed.:

The development of the law does seem to show, however, that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as under contemporary conditions may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract provided that any prevention of work outside the contract viewed as a whole is directed towards the absorption of the parties services and not their sterilisation,[45] e.g. sole agencies; a film star who ties herself upto a company to get stardom.[46]

The law fetters traders by a particular inability to limit their freedom of trade; so that it may protect the general freedom of trade and the good of the community; and since the rule must be a compromise it is difficult to define its limits or any logical basis.[47]

Tailors Case (1614) Co. Rep. 53a quoted R. v. *Lincoln's Inn Benchers* per Bayley J. (1825) 4 B. & C. 855 at pages 859-860 not applied; *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co.* (1967) 2 S.C.R. 367; (1967) A.SC. 1098; *Gopal Paper Mills* v. *Malhoutra* (1962) A. Cal. 61, 65.

39 *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co.* (1967) 2 S.C.R. 367: (1967) A.S.C. 1098; Halsbury's *Laws of England,* Vol. 38, p. 15 (3rd Ed.) appd.; *Gopal Paper Mills* v. *Malhoutra* (1962) A. Cal. 61, 65.

40 *ESSO Petroleum* v. *Harpers Garage* (1967) 1 All E.R. 699, 706 (H.L.); (1968) A.C. 269; *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co.* (1967) 2 S.C.R. 367; (1967) A.S.C. 1098; *Gopal Paper Mills* v. *Malhoutra* (1962) A. Cal. 61, 65; *Mitchel* v. *Reynolds* (1711) 1 P.Wms. 181.

41 *Petrofina Ltd.* v. *Martin* (1965) 2 W.L.R. 1299, 1310, 1311 (Buckley J.); *Attorney-General of Australia* v. *Adelaide Steamship Co. Ltd.* (1913) A.C. 781, 795.

42 *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181, 189-190; *Peters American Delicacy Co. Ltd.* v. *Patricias Chocolates of Candies Pty. Ltd.* (1947) 77 C.L.R. 574, 598 (Ice cream manufacturer); *M. & S. Drapers* v. *Reynolds* (1957) 1 W.L.R. 9, 18.

43 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1967) 1 All E.R. 699, 707 (H.L.) (Per Lord Reid); (1968) A.C. 269.

44 Ibid, 729 (per Lord Wilberforce).

45 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1967) 1 All E.R. 699, 727 (per Lord Pearce).

46 *Gaumont-British Pictures Corporation Ltd.* v. *Alexander* (1936) 2 All E.R. 1686; *Warner Bros. Pictures Ltd.* v. *Nelson* (1937) 1 K.B. 209; (1936) 3 All E.R. 160.

47 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1967) 1 All E.R. 699, 724 (H.L.); (1968) A.C. 369.

The section is general in its terms, and declares all agreements in restraint of trade void[48] *pro tanto,* except in the case specified in the exception. The object appears to have been to protect trade. It has been said that "trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained".[49] That reason, however cannot have been supposed applicable in New York; and it seems more likely that the New York clause was simply copied without reflection by the draftsman of the Indian Legislative Department.[50]

English Law.—The law in England has been thus summarised.

(1) The fundamental principle is that every restraint whether partial or general is contrary to public policy and is *prima facie* void.[51]
(2) This presumption of invalidity is rebutted by a proof of the restraint being reasonable.[52]
(3) The restraint must be reasonable in the interests of both contracting parties and also in the interests of the public. The onus of proving reasonableness lies upon the covenantee. But the onus of proving that the contract tends to injure the public lies upon the covenantor.[53]
(4) The restraint to be reasonable must not be more than what is reasonably necessary to protect the covenantee's interest.[54]
(5) Existence of proprietary interest necessary for protection of the covenantee has to be proved and it must be shown to the satisfaction of the court that the restraint as regards its area and time of operation and the trades against which it is directed, is not excessive.
(6) Whether restraint is reasonable or not is a question for the court to decide.[55]

Australian Law.—According to the Australian Courts the ten principles of the law relating to restraint of trade are the following and they are also applicable to cases of employer and employee. They are particulars of a larger principle that true freedom of trade is not to be restricted but that a provision which taken by itself would amount to such a restriction may, when considered in conjunction with and as qualified by the surrounding circumstances, prove to be not really a restriction[56] but merely part of a larger transaction which regarded as a whole does not restrict but may even assist freedom of trade. To employ a simile expenditure is *per se* a loss but expenditure which secures a greater benefit is not.[57]

(1) Freedom of trade cannot without sufficient legal justification be restricted by agreement simply on the principle of freedom of contract.[58]
(2) No person has an abstract right to be protected against competition *per se* in his trade or business.[59]

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48 Certainly not "illegal" *Haribhai Maneklal* v. *Sharafali Isabji* (1897) 22 Bom. 861, 866.
49 Per Kindersley J. in *Oakes & Co.* v. *Jackson* (1876) 1 Mad. 134, 145.
50 "It is unfortunate that s. 27 has been moulded upon the New York draft Code and seriously trenches upon the liberty of the individual in contractual matters affecting trade:" per cur. in *Bholanath Shankar Das* v. *Lachmi Narain* (1930) 53 All. 316, at p. 322; (1931) All.L.J. 84; 1931 A.A. 83.
51 *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1913) A.C. 724; (1911-13) All E.R. Rep. 400.
52 See *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition & Co.* (1894) A.C. 535, 565; (1891-94) All E.R. Rep. 1 (H.L.); Lord Macclesfield's dictum in *Mitchel* v. *Reynolds* (1711) 1 P.Wms. 181 interpreted.
53 *Attorney-General of Commonwealth* v. *Adelaide Steamship Co.* (1913) A.C. 781, 796; (1911-13) All E.R. 1120.
54 *Underwood & Son Ltd.* v. *Barker* (1899) 1 Ch. 300, 305; *Herbert Morris Ltd.* v. *Saxelby* (1916) 1.A.C. 688, 706; (1916-17) All E.R. Rep. 305 (H.L.).
55 *Haynes* v. *Doman* (1899) 2 Ch. 13; *Mason* v. *Provident Clothing and Supply Co. Ltd.* (1913) A.C. 724 at pp. 732-3; (1911-13) All E.R. Rep. 400.
56 *Baclhus Marsh Concentrated Milk Co. Ltd.* v. *Joseph Nathan & Co. Ltd.,* (1919) 26 C.L.R. 410, 440-441.
57 Ibid, 441.
58 *Trego* v. *Hunt* (1896) A.C. 7, 24; (1895-99) All E.R. Rep. 804; *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688.
59 *Trego* v. *Hunt* (1896) A.C.7; (1895-99) All E.R. 804; *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 700; applied in; *Kores Manufacturing Co. Ltd.* v. *Kolak Manufacturing Co.* (1959) Ch. 108; (1958) 2 All E.R. 65; *Attwood* v. *Lamont* (1920) 3 K.B. 571.

(3) If there is something he is entitled to be protected against then a reasonable protection for that purpose contracted for will be upheld, as far as personal interests of the parties themselves are concerned and subject to public interests.[60]

(4) The onus of proving the special circumstances justifying the restraint as reasonable between the parties lies on the person alleging it to be so; the onus of proving injury to the public is on the person alleging it.[61]

(5) When a man sells anything he may preclude himself from lessening by competition the value of what he sells provided the restriction is not unreasonable, having regard to the subject-matter of the contract.[62]

(6) Therefore when the goodwill of a business is sold, a reasonable covenant on the part of the vendor against competition is valid to protect what is bought and sold.[63]

(7) But the business, the goodwill of which is to be protected, is a specific business transferred by the covenantor to the covenantee.[64]

(8) Similarly if what are properly called "trade secrets" are sold, they are regarded as property and may be similarly protected.[65]

(9) But general skill and knowledge which a person of ability necessarily acquires in his business or calling is not a trade secret, and is not knowledge, which can be regarded as property.[66]

Indian Law contd.—To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly brought within one of the exceptions.

"The words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary." Moreover, "in the following section (s.28) the legislative authority when it intends to speak of an absolute restraint, and not a partial one, has introduced the word 'absolutely' .... The use of this word in s. 28 supports the view that in s. 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear".[67]

This view was expressed by Couch C.J. in *Madhub Chunder* v. *Rajcoomar Doss*.[68]

The parties in that case carried on business as braziers in a certain part of Calcutta. The plaintiff's mode of business was found by the defendants to be detrimental to their interests, and an arrangement was thereupon entered into between the parties whereby the plaintiff agreed to stop his business in that quarter, and the defendants promised in consideration of his doing so to pay to the plaintiff all sums which he had then disbursed as advances to workmen. The plaintiff accordingly ceased carrying on business in that locality, and the defendants having failed to perform their part of the contract, he sued them to recover Rs. 900, being the amount advanced by him to the workmen. The agreement was held void under this section, though the restriction put on the plaintiff's business was limited to a particular place.

"If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; and the whole contract must be treated as one which cannot be enforced."[69]

Similarly a stipulation in a contract prohibiting the defendant from engaging in the cultivation of tea for a period of five years from the date of the termination of his agreement with the plaintiffs was held void, although the restriction only extended to a distance of forty miles

60 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 700-1.
61 *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1914) A.C. 461, p. 470; *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 700, 707, 715.
62 *Leather Cloth Co.* v. *Lorsont*, 9 Eq. at p. 354, approved in *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 701.
63 *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 709, 713.
64 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 707-9, 713.
65 *Leather Cloth Co.* v. *Lorsont*, 9 Eq. at p. 353; *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 703, 710-11, 714.
66 *Herbert Morris* v. *Saxelby* (1916) 1.A.C. 688, 711.
67 The generality of the section, as thus explained, appears to have been overlooked in framing illustration (e) to s. 57 of the Specific Relief Act; s. 42 of 1963 Act. I11s. have been omitted.
68 (1874) 14 B.L.R. 76, 85, 86.
69 (1874) 14 B.L.R. 76, at p. 86.

from the plaintiffs tea gardens.[70] And where by the terms of a contract the plaintiff agreed with the defendant not to carry on the business of a *dubash* for a period of three years, and to act as a stevedore only of five ships to be given to him by the defendant, and not to do any services to ships belonging to anybody else for the like period, it was held that the agreement was void, as the first branch imposed an absolute, and the second a partial, restraint on the plaintiff's business.[71] In an earlier Madras case a covenant whereby the defendants agreed with the plaintiffs, at the time of entering into their service at Madras, not to carry on the same business (that of dress-makers and milliners) on the expiry of the period of service within 800 miles from Madras, was held void, as being in restraint of trade.[72]

Reasonable and fair.—The dictum of Lord Macclesfield in *Mitchel* v. *Reynolds*[73] that the validity of a restraint is dependent on its reasonableness and fairness was interpreted to mean that a general restraint was void in cases of contracts of both employment and of sale of a business but a partial restraint was valid and if reasonable it was enforceable.[74] But on appeal the House of Lords held that a general restraint between vendor and purchaser was not necessarily void and that it was valid if reasonable in the interests of the parties and in the interest of the public.[75] The distinction between general and partial restraint was thus removed and the test of validity in either case was reasonableness with reference to the particular circumstances.[76] In 1913 the House of Lords in *Mason* v. *Provident Clothing & Supply Co. Ltd.*[77] accepted the statement of law as explained by Lord Macnaghten in *Nordenfelt's* case[76] and developed two propositions:

(1) All covenants in restraint of trade partial as well as general are *prima facie* void and they cannot be enforced unless the test of reasonableness propounded by Lord Macnaghten is satisfied.

(2) A distinction was made between contracts of service and contracts of sale of a business.

Restraint—in the sale of business.—The plaintiffs who manufactured and sold B.R.C. purchased the business of the defendants who sold but did not make "Loop" road reinforcement. The contract of sale contained a term that the defendant will not compete directly or indirectly compete in any business in the United Kingdom for a specified period in the manufacture or sale of road reinforcements. The defendant took employment in breach of the contract. The plaintiffs' action to enforce the contract failed as the contract was unreasonable. It would have been otherwise if the contract had been confined to the sale of "Loop" road reinforcement.[78]

Rules of a Trade Union.—A rule of a registered trade union that "no person who has been convicted of a criminal offence... shall be eligible for or retain membership of the association" is not void as uncertain, unreasonable, contrary to natural justice or restraint of trade".[79] A distinction was drawn between the rules for admission to a trade union and expulsion therefrom. The closed shop rule imposed by a registered trade union is valid in U.K. notwithstanding that it is in restraint of trade.[79] The position in New South Wales, Queensland,

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70 *The Brahmaputra Tea Co.* v. *Scarth* (1885) 11 Cal. 545, 549.
71 *Nur Ali Dubash* v. *Abdul Ali* (1892) 19 Cal. 765.
72 *Oakes & Co.* v. *Jackson* (1876) 1 Mad. 134. *Semble* the covenant was void for unreasonableness according to English law, ibid, p. 145.
73 (1711) 1 P. Wms. 181.
74 See Bowen L.J. in *Maxim Nordenfelt Arms & Ammunition Co.* v. *Nordenfelt* (1893) 1 Ch. 630, 662.
75 *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (1894) A.C. 535, 565; (1891-94) All E.R. Rep. 1.
76 Ibid, p. 574.
77 (1913) A.C. 724. See also *Attwood* v. *Lamont* (1920) 3 K.B. 571, 585-6; (1920) All E.R. Rep. 55; per Younger L.J.
78 *British Reinforcement Concrete Engineering Co. Ltd.* v. *Schelff* (1921) 2 Ch. 563.
79 *Faramus* v. *Film Artistes Association* (1963) 2 W.L.R. 504 (Denning M.R. Contra) appd. by House of Lords (1964) 2 W.L.R. 126; (1964) A.C. 925; (1964) 1 All E.R. 25; *Hill* v. *C.A. Parson & Co. Ltd.*, (1971) 3 All E.R. 1345. (One month's notice to a Chartered Engineer terminating his services because of a rule of a trade union requiring technical staff to join the Union is ineffective and injunction was issued against employer terminating service).

and the Australian Capital Territory is otherwise.[80]

Professional bodies.—The doctrine of restraint of trade was applied to the rules of professional body's code of ethics in *Dickson* v. *Pharmaceutical Society of Great Britain*[81] where the latter society had included in its code of ethics a rule the effect of which would be the elimination of non-traditional goods being retailed by chemists such as "Boots"; such goods being other than pharmaceutical goods and traditional goods like toiletries and photographic equipment. This rule was considered arbitrary and capricious by Lord Denning M.R.

Sex disqualifications.—A well-known and capable woman race-horse trainer was refused a licence by the stewards of a Jockey Club on an unwritten practice that such licences are given only to males. The Court of Appeal held that the stewards were acting capriciously and the lady had *locus standi* to avoid a rule or practice having that effect.[82] A contract is a prerequisite to relief only if the defendant organisation is a social club and anything to the contrary in *The King* v. *Benchers of Lincoln's Inn*[83] is no longer the law.[84]

Restraint during term of service.—An agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade.[85] If it were otherwise,

"all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms."

Such an agreement may be enforced by injunction where it contains a negative clause, express or implied,[86] providing that the employee should not carry on business on his own account during the term of his engagement.[87]

Interim injunction.—A Solicitor's clerk employed for one year and thereafter from year to year had given undertaking not to be employed in any other firm of Solicitors or be interested in or concerned with the legal profession for five years within two postal districts of Greater London. But he did take service in another firm six months after leaving the plaintiff's firm. The Court of appeal refused to give an interim injunction as there was a serious issue to be tried and in the absence of evidence on the adequacy of damages in lieu of injunction.[88]

In *Deshpande* v. *Arvind Mills Ltd.*,[89]an employee contracted to serve as a weaving master for three years, and agreed not to serve anyone else in India during that period. He left the service after one year, and joined another mill as a weaving master. In terms the prohibition in the agreement was not restricted to serving anyone else as weaving master, but was absolute. The Court, however, in the light of the intention of the parties, construed the prohibition as confined to the profession of weaving master, held the agreement reasonable, and issued an injunction against the employee.

This is in accordance with English practice: as Lord Esher M.R. said in *Dubowski* v. *Goldstein*:[90]

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80 40 A.L.J. 356. S. 115 of the Industrial Arbitration Act (1940-64) (Australia).

81 (1967) Ch. 708; (1967) 2 W.L.R. 718; (1967) 2 All E.R. 558.

82 *Nagle* v. *Fieldon* (1966) 2 W.L.R. 1027, (1966) 1 All E.R. 689; (1966) 2 Q.B. 633; *Faramus* v. *Film Artistes Association* (1964) A.C. 925 not applied.

83 (1825) 4 B. & C. 855.

84 *Nagle* v. *Fieldon* (1966) 2 W.L.R. 1027; (1966) 1 All E.R. 689; (1966) 2 Q.B. 633.

85 *Gaumont Corporation* v. *Alexander* (1936) 2 All E.R. 1686, 80 S.J. 816; *Warner Bros.* v. *Nelson* (1937) 1 K.B. 209.

86 See Specific Relief Act, 1877, s. 57, ill, (d) (now s. 42 of 1963) below. *Subba Naidu* v. *Haji Badsha* (1902) 26 Mad. 168, 172, *Pragji* v. *Pranjiwan* (1903) 5 Bom. L.R. 878.

87 Note that wrongful dismissal of the employee, being an entire repudiation of the contract, puts an end to an ancillary agreement of this kind no less than to the service itself: *General Bill-posting Co.* v. *Atkinson* (1909) A.C. 118.

88 *Fellowes & Son* v. *Fisher* (1976) Q.B. 122 *American Cyanamid Co.* v. *Rex Chainbelt Inc.* (1975) 1 All E.R. 504; (1975) A.C. 396 appld. *J.T. Stratford & Son Ltd.* v. *Lindley* (1965) A.C. 26; (1964) 3 All E.R. 102 considered.

89 (1946) Bom. 89, 48 Bom. L.R. 90, 226 I.C. 138, 1946 A.B. 423.

90 (1896) 1 Q.B. 478, 481 (C.A.): where a covenant by a milk-seller with his employer was limited by the

"It is ordinary canon of construction that the meaning of words in an agreement which, taken by themselves, are quite general may be confined to a particular subject-matter with which the parties were dealing."

An English case similar to the *Deshpande Case* is *Hood & Moore's Stores* v. *Jones*,[91] where a covenant by an employee of a corn dealer not to enter into business within two miles of the employer's shop was contrued as being confined to businesses of the same nature as the employer carried on at the time of the covenant. Though the Courts have applied the ordinary rules of construction to such covenants, a clause which is too uncertain to permit the precise intention of the parties to be discovered will not be enforced. Thus in *Davies* v. *D* a covenant to retire from a business 'so far as the law allows' was held to be too vague to be enforced.[92]

In *Charlesworth* v. *MacDonald*[93] the defendant agreed to serve the plaintiff, a physician and surgeon practising at Zanzibar, as an assistant for three years. The letter stating the terms which the plaintiff offered and the defendant accepted contained the words "The ordinary clause against practising must be drawn up." No formal agreement was drawn up. and at the end of a year the defendant ceased to act as the plaintiff's assistant and began to practice in Zanzibar on his own account. It was held that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account during the period of the agreement.[94]

At first sight there seems force in the contrary view of the lower court that the agreement was too vague to be valid. There was no evidence as to what 'the ordinary clause against practising' was. There could not have been any common intention on the point as the defendant accepted the offer of the plaintiff in Edinburgh, and had no local knowledge. The Court had to fix limits on the profession to be protected, the area in which the covenant was to operate, and the duration of the covenant before it could be binding. No English decision goes so far, and the Court scarcely faces up to the difficulties, but in two respects at least the circumstances made it more feasible for the Court to ascertain the probable intention of the parties with some degree of certainty. As to locality, it was an obvious conclusion to limit the area of the covenant to the island of Zanzibar, rather than to hold it applicable also on the mainland thus rendering it too wide to be reasonable. It also seems reasonable to restrict the time of the operation of the covenant to the duration of the agreement of service, as in India it would be void if more extensive: there was a hard and fast line available to the Court, whereas in England there is no convenient limit to rescue such a covenant from the limbo of uncertainty, a covenant being enforceable beyond the period of service provided it is reasonable.

In *McDonald's case* [95] an employee was brought out from England to serve Burn & Co. for a 5-year period on the ground of his special knowledge and skill. The company paid his expenses of the voyage, etc., but injunction was granted although there were no negative covenants. The grant was on the basis of equity, justice and good conscience.

Considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract and where they are operative during the period of the contract. Negative covenants that the employee would not get himself employed with any other employer where he would perform similar duties is not restraint of

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Court to the locality where the covenantor had served, despite the absence of any express limitation in the covenant itself.

91 (1899) 81 L.T. 169. Cozens-Hardy J.

92 (1887) 36 Ch. D. 539 (C.A.). See also *British Electrical* v. *Patley Pressings* (1953) 1 W.L.R. 280: ('subject to *force majeure* conditions'—held too vague, as there was a variety of *force majeure* conditions in the trade).

93 (1898) 23 Bom. 103, distinguishing *Davies* v. *D.* (1887) 36 Ch.D. 539 *(supra)*. See also *The Brahmaputra Tea Co.* v. *Scarth* (1885) 11 Cal. 545, 550.

94 Note that the Specific Relief Act is not law in Zanzibar. The Bombay Court based its decision on the authority of *Lumley* v. *Wagner* (1852) 1 D.M.G. 604; 91 R.R. 193; a rule which is now considered anomalous and will not be extended: see *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416, and *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671. These later authorities cannot, of course, affect the application of the Specific Relief Act where it is in force. See s. 57 of that Act (s. 42 of 1963) and notes thereon, below. *Lalbhai* v. *Pandya* (1966) A. Guj. 189; (1965) 2 Lab. L.J. 284. See also *Burn & Co.* v. *McDonald,* 36 Cal. 354.

95 *Burn & Co. Ltd.* v. *McDonald,* 36 Cal. 354.

trade unless the contract is unconscionable or excessively harsh or one-sided as in *W.H. Milsted case.*[96]

Apprentice.—A contract of apprenticeship where a person is bound to another for the purpose of learning a trade does not create the relationship of employer and employee.[97]

Covenants between Master and Servant and Commercial Contracts.—The Courts take a stricter view of covenants between master and servant than of commercial contracts. The principle is based on the policy that an employer has no legitimate interest in preventing an employee after he leaves service of a competitor merely because of his being a competitor.[98] This distinction was stated by Viscount Haldane in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[99] thus:

". . . . when the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves."[1]

"If, then, the compensation provisions were, in the light of the agreed arrangement as a whole, reasonable as between the parties, they can only be invalidated if they are shown to have been against the public interest and voidable, therefore, on grounds of public policy."[1]

There is a distinction between contracts entered into by vendors and purchasers of business where parties are of equal strength and contracts between master and servant where often they are not.[2] Accordingly, a restriction unreasonable in the former case may be reasonable in the latter.[3] The Privy Council,[4] after pointing out that it was not aware of any case in which a restraint, though reasonable in the interests of the parties, had been held unenforceable because it involved some injury to the public[4] said:

"...the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. If the restraint is reasonable in the interests of the parties. it will not be unenforceable because it involved some injury to the public."[5]

Restraints in Sale of business agreement & Employing an Employee.—The sale of a business by which the seller undertakes not to complete with the buyer and the contract of employment by which the employee undertakes not to, after leaving the employer, compete with him or not to take service with a competitor are subject to restraints. The validity of such restraint depends on (i) A proprietary interest; (ii) Reasonableness; (iii) public interest.

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96 *Naranjan Shankar Golikari* v. *Century Spg. & Mfg. Co.* (1967) 2 S.C.R. 367; (1967) A.SC. 1098; Halsbury's Laws of England, Vol. 38, p. 31 refd. to; *W. H. Milsted & Son Ltd.* v. *Hamp & Ross & Glendinning Ltd.* (1927) W.N. 233; *Gopal Paper Mills Ltd.* v. *Surendra Malhotra* (1962) A. Cal. 62 (a case of 20 years period) dist.

97 *Employees State Insurance Corpn.* v. *Tata Engineering & Locomotive Co.* (1966) A.P. 445.

98 *Kores Manufacturing Co.* v. *Kolok Manufacturing Co. Ltd.* (1959) Ch. 108, 126; (1958) 2 All E.R. 65, 74; Per Lord Haldane L.C. *North Western Salt Co. Ltd.* v. *Electrolytic Alkali* (1914) A.C. 461; (1914-15) All E.R. 752.

99 (1914) A.C. 461, 471; (1914-15) All E.R. 752, 757.

1 *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co.* (1914) A.C. 461 at page 471; (1914-15) All E.R. 752, 757; applied in *Kores Manufacturing Co.* v. *Kolok Manufacturing Co.* (1959) Ch. 108, 126; (1958) 2 All E.R. 65, 74; *Tool Metal Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 685 (H.L.).

2 *Eastham* v. *Newcastle United Football Club* (1963) 3 All E.R. 139, 146. (A case of a professional football player and a football club).

3 *Ronbar Enterprises Ltd.* v. *Green* (1954) 2 All E.R. 266. 270. (A case of partnership agreement.) This statement made in reference to possible differences in the law as to severance; *Jenkins* v. *Read* (1948) 1 All E.R. 471 (A case of a medical practitioner, a borderline case); *Mason Provident Clothing & Supply Co.* v. *Green* (1913) A.C. 724, 731; *M. & S. Drapers* v. *Reynolds* (1956) 3 All E.R. 814, 820 (Denning L.J.); *Leather Cloth & Co.* v. *Lorsont* (1869) 9 Eq. 345, 354.

4 *A.G. of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.* (1913) A.C. 781; (1911-13) All E.R. Rep. 1120, 1123.

5 Ibid, 1124; Cited with approval in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (1914) A.C. 461, 471 (per Lord Haldane); (1914-15) All E.R. Rep. 752.

Proprietary interest of an employee is more narrowly defined than that of the buyer of business. That is because Courts in restraint of trade cases attach importance to the bargaining power[6] or the disparity in it in the case of employees who require greater protection than in the case of sale of business. The employer pays for the service of employee but the purchaser of business pays *inter alia* for freedom from competition. In the case of an employee "it is not enough that business will suffer from competition. It must be shown that the employee has come into contact with the customer or has trade secrets of the employer.[7]

Text of reasonableness.—A covenant in restraint of trade must be reasonable in reference to the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed and at the same time it is in no way injurious to the public.[8]

The term "detriment to the public" does not mean only the consuming public but also those engaged in production and distribution.[9] Such protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it.[10] The covenant must also be reasonably necessary for the protection of the interests of the covenantee and regard must be had to the interests of the covenantor. The interests of the covenantor equates with that of the public.[11] Even then it is possible that restrictions though reasonable according to the tests usually employed may fail because they deprive the public of extra services which are needed by them. For instance in case of the sale of chemists shop this may happen as the locality may be short of such shops: Similarly in case of an employee who has special skill which is in great public demand.[12]

The onus is on the covenantees to show that the restriction is reasonably necessary for the protection of their business.[13] In such cases the nature of the business and the nature of the employment are relevant factors. Lord Parker in *Herbert Morris Ltd.* v. *Saxelby*[14] emphasised that for the restraint to be justifiable the servant must be one who has acquired not merely knowledge of customers but in addition influence over them.

Restraints against the invasion of trade connection have been upheld in the case of a solicitor's clerk,[15] a tailor's cutter-fitter,[16] a milk roundsman,[17] a stockbroker's clerk,[18] and the manager of a brewery.[19] On the other hand, they have been disallowed in the case of a grocer's assistant[20] and in cases where the business is one in which customers do not normally

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6 *A Schroeder Music & Publishing Co. Ltd.* v. *Macaulay* (1974) 1 W.L.R. 1308, 1315; (1974) 3 All. E.R. 616 (H.L.).

7 Outlines of Law of Contract by Treital pp. 171-172 (2nd Ed).

8 *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co. Ltd.* (1967) 2 S.C.R. 367; (1967) A.S.C. 1098; *Lalbhai* v. *Chittaranjan Pandya* (1966) A. Guj. 189; *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (1894) A.C. 535 565 per Lord McNaghten; *Mason* v. *Provident Clothing & Supply Co.* (1913) A.C. 724; (1911-13) All E.R. 400 (Case of a canvasser); *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 707, 716; (1916-17) All E.R. Rep. 305; Halsbury's *Laws of England,* Vol. 38, page 23 (3rd Edn.).

9 *Att. Gen. of Australia* v. *Adelaide Steamship Co.* (1913) A.C. 781; (1911-13) All E.R. Rep. 1120, 1126.

10 *Underwood & Son Ltd.* v. *Barker* (1899) 1 Ch. 300, 305, per Lindley M.R.

11 Halsbury's *Laws of England* (3rd Ed.) Vol. 38, page 24; Per Lord Shaw in *Herbert Morris* v. *Saxelby* (1916) 1 A.C. 688, 716; (1916-17) All E.R. Rep. 305.

12 Treital: Outlines of Law of Contract (2nd Ed.) 175.

13 *Relly-a-Bell Burglar & Fire Alarm Co.* v. *Eisler* (1926) Ch. 609 (per Lindley M.R.); *A.G. of Australia* v. *Adelaide Steamship Co. Ltd.* (1913) A.C. 781; (1911-13) All E.R. 1120; cited with app. in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (1914) A.C. 461, 471 (per Lord Haldane); (1914-15) All E.R. Rep. 752; *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1913) A.C. 724; (1911-13) All E.R. Rep. 400; *Niranjan Shankar Golikari* v. *Century Spg. & Wvg. Co.* (1967) 2 S.C.R. 367; (1967) A.SC. 1098.

14 (1916) 1 A.C. 688; (1916-17) All E.R. Rep. 305.

15 *Fitch* v. *Dewes* (1921) 2 A.C. 158; (1921) All E.R. Rep. 13.

16 *Nicoll* v. *Beere* (1885) 53 L.T. 659.

17 *Cornwall* v. *Hawkins* (1872) 41 L.J. (Ch.) 435; *Home Counties Dairies* v. *Skilton* (1970) 1 All E.R. 1227.

18 *Lyddon* v. *Thomas* (1901) 17 T.L.R. 450.

19 *White, Tomkins and Courage* v. *Wilson* (1907) 23 T.L.R. 469.

20 *Pearks Ltd.* v. *Cullen* (1912) 28 T.L.R. 371.

recur, as, for instance, that of a house agent.[21] But the law will not tolerate a restraint "in gross", i.e. the covenantor will not trade at all.[22] The question whether a particular covenant in an agreement of service is unreasonably wide depends upon the nature of the agreement, the service to be rendered, place of employment and availability of service of the same nature.[23]

During the operation of a Solus agreement by which L tied himself to sell petrol only from Shell, Shell introduced a support scheme which operated to the detriment of L and in favour of neighbouring garages working under Shell's agreement. L, under the contract, gave notice of termination of agreement and Shell brought an action for injunction against L restraining him from breach of the agreement. L counter claimed that the agreement was in restraint of trade and alternatively a term should be implied therein that Shell could not discriminate against L in working the support scheme.

The Court of Appeal held that no term could be implied and also that the operation of the agreement was unreasonable restraint of trade as the support scheme unfairly and unreasonably operated against L, and further it was not in the contemplation of the parties when the agreement was entered into.[24]

Restraint of Trade.—An agreement was entered into between Amoco, a petrol refiner and distributor, and Rocca a Service Station proprietor whereby Rocca was to build a service station on a vacant piece of land at its own expense but the necessary plant and equipment for the station was to be supplied by Amoco. When built Rocca was to grant lease of the premises to Amoco for 15 years at a rent of £1 a year and a commission of 3 d. per gallon on all petrol supplied to the service station by Amoco; and Amoco was to grant a sublease to Rocca at £1 a year for a period of 15 years less a day. The lease and the sublease were to be attached to the agreement. Cl. 18 and Cl. 19 of the lease and under lease provided that Rocca will not cease business during the period therein mentioned without the consent in writing of Amoco and Rocca was not to purchase and sell petrol of any other company and there was also a condition of minimum quantity to be purchased by Rocca from Amoco. Rocca later tried to remove the plant and equipment of Amoco and replace them with equipment of another company and Amoco brought an action against Rocca, and the issue agreed to be tried was whether the agreement was an unreasonable restraint of trade making the underlease void and so was the lease.

The Privy Council on appeal from Australia held that the agreement was an unreasonable restraint of trade which made both the underlease and the lease void the whole transaction being one.[25]

Reasonableness—Parties and Public Explained.—A legal charge on property of the defendant to whom a sum of money was advanced payable in a certain number of years in half yearly instalments coupled with a solus tie was not void as being in restraint of trade because (a) the restraints were reasonable in reference to the parties since it conformed to the test laid down by authorities, the test being that such restraints were no more than what was necessary for the protection of the rights of the covenantee and the restraints were part of a commercial contract between parties with equality in bargaining and the contract would not interfere with the parties interest (b) The restraints were reasonable in reference to the interests of the public since such interest referred to the interest of the public as recognised and recognisable by law and it did not refer to the interest of the public at large. So the question such 'reasonable' raised was not whether the abolition of the restraints would not lead to a different organisation of industry or society and these on a balance of different circumstances to the economic or social advantage of the country; but whether the restraint was in industry or society as at present organised and with reference to which the law operated, reasonable, in the interest of the public as recognised in principle of law.

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21 *Bowler* v. *Lovegrove* (1921) 1 Ch. 642.

22 *Townseed* v. *James* (1900) 2 Ch. 698, 703 (per Farwell J.).

23 *Sunilchand* v. *Aryodaya Spinning & Weaving Mills* (1964) A. Guj. 115; *Deshpande* v. *Arvind Mills Co.* (1948) A.B. 423 folld.; Cf. *Marco Production Ltd.* v. *Pagola* (1945) 1 All E.R. 155 ("or any time prior" held too wide).

24 *Shell U.K. Ltd.* v. *Lostock Garage Ltd* (1977) 1 All E.R. 481, 488, 490, 492 (C.A.)

25 *Amoco Australia Pty. Ltd.* v. *Rocca Bros Engineering Motor Pty. Co. Ltd.* (1975) 1 All E.R. 968, 977. 978, 979 (P.C.); *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stowrport) Ltd.* (1967) 2 All E.R. 699, 708; (1968) A.C. 169 explained.

Thus considered the restrictions were reasonable in reference to the interest of the public expressed in the proposition that public had in men being able to trade freely subject *(inter alia)* to reasonable *limitations which conformed to contemporary trade.*[26]

An agreement between the employer, a Motor Garage owner and the employee, a skilled mechanic, enjoining on the latter not to take employment with another Garage for a period of 12 months after termination of service was held unenforceable in Australia.[27] This was because of the notorious shortage of labour and economic situation and because of the shortage of houses,[28] and because it was not limited to the area where the workman was employed (p.641).

Time of Application.—The validity of the covenant has to be determined at the date it was entered into. The employee acquiring considerable skill and knowledge of the customers of the employer is irrelevant,[29] but unenforceable restriction may temporarily become enforceable where it becomes unfair in changed circumstances.[30]

Agreements between Master and Servant.—Agreements, which attempt to regulate labour and impose restrictions on re-employment of former employees under the guise of master-servant covenants, will be struck down as being master-servant covenants in disguise.[31]

The "retain and transfer" system operates as unreasonable and unjustifiable restraint upon a professional football player and is therefore invalid.[32] Thus in *Eastham* v. *Newcastle United Football Club, Ltd.*[33]

By the rules of the Football Association, the defendant club operated a 'retain and transfer' system. A football player employed by the club could be retained after the determination of his contract of employment and so be debarred from playing for any other club, although there was no obligation to re-employ him. He could also be placed on a transfer list, and then he could not obtain employment with any other club in the Football League which was not willing to pay a stipulated transfer fee, only a trivial part of which went to the player himself. The plaintiff, a professional football player employed at the club, claimed that these conditions were not binding on him as being in unreasonable restraint of trade, and were invalid.

Wilberforce J. upheld this contention and held that the combined effect of retention and transfer system was in restraint of trade because

(i) the arrangement did not amount merely to giving the employer options to extend contracts from year to year;[34]

(ii) the retention system interfered with players' obtaining other employment when they no longer remained employees of the retaining club;

(iii) the legitimate interests of the Association could not justify the retention or the transfer system.[35]

An agreement of an unqualified employee with an Estate Agent who had many recurring clients, that the employee would not practise within 5 miles of the Knightsbridge and Dartmouth offices of the employer is not unreasonable restraint of trade in regard to the office where the employee was working but would be unreasonable in regard to the office where the employee did not work. Such an agreement is severable to be reasonable and operative in regard to the former office and not the latter.[36]

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26 *Texaco Ltd.* v. *Mulberry Filling Station Ltd* (1972) 1 All E.R. 513, 524, 528 Lord Wilberforce's speech in *Pharmaceutical Society of Great Britain* v. *Dicksons* (1968) 2 All E.R. at 702; *Esso Petroleum Co. Ltd.* v. *Harpers Garage (Stockport) Ltd* (1967) 1 All E.R. 699 refd. to.

27 *Linder* v. *Murdocks Garage* (1950) 83 C.L.R. 628.

28 Ibid. p. 641

29 *Gledhow Autoparts Ltd.* v. *Delaney* (1965) 3 All E.R. 288

30 *Shell (U.K.) Ltd.* v. *Lostock Garage Ltd.* (1976) 1 W.L.R. 1157.

31 See *Eastham* v. *Newcastle United Football Club Ltd.* (1963) 2 W.L.R. 574; (1963) 3 All E.R. 139; Anson: Law of Contract (22nd Edn.) page 334. (24th Ed) p 388.

32 *Eastham* v. *Newcastle United Football Club Ltd.* (1963) 3 All E.R. 139; (1963) 3 W.L.R. 574.

33 Ibid; *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (1887) 36 Ch.D. 465; *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.* (1959) Ch. 108; Anson: *Law of Contract,* 22nd Edn., p. 334.

34 *Warner Bros. Picture Inc.* v. *Nelson* (1936) 3 All E.R. 160; (1937) 1 K.B. 209 dist.

35 *Eastham* v. *Newcastle United Football Club Ltd.* (1963) 3 All E.R. 139; (1963) 3 W.L.R. 574; 1964 Ch. 535.

36 *Scorer* v. *Seymour-Johns* (1966) 3 All E.R. 347.

And it is proper to take into account that the employee is unqualified and thus uncontrolled by professional rules.[37]

An agreement between an employer—a firm of credit drapers—and a collector salesman providing that for five years after determination of the agreement, "the servant shall not... sell or solicit orders... by way of the business of a credit draper for any person inscribed on the books of the employer during the three years immediately preceding such determination upon whom the servant has called in the course of his duties for the firm"

is unreasonably restrictive.[38]

In the case of a manager of a bookmaker's business the covenant was not to carry on business within 12 miles and for 3 years; the manager had the book containing the names and addresses of customers.

But this agreement was held unenforceable as the nature of business was not such that the customers would seek out the defendant or he had acquired any personal goodwill, confidential information or knowledge to endanger plaintiff's business and the agreement was against legitimate competition.[39]

A negative covenant in a contract of service of an Assistant Engineer not to leave the service of his employer during the term of the contract and not to serve or engage for any other firm in India or elsewhere was held not to be a contract in restraint of trade but no injunction was given against the Engineer not to serve elsewhere as in the case of a fresh graduate it would amount to specific performance for if he was not to serve elsewhere he would have to starve.[40]

An agreement between two neighbouring firms carrying on the same business not to employ servants in their respective employment was held to be void as being unreasonable and excessive and the restraints imposed were excessive and unreasonable in the interest of the parties because (1) it applied to all employees without distinction between those possessed of trade secrets or confidential information; and (2) the real reason of the agreement was the proximity of the two firms and there was no provision for limiting the duration of the period while the proximity continued.[41]

There may be no specific undertaking not to compete and yet the effect may be that. As in the case of a promise to pay a pension on retirement which was to cease on, the employee competing with the employer.[42] Similarly where the employment is a long term one with the employer having the option to renew from time to time (and) such provisions are used to stifle competition.[43]

Competition per se.—An employer is not entitled to protect himself against competition *per se* on the part of an employee after the employment has ceased.[44] There is no case in the English Law Reports—certainly none was cited at the Bar—in which a bare covenant not to compete had been upheld.[45] But a purchaser of a business is entitled to protect himself against competition *per se* on the part of the vendor.[46]

After and during continuance of employment.—Considerations against restrictive covenants are different in cases where the restriction is to apply during the period after termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively, are generally not regarded as restraint of

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37 Ibid, 349.
38 *M. & S Drapers* v. *Reynalds* (1957) 1 W.L.R. 9.
39 *S.W. Strange Ltd.* v. *Mann* (1965) 1 W.L.R. 629.
40 *Lalbhai Dalpatbhai* v. *Pandya* (1965) 2 Lab. L.J. 284; (1966) A. Guj. 189.
41 *Kores Manufacturng Co.* v. *Kolak Manufacturing Co.* (1959) Ch. 109; (1959) 2 All E.R. 65.
42 *Wyatt* v. *Kreglinger* (1933) 1 K.B. 793.
43 *A Schroeder Music Publishing Co. Ltd.* v. *Macaulay* (1974) 1 W.L. R. 1308; (1974) 3 All E.R. (616).
44 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, applied in *Kores Manufacturing Co. Ltd.* v. *Kolak Manufacturing Co.* (1959) Ch. 108; (1958) 2 All E.R. 65; *Attwood* v. *Lamont* (1920) 3 K.B. 571; Halsbury's *Laws of England* (3rd Edn.), page 25, Vol. 38.
45 *McEllistrim* v. *Ballymacelligolt Co-operative Agriculture & Dairy Society Ltd.* (1919) A.C. 548, 562-3; *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181, 191; (1934) All E.R. Rep. 38, 41 (P.C.); *Stewart* v. *Stewart* (1899) 1 F. (Ct. of Sess.) 1158 not appd.
46 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 709; (1916-17) All E.R. Rep. 305; Halsbury's *Laws of England* (3rd Edn.), Vol. 38, page 26; *Attwood* v. *Lamont* (1920) 3 K.B. 571 (C.A.), 589; (1920) All E.R. Rep. 55; *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181, 190; (1934) All E.R. Rep. 38, 41 (P.C.).

trade and do not fall under section 27 of the Contract Act. A negative covenant, that the covenantor would not engage himself in a trade or business or would not get employment under any other master for whom he would perform similar or substantially similar duties, is not a restraint of trade unless the contract is unconscionable or excessively harsh or unreasonable or one-sided as in the case of *W.H. Milsted & Son Ltd.* v. *Hamp. & Ross & Glendining*.[47]

But a restraint which may reasonably be necessary for the protection of the employer may be oppressive and fatal to the chance of an employee earning his living in the country. This will be unenforceable because national economy will be deprived of the services of an experienced man.[48] In *Wyatt* v. *Kreglinger Fermus*[49] the covenant was that the employee would get a pension on the condition that after retirement he was not to be engaged in wool trade. On breach of the covenant the pension ceased. The employee's claim for arrears of pension was rejected and the covenant was held to be an unreasonable restraint of trade. And also the condition was held void.

Master's proprietary interest—Contract of employment.—The only matters in respect of which a master is said to possess an interest—proprietary interest—are his trade secrets, if any, and a business connection.[50] It is submitted that the decisions prior to *Mason's case* in 1913 which revolutionised the law by adding *Macnaghten's* test have to be viewed with suspicion.[51]

In *Gopal Paper Mills* v. *S.K.G. Malhoutra*,[52] the plaintiff who carried on business of manufacture of paper agreed to appoint the defendant as an apprentice. He was to serve the plaintiff for 20 years out of which apprenticeship was for 3 years and during the 20 years he was not to give advice or services to any other person or company or to divulge to any person any information which he might receive or obain with regard to affairs of the plaintiff. His starting salary was Rs. 75 p.m. rising in 20 years' time to Rs. 300 p.m. No trade secret or confidential information was imparted to the defendant.

This was held not to be within the protection of trade secrets or connections.

In a Gujarat case, the defendant, a qualified technician and diploma-holder, in textile technology agreed to serve the plaintiff spinning mills for 5 years. After serving for about a year as a Senior Assistant he resigned and accepted an employment in another spinning company on a salary higher than he was getting. He was employed by the plaintiff because of his specialised training and there was considerable dearth of such trained technicians.

This agreement was held valid and an injunction to prevent breach of negative covenant was granted.[53] But in another somewhat similar case, the same court did not grant an injunction.[54] The reason for upholding restraint against an employee is to protect the proprietary rights of the employer if it is reasonably necessary in the case of trade connections or trade secrets but it is not available if directed to prevent competition or against the use of personal skill and knowledge acquired by the employee in his employer's business.[55]

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47 1927 W.N. 233; *Niranjan Shankar Golikari* v. *The Century Spinning & Manufacturing Co. Ltd.* (1967) 2 S.C.R. 367; (1967) A.S.C. 1098; The decision in *Gopal Paper Mills* v. *Malhotra*, 1962 A. Cal. 61 dist.; *Lalbhai* v. *Chittaranjan Pandya* (1966) A. Guj. 189; *Gaumont British Pictures Corporation* v. *Alexander* (1936) 2 All E.R. 1686 (agreement not to serve another during term of contract not restraint of trade); Halsbury's *Laws of England* (3rd Edn.) Vol. 38, p. 32; *William Robinson & Co. Ltd.* v. *Hever* (1898) 2 Ch. 451; *Rely-a-bell Burglar & Fire Alarm Co.* v. *Eisler* (1926) Ch. 609; *Ehrman* v. *Brotholomew* (1898) 1 Ch. 67; *Warner Bros.* v. *Nelson* (1937) 1 K.B. 209; *Deshpande* v. *Arvind Mills Ltd.*, 48 Bom. L.R. 90; *Lalbhai Dalpatbhai & Co.* v. *C.C. Pandya* (1965) 2 Lab. L.J. 284; (1965) A. Guj. 189.

48 Chitty: On Contracts (24th Ed.) Para 975.

49 (1933) 1 K.B. 793 appld. in *Bull* v. *Pitney-Bowes Ltd.* (1967) 1 W.L.R. 273; (1966) 3 All E.R. 384; see also *Howard F. Hudson Pty. Ltd.* v. *Ranayne* (1971) 46 A.L.J.R. 173.

50 See *Eastham* v. *Newcastle United Football Club* (1963) 3 All E.R. 139 (a case relating to Football Association and the Football League); *Mason* v. *Provident Clothing & Supply Co.* (1913) A.C. 724; (1911-13) All E.R. Rep. 400.

51 See Dewes v. *Fitch* (1920) 2 Ch. 159, p. 185. Decision affd. on app. *Fitch* v. *Dewes* (1921) 2 A.C. 158; (1921) All E.R. Rep. 13 but this point not mentioned.

52 (1962) A. Cal. 61.

53 *Sunilchand Mazumdar* v. *Aryodaya Spinning & Weaving Mills Co. Ltd.* (1964) A. Guj. 115.

54 *Magan Lal* v. *Ambica Mills Ltd.* (1964) A. Guj. 215.

55 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688; (1916-17) All E.R. Rep. 305.

In an agreement the restrictive clause provided that the employee will not within 3 years of the termination of his service be in the employ of or be engaged in on his own or partner with or an agent or manager or assistant for any person or firm or company carrying on the same or similar business. The agreement was terminable by two weeks notice on either side. The House of Lords held that the restriction was unenforceable Lord Haldane L.J. said:

that the capacity of the servant must obviously be due mainly to natural gifts as a canvasser and only in a secondary degree to special training by the employers. That did not entitle them to exclude the employee from exercising his talent within the time and area specified in the agreement. The clause was therefore wider than anything that could reasonably be required to protect the employer's business.[56]

During the course of his employment, the employee may have acquired extra skill and knowledge. They are his own and their exercise cannot lawfully be restrained by the employer.[57]

So also where a film actor had made a reputation under a pseudonym, it was held that a term of his employment restraining him from using that name after the termination of his employment was invalid as partial restraint of trade.[58]

An agreement[59] between an insurance company and one of its employees provided that the employee after ceasing to be an employee of the company will not solicit business from the company's clients, a term narrowly defines and the period of prohibition was 5 years. It was held that the clause prohibiting soliciting the customers of the company was not unreasonable but the term of five years was unreasonable restraint making the agreement void.

Public policy.—In two cases it was suggested that, even if the section did not apply to cases of partial restraint, they might come under ss. 23, 24 of the Act. In *Haribhai* v. *Sharafali*[60] Candy J. said:

"I would not extend the meaning of s. 27 beyond what the words primarily mean. There may be contracts which do not come within the terms of that section and its exceptions, and yet may be contracts 'in partial restraint of trade', and as such contrary to public policy and so void (ss. 23, 24 Contract Act). That is the common law doctrine by which restraints of trade, even though partial, are presumed to be bad,[61] the presumption being rebuttable. It is for the Court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided."

And in *Nur Ali Dubash* v. *Abdul Ali*[62] the Court said:

"It is not necessary to consider the effect of s. 24 of the Contract Act upon the case, whether, even had the stipulation in partial restraint of trade not been illegal, the defendant's agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash. Probably that would be the proper construction of the contract."

In a Madras case[63] an agreement whereby certain Hindu workers in lead bound themselves not to carry on their business with the assistance of any persons not belonging to their caste was held to be void. The decision was put on the ground that it would be against public policy to give effect to the agreement, as it might cause very serious restraint upon trade operations. There was no reference either in the judgment or argument of counsel to the present section. If there had been, the question might have been considered whether the words

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56 *Mason* v. *Provident Clothing Co.* 1911 A.C. 724; (1911-13) All E.R. Rep. 400, 403.
57 *Leng & Co* v. *Andrews* (1909) 1 Ch. 763, 773; *Mason* v. *Provident Clothing Co.* (1913) A.C. 724; (1911-13) All E.R. Rep. 400, 403.
58 *Hepworth Manufacturing Co.* v. *Ryott* (1920) 1 Ch. 1 Cf *Fisher* v. *Star Co.* (1921) N.Y. 414; 257 U.S. 654.
59 *Stenhouse Australia Ltd.* v. *Philips* (1974) 1 All E.R. 117, 123, 124 (P.C.)
60 (1897) 22 Bom. 861, 873.
61 This mode of stating the law is erroneous. See per Lindley L.J. in *Mills* v. *Dunham* (1891) 1 Ch. 576, 587, a case which apparently was not before the learned Judge: "You are to construe the contract, and then see whether it is legal."
62 (1892) 19 Cal. 765, at p. 774.
63 *Vaithelinga* v. *Saminada* (1878) 2 Mad. 44.

"any one" are limited to a party to the agreement, though in this case the parties already purported to restrain themselves to the extent of not employing persons not belonging to their caste, however difficult it might be to carry on the business otherwise. It has been observed that an agreement which confers an exclusive right on a priest to perform the religious ceremonies of a village would be void, but an agreement which restricts the right to a certain caste would be valid.[64]

These suggestions, however, do not seem sound. The present section is very strong; it invalidates many agreements which are allowed by the Common Law; and it does not seem open to the Courts to hold that any agreement *in pari materia,* not coming within the terms of the section, is void on some unspecified grounds of public policy. "So far as restraint of trade is an infringement of public policy, its limits are defined by section 27".[65]

Restraint of trade and public policy.—The rule stated in *Rex* v. *Benchers of Lincolns Inn*[66] that if the Benchers who made their own rules act capriciously upon the subject, the court will not interfere as there has been no violation of any right, was not accepted by Denning M.R.; as being opposed to Common Law of England.[67]

In *ESSO Petroleum,*[68] *case* Lord Reid said that the doctrine of restraint of trade is based on public policy and therefore its application ought to depend less on legal niceties or theoretical possibilities and Lord Wilberforce observed that by saying that justification under a public policy test of reasonableness does not apply to contracts which under contemporary conditions may have become accepted and normal currency of commercial or contractual relations.

Confidence to be protected.—An employee owes a duty of fidelity to his employer. He must not disclose to others or use to his own profit trade secrets or confidential information which he learns during the course of employment. Equity awards injunction against such erring servants[69] and common law awards damages.[70] The most common explanation of this duty has been that of implied term in the contract of employment.[71] But this has ceased to be the view and now it is said to be based merely on confidence.[72] The principle of 'breach of confidence' was used in *Saltman Engineering Co.* v. *Campbell Engineering Co.*[73] which was not a case of contract, but a duty not to use information of a process was extended to a person receiving information in circumstances showing confidence, e.g. by one trader to another and the latter making use of it by way of competition with the former.[73]

In *Cranleigh's case*[74] an injunction was given against a servant who as a servant acquired confidential information and sought to take advantage of it after leaving the service of the master. This would be so even where the servant's conduct is not dishonest but inconsistent with his duty towards the master who would be entitled to dismiss the servant summarily.[75] The

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64 *Revashankar* v. *Velji Jagjivan,* 1951 A. Kutch 56.
65 Per Jenkins C.J. in *Fraser & Co.* v. *The Bombay Ice Manufacturing Co.* (1905) 29 Bom. 107, at p. 120.
66 (1825) 4 B. & C. 855.
67 *Nagle* v. *Feilden* (1966) 2 W.L.R. 1027, 1033; *Tailors of Ipswich* (1614) 11 Co. Rep. 53a & *Weinberger* v. *Inglis* (1919) A.C. 606 (A case of stock exchange where "shall think proper" held not to include capricious or arbitrary action) refd. to; But see *Rex* v. *Surgeons' Co. (Master)* (1759) 2 Burr. 892; (Surgeons held justified in rejecting apprentice not knowing Latin).
68 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1967) 1 All. E.R. 699, 707 (Lord Reid); 729 (Lord Wilberforce) (H.L.).
69 *Lamb* v. *Evans* (1893) 1 Ch. 218; *Amber Size & Chemical Co.* v. *Menzel* (1913) 2 Ch. 239 (Secret process); *Forster & Sons Ltd.* v. *Suggett* (1918) 35 T.L.R. 87 (Mixture of gas and air for glass making; knowledge gained, of); *Dewes* v. *Fitch* (1920) 2 Ch. 159, 181-2 (Customers being enticed away); on app. (1921) 2 A.C. 158; (1921) All E.R. Rep. 13 (Solicitor's managing clerk).
70 *Robb* v. *Green* (1895) 2 Q.B. 315; (1895-9) All E.R. Rep. 1053.
71 (1967) N.Z.L.J. 484; *Lamb* v. *Evans* (1893) 1 Ch. 218.
72 *Cranleigh Precision Engineering Co. Ltd.* v. *Bryant* (1964) 3 All E.R. 298; (1965) 1 W.L.R. 1293; *Saltman Engineering Co.* v. *Campbell Engineering Co.* (1963) 3 All E.R. 613 (n).
73 (1963) 3 All E.R. 413(n) quoted in *Peter Pan Corpn.* v. *Corsets* (1963) 3 All E.R. 402, 406; *Terrapin Ltd.* v. *Builders Supply (Hayes) Ltd.* (1960) R.P.C. 128, 131; refd. to.
74 *Cranleigh Precision Engineering Ltd.* v. *Bryant* (1965) 1 W.L.R. 1293, 1311; (1964) 3 All E.R. 289.
75 *Sinclair* v. *Neighbour* (1966) 3 All E.R. 988.

principle was extended to licencees of a patent, used for their own benefit further ideas communicated to them by the patentees for the purpose of manufacturing their machines[76] and to information given before negotiations, which proved abortive. The court awarded damages as compensation even though the user by the defendant was honestly done and the breach was innocent.[77]

The confidence can be enforced by injunction as well damages.[78] According to Lord Denning M.R. the duty to observe confidence is based on broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.[79] But when the information is mixed, partly private and partly public, then the recipient must take special care to use only the material which is in the public domain.[80] Can an injunction be given against an innocent third party to whom the information is passed on? It can be, so held by Cross J. in *Printers & Publishers Ltd.* v. *Holloway*.[81]

Post-service restraint.—A company having developed its own technique for quality testing and control and having built up its reputation possessed trade secrets. It employed one R who entered into an agreement with the firm containing a post service restraint of not taking up service with a firm in competition with the former firm nor start his own business at the place of his last posting for a period of two years. This condition became operative after "you leave service". R's services were terminated and he started his own business substantially on the same lines as his former buyers. The employers sued for injunction and damages. It was held that the terms of the contract applied only to R's voluntary giving up service, the word 'leave' may be of volition and therefore the suit failed.[82] A.P.Sen J. held the clause "obviously illegal."

Restraint of Trade.—The employers had employed the defendant in their mail order business which was fairly extensive and put him in planning of the catalogues which were of considerable importance in their trade. The defendant had entered into an agreement that he would not seek employment with a rival business within one year after leaving the employer's service. It was held that the defendant had got considerable amount of information of a confidential and secret nature. Therefore the employers were entitled to protection and the covenant was therefore valid but it would be confined to the business of the rival within the limited Kingdom. Injunction was therefore granted.[83]

Masters Trade Secrets and Confidential Information.—Injunction.—Court will give injunction against disclosure of master's trade secrets and confidential information but not the use of them since the word disclosure did not include user.[84]

The defendant, a works Engineer, in his contract agreed with the plaintiff not to divulge during his employment or thereafter the secret process of manufacturing glass and glass bottles in which he had been instructed by the plaintiff. He also agreed not to carry on in the United Kingdom after his employment ended, that trade for five years. That contract was enforced at the instance of the employers-plaintiffs—as the restraint was reasonable in the circumstances.[85]

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76 *National Broach & Machine Co.* v. *Churchill Gear Machines Ltd.* (1965) 2 All E.R. 961.
77 *Seager* v. *Copydex* (1967) 2 All E.R. 415.
78 *National Broach & Machine Co.* v. *Churchill Gear Machines Ltd.* (1965) 2 All E.R. 961; *Saltman Engineering Co.* v. *Campbell Engineering Co.* (1963) 3 All E.R. 413 (n).
79 *Seager* v. *Copydex* (1967) 2 All E.R. 415, 417.
80 Ibid.
81 (1964) 3 All E.R. 731, 739(n).
82 *Superintendence Co of India* v. *Krishan Murgai* (1981) A.SC. 1717, 1721; (1979) A.D. 232 appd. Words & Phrases Permanent Edition Vol. 24, P. 499 relying on *Muesling* v. *International Railway Co.* 147 N.Y.S. 177, 178; 85 Misc. 309; *Shankar Golikari* v. *Century Spg. Mfg. Co. Ltd.* (1967) 2 S.C.R. 318; (1967) A.SC. 1098 disting.
83 *Littlewood Organisation Ltd.* v. *Harris* (1978) 1 All E.R. 1026, 1035; *Moenich* v. *Fenestra* (1892) 6 T.L.T. at pp. 604-5; *Herbert Morris* v. *Saxelby* (1916-17) All E.R. Rep. 305; (1916) 1 A.C. 658; *G.W. Plowman Ltd.* v. *Ash* (1964) 2 All E.R. 10; and *Home Counties Dairies Ltd.* v. *Skilton* (1970) 2 All E.R. 1227 applied; *Commercial Plastics Ltd.* v. *Vincent* (1964) 1 All E.R. 546 disting.
84 *Thomas Marshall* v. *Guinle* (1978) 3 All E.R. 193, 208; *Printers & Finishers* v. *Holloway* (1965) 1 W.L.R. 1 explained.
85 *Forster & Sons Ltd.* v. *Suggett.* (1918) 35 T.L.R. 87 (C.A.).

Repudiation of Contract of service wrongfully—Trade Secrets.—A contract of service like other contracts cannot be wrongfully repudiated by one party— the other party not accepting—so it is not terminated. Therefore an employee's unilateral repudiation of contract of service remains in force including the restrictions placed on the employee not to disclose trade secrets or deal with the employers, suppliers and customers.[86]

The rule regarding confidence may be stated thus.

No one can divulge to the world information received in confidence without just cause or excuse; even if he comes by it innocently. But the complaining party must be entitled to have the confidence respected and to whom duty of good faith is owed.[87] But there is an exception, e.g. to the disclosure of iniquity.[88] Commenting on the word "iniquity" Denning M.R. has observed that this is not a principle but merely a just cause or excuse for breaking confidence. There may be cases of breach of confidence which are defamatory where the Courts may intervene even though justification is pleaded.[89]

Factors upon which reasonableness of restraint depends.—The restrain in order to prévent misuse of trade secrets or business connection has to be reasonable in the interest of the parties affording no more than adequate protection to the covenantee which will depend upon two factors of time and space. As the time of restriction lengthens or the space of its operation grows, the weight of the onus on the covenantee to justify it grows too.[90] But a restraint for life was held valid in *Fitch* v. *Dewes,*[91] a case of a Solicitor's clerk. An ex-servant confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his late master not to disclose any knowledge or information as to that secret process acquired during his employment.[92] This applies to information retained in servant's memory as well as to information committed to writing and existing in a tangible form.[93] An injunction will be granted where the court is satisfied as to the existence of a secret process, the servant has learnt during his service and of its misuse by the servant, even without the disclosure of the secret process to the court.[94] A restraint against competition is justifiable if its objects is to prevent the exploitation of trade secrets learned by the servant in the course of his employment. An instance of this occurred in *Forster & Sons Ltd.* v. *Suggett,*[95] where a Works Manager had knowledge of certain confidential methods concerning the correct mixture of gas and air in furnaces for making glass and glass bottles. An employer is also entitled to protect his trade connection, that is to prevent his customers from being enticed away from him by a servant formerly in his employment.[96] But if the so-called secret is nothing more than a special method of organisation adopted in the business or if only part of the secret is known to the servant so that its successful exploitation by him is impossible, there can be no valid restraint.[97]

A contract not to divulge a trade secret may be reasonable though unlimited as to space or time and a restraint imposed in order to give effect to such a contract would apparently be treated in the same way.[98] Apart from the protection of trade secrets or confidential informa-

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86 *Thomas Marshall (Exports) Ltd.* v. *Guinle* (1978) 3 All E.R. 193, 202, et seq; *Havans* v. *Pickford Tool Co. Ltd.* (1951) 1 K.B. at p. 421; *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* (1971) 2 All E.R. at p. 223; *Hill* v. *C.A. Parson & Co. Ltd.* (1971) 3 All E.R. 345, 353, 354 applied; *Vine* v. *National Docks & Labour Board* (1956) 3 All E.R., 944 *Sanders* v. *Ernest A. Nial Ltd.* (1974) 3 All E.R. 374 not folld.

87 *Fraser* v. *Evans* (1969) All E.R. 8, 11; *Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25; and *Duchess of Argyll* v. *Duke of Argyll* (1967) Ch. 302; (1965) 1 All E.R. 611 refd. to.

88 *Gartside* v. *Outram* (1856) 26 L.J. Ch. 113, 114; (Wood V.-C.); *Initial Services Ltd.* v. *Putterill* (1968) 1 Q.B. 396; (1967) 3 All E.R. 145.

89 *Fraser* v. *Evans* (1969) 1 All E.R. 8, 11; *Sim* v. *H.J. Heinz & Co. Ltd.* (1959) 1 All E.R. 547 dist.

90 *Attwood* v. *Lamont* (1920) 3 K.B. 571, at p. 589 per Younger, L.J.; *Fitch* v. *Dewes* (1921) 2 A.C. 158; See also Halsbury's *Laws of England,* Vol. 38, page 33 (3rd Edn.).

91 (1921) 2 A.C. 158.

92 *Amber Size & Chemical Co.* v. *Menzel* (1913) 2 Ch. 239.

93 Ibid.

94 Ibid.

95 (1918) 35 T.L.R. 87.

96 *Dewes* v. *Fitch* (1920) 2 Ch. 159, 181-2.

97 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688.

98 Halsbury's *Laws of England,* Vol. 38, p. 33 (3rd Edn.).

tion an employer is not entitled to restrain an employee from making use after the employment has ceased of any knowledge or skill gained during the period of employment.[99] But a covenant reasonably necessary to protect an employer against the betrayal of trade secrets or confidential information is not void merely because it unavoidably protects the employer against competition.[1]

Test of fairness.—The House of Lords[2] has drawn a distinction between the two circumstances (a) where the contracting parties enter into the contract in standard form and they are bargaining on equal terms and (b) which are not the subject of negotiations between the parties nor approved by any organisation representing the weaker party and which had been dictated by the party having superior bargaining power (a) type contracts raise strong presumption of their being fair and reasonable. But (b) type have to be examined by Courts as they raise no such presumption.

Partnerships.—The following is taken from Chitty.[3] Restrictive covenant operating between parties on dissolution of partnership are valid[4] if they impose restraints which are not wider than the circumstances reasonably required.[5] Such covenants are valid during the continuance of the partnership. Thus an agreement by one of the proprietors of a theatre not to write a play for another theatre is valid.[6] In the absence of an express covenant a partner on dissolution may carry on the same or similar business in his own name and not in the name of the old partnership and may deal with the customers of the former partnership but he may not persuade them to deal with himself and not the old firm[7] nor may represent his business as the business of the old firm.[8]

Foreign Contracts and Foreign Merchants.—In England it has been held that contracts in restraint of trade apply to English Merchants as to foreigners in England and if a contract is void against public policy it will not be enforced in an English Court though made in a country where it is unobjectionable.[9] It is submitted that the same rule applies in India.[10] Conversely English courts would not refuse to enforce contracts solely on account of the extra-territorial application of foreign laws which purport to illegalise them though those contracts do not necessitate any illegal acts within the foreign jurisdiction.[11]

Agreements not in restraint of trade.—This section aims at "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, not contracts by which in the exercise of his profession, trade or business, he enters into ordinary agreements with persons dealing with him which are really

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99 *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 710.

1 Halsbury's *Laws of England,* Vol. 38, p. 34 (3rd Edn.); *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688, 710; (1916-17) All E.R. Rep. 305; *Haynes* v. *Doman* (1899) 2 Ch. 13, 23; *Attwood* v. *Lamont* (1920) 3 K.B. 571, 597; 1920 All E.R. Rep. 58; *Forster & Sons* v. *Suggett* (1918) 35 T.L.R. 87; *Gopal Paper Mills* v. *Malhoutra* (1962) A. Cal. 61, 66.

2 *Schroeder (A) Music Publishing Co. Ltd.* v. *Macaulay* (1974) 3 All E.R. 616; *Clifford Davis Management Ltd.* v. *W.E.A. Records* (1975) 1 W.L.R. *(Bargaining power invoked in Esso Petroleum Co.* v. *Harpers Garage Ltd.* (1968) A.C. 269; *Cleveland Petroleum Co. Ltd.* v. *Darstone Ltd.* (1969) 1 W.L.R. 116. See also *Lloyds Bank Ltd.* v. *Bundy* (1975) Q.B. 326; *Esso Petroleum Co. Ltd.* v. *Harpers Garage (Stowport) Ltd.* (1967) 1 All E.R. 644, 723.

3 Chitty: On Contracts (24th Ed.) Para 985.

4 See *Leighton* v. *Wales* (1838) 3 M & W 545; 7 L.J. Ex. 145.

5 See *Whitehill* v. *Bradford* (1952) Ch. 236. (1952) 1 All E.R. 115. Also *Macforlane* v. *Kent* (1965) 1 W.L.R. 1019; (1965) 2 All E.R. 376; *Ronnar Enterprises* v. *Greeen* (1954) 1 W.L.R. 815; (1954) 2 All E.R. 266; *Lyne-Pirkis* v. *Jones* (1969) 1 W.L.R. 1293; (1969) 3 All E.R. 738; *Peyton* v. *Mindham* (1972) (1972) 1 W.L.R. 8; (1971) 3 All E.R. 1213.

6 *Morris* v. *Colman* (1812) 18 Ves. 437.

7 *Churton* v. *Douglas* (1859) Johns 174; 28 L.J. Ch. 841. *Macfarlane* v. *Kent ante* (1965) 1 W.L.R. 1019 (1965) 2 All E.R. 376.

8 *Trego* v. *Hunt* (1896) A.C.7; (1895-99) All E.R. Rep. 804, cf. *Curl Brothers* v. *Webster* (1904) 1 Ch. 685; *La Bouchere* v. *Dawson* (1872) 13 Eq. 322.

9 *Rousillon* v. *Rousillon* (1880) 14 Ch.D. 351, 369; Halsbury's *Laws of England,* Vol. 38, p. 22 (3rd Ed.). Chitty on *Contracts* (24th Ed.) para 961, fn. 13.

10 *Oakes & Co.* v. *Jackson* (1876) 1 Mad. 134, 141. See *infra (lex loci contractus).*

11 *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.* (1953) Ch. 19; (1952) 2 All E.R. 780 (Sherman Anti-Trust Laws); *Sharif* v. *Azad* (1967) 1 Q.B. 605, 617.

necessary for the carrying on of his business.[12] In one sense every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade, for if *A B* agrees to sell goods to *C D* he precludes himself from selling to anybody else. But a reasonable construction must be put upon the section, and not one which would render void the most common form of mercantile contracts.[13] Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade.[14] Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.[15] It is otherwise if the agreement, while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all the produce or any definite quantity. In such a case the agreement is bad as being in restraint of trade. Where twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with *R S* to supply him with combs and not to sell combs to any one else, with an option to *R S* not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta, or elsewhere, the agreement was held void.[16] And where *A* agreed to purchase certain goods from *B* at a certain rate for the Cuttack market, and the contract contained a stipulation that, if the goods were taken to Madras, a higher rate should be paid for them, it was held that the stipulation for the higher rate was not in restraint of trade.[17] All that the contract comes to in such a case is that the vendor is to sell the goods at one price if they are sent to Cuttack, but at another price if they are sent for sale to Madras. Where the owners of two neighbouring villages, which were let out for holding a cattle market on Tuesdays and Saturdays on payment of market fees, entered into an agreement, to prevent competition and consequent loss to them, that each should let out his village for holding the market on certain specified days, it was held that the agreement was not in restrain of "any profession, trade or business" within the meaning of this section, and it was not therefore void. The Court said: "It seems to us that a landlord who, in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising the trade or business of selling cattle".[18]

Area and period of restraint.—Even if the restraint is unlimited in time[19] or in space[20] it will be upheld if it is reasonable.[21]

World-wide restrictions have passed muster in courts but only where the restrictions to be reasonably effectual had to be world-wide. An agreement providing a total restriction on manufacture, sale, etc., of beer, ale, port or lager beer for a period of 15 years for a consideration of $15,000 which was not only not confined to Vancouver but anywhere in the world was condemned by Privy Council.[22]

A restraint may be invalidated by the excessive area of its sphere of intended operation, but everything will depend upon the circumstances and a restriction extending throughout the U.K. has been allowed.[23] In another case the Eastern Hemisphere was regarded as a

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12 Per Handley J. in *Mackenzie* v. *Striramiah* (1890) 13 Mad. 472, 475.
13 13 Mad. 472, at p. 474.
14 *Carlisles, Nephews & Co.* v. *Ricknauth Bucktearmull* (1882) 8 Cal. 809.
15 *Mackenzie* v. *Striramiah* (1890) 13 Mad. 472; affirmed in appeal *sub nom. Sadagopa Ramanjiah* v. *Mackenzie* (1891) 15 Mad. 79.
16 *Shaikh Kalu* v. *Ram Saran Bhagat* (1909) 13 C.W.N. 388. It was also said that the agreement was void as creating a monopoly. *Qu.* was there any agreement at all until R.S. actually accepted some goods? *R.* v. *Demers* (1900) A.C. 103, cited under s. 5, "standing offers", above.
17 *Prem Sook* v. *Dhurum Chand* (1890) 17 Cal. 320.
18 *Pothi Ram* v. *Islam Fatima* (1915) 37 All. 212; 27 I.C. 871.
19 *Hitchcock* v. *Coker* (1837) 6 A. & E. 438; *Haynes* v. *Doman* (1899) 2 Ch. 13; *Fitche* v. *Dewes* (1821) 2 A.C. 158; Chitty on *Contract*, para 968 (24th Ed.).
20 *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (1894) A.C. 535; *Lamson Pneumatic Tube Co.* v. *Philips* (1904) 91 L.T. 363; *Caribonum Co. Ltd.* v. *Le Couch* (1913) 109 L.T. 385.
21 *Peters American Delicacy Co.* v. *Patricia Chocolates* (1947) 77 C.L.R. 574.
22 *Vancouver Malt & Sake Brewing Co.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181, 191; (1934) All E.R. Rep. 38, 42. (A case not of restrictive covenants in aid of a sale but of a sale in aid of restrictive covenants.)
23 *Underwood & Sons Ltd.* v. *Barker* (1890) 1 Ch. 300; *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181; (1934) All E.R. Rep. 38.

reasonable area.[24] The absence of such a limit will be an important factor in determining whether it is in fact reasonable.

In *Goldsoll* v. *Goldman*[25] the defendant had agreed not to compete in any part of the U.K. and in some foreign countries. The agreement was held to be reasonable as to the U.K. but not in relation to the others. The agreement was therefore severed.

One learned author has pointed out that English Courts would not refuse to enforce an English contract simply on the ground of extra-territorial application of a foreign law purporting to illegalise such contracts, e.g. Sherman Act, 1890 (U.S.A.).[26]

It is not necessary for the covenantee to prove that the business for which the restraint was imposed has in fact been carried on in every part of the area specified in the contract.[27]

A covenant in a sale agreement of a business providing that the vendor will not for a period of 20 years be concerned with any business conflicting with the business sold within the Dominion of New Zealand was upheld.[28]

An agreement between two icecream manufacturers and a milk bar whereby the latter agreed for 5 years to exclusively sell the manufactures of the former was upheld.[29]

On a dissolution of partnership, it was agreed between the two sets of partners that one would not carry on the business of a Produce merchant for a period of 5 years and the other would not carry on business of Transhipping Agent. The agreement was held not binding or enforceable as there was no limitation of a particular area and it could not be implied in the contract.[30]

Restrictive covenants which operate on dissolution of partnerships are valid upon similar principles if they impose no wider restraint than the circumstances reasonably require.[31] On dissolution unless restricted by covenant an ex-partner may carry on a similar and competing business in his own name and deal with customers of his former firm. But he cannot directly or indirectly canvass them or persuade them to deal with himself and not with the old firm. But he cannot carry on the business in the name of the old firm or represent the business as that of the old firm.[32]

An agreement of partnership between two medical practitioners provided that if any partner retired or was expelled he should not "for a period of five years immediately following such a retirement or expulsion engage in practice as a medical practitioner either alone or jointly with any other person within a radius of 10 miles of the Market House in Godalming". The practice was wholly confined to patients resident within a radius of five miles. The clause was held unenforceable because in its terms it was perfectly general and included a restraint on practice as a consultant and thus it was wider than was reasonably necessary for the protection of the partnership practice which was a general one.[33]

Where in a deed of partnership carrying on insurance business it was provided that retiring partners will not carry on the business of insurance for a period of 3 years within 20 miles of the place of business it was held that the restraint was reasonable and therefore valid and enforceable.[34]

A clause is not void as being in unreasonable restraint of trade by reason of its continued application after the expiration of a patent as there was nothing to show that the clause was

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24 *Lamson Pneumatic Tube Co.* v. *Philips* (1904) 91 L.T. 363. (Pneumatic tube system for use in shops invented in Western Hemisphere and practically unknown in the Eastern Hemisphere).

25 (1915) 1 Ch. 292; (1914-15) All E.R. Rep. 257 (A case of imitation jewellery mainly); *Leather Cloth Co.* v. *Lorsont* (1869) 9 Eq. 345, 351 (Covenant good as to U.K., "need not concern ourselves with France & Germany").

26 Chitty: *On Contracts* (24th Ed.) para 924; *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries* (1953) Ch. 19; (1952) 2 All E.R. 780; *Sharif* v. *Azad* (1967) 1 Q.B. 605, 617; (1966) 3 W.L.R. 1285; (1966) 3 All E.R. 785.

27 *Connors Bros. Ltd.* v. *Connors* (1940) 4 All E.R. 179.

28 *Escott* v. *Thomas* (1934) N.Z.L.R. 1046 (Soaps & Soap powders business); *Bridges* v. *Carson* (1934) N.Z.L.R. 158 reld. on.

29 *Peters American Delicacy Co. Ltd.* v. *Patricias Chocolates & Candies Pty. Ltd.* (1947) 77 C.L.R. 574 (Dixon J. contra).

30 *Butt* v. *Long* (1953) 88 C.L.R. 476, 489; *Vancouver Malt & Sake Brewing Co.* v. *Vancouver Breweries Ltd.* (1934) A.C. at p. 191 reld on.

31 *Whitehill* v. *Bradford* (1952) Ch. 236.

32 *Labouchere* v. *Dawson* (1872) 13 Eq. 322; *Mcfarlene* v. *Kent* (1965) 1 W.L.R. 1019.

33 *Lyne-Pirkis* v. *Jones* (1969) 3 All E.R. 738 (C.A.); *Routh* v. *Jones* (1947) 1 All E.R. 758 folld.

34 *Geraghty* v. *Minter* (1979) 53 A.L.J.R. 638.

likely to limit the total supply of the patented material available for sale or to have substantial effect on the price.[35]

Limits on scope of restraint.—A covenant restraining/soliciting customers who were customers at the beginning of the employee's employment but had ceased to be customers before the determination of the employment but not those who became customers after the determination of the employment-is valid.

But the enforceability of a restrictive covenant does not extend to the business of the employer other than the one the employee was employed in. Thus a tailor's assistant giving a covenant not to carry on any business within certain space of time and space is invalid but not if it is confined to tailor's business. So also in the case of an employee of a company, a covenant to protect associated or subsidiary companies in which he does not serve—is an unreasonable restraint.[36]

Negative Covenants.—Ordinary negative covenants preventing the use of a particular site for trading of all kinds or of a particular kind are not within the scope of the doctrine of restraint of trade.[37] But the doctrine of restraint of trade applies in the case of covenants in mortgages of land also.[38]

In a case of solus agreements which was decided by the House of Lords the facts were these:

The ESSO Co. entered into two solus agreements with *H* who owned two garages *C* & *M* for the supply of motor fuel. With regard to *C* there was a mortgage in favour of ESSO repayable in 21 years and the agreements imposed upon *H* not to sell any motor fuel except of ESSO's. Agreement regarding *C* garage was for 21 years and regarding *M* was for 4½ years. The agreements also contained a retail price maintenance clause. ESSO later wrote to *H* deleting this clause. *H* started selling other petrol both at *C* and *M* garages. ESSO sued for injunction which was granted.[39]

In the case of *M* garage the agreement was held by the Court of Appeal to be for too long a period considering all the circumstances including "continuity" clause, "keep open" clause and "tie" clause and was an unreasonable restraint of trade and therefore unenforceable.

In the case of *C* garage where £7,000 had been advanced by ESSO and the period was 21 years for buying the garage and improving it, the amount being repayable after 21 years, the Court of Appeal held it to be in restraint of trade even in regard to the mortgage.[40]

On appeal to the House of Lords it was held that

(i) agreements could not be excluded from the ambit of the doctrine regarding agreements by way of restraint of trade by the fact the restriction imposed was by way of covenant in a mortgage of land;

(ii) solus agreements were within the category of agreements in restraint of trade (as distinct from agreements for promoting trade) and required to be justified on the ground of reasonableness; so also did the stipulations in the mortgage in respect of C garage, the loan and mortgage being linked with the solus agreeement as one transaction;

(iii) the crucial consideration in determining reasonableness was the length of the period for which each agreeement was to last;

(iv) in the circumstances the period of the solus agreement for the *M* garage (between four and five years) was reasonable); but the period of 21 years in relation to *C* garage was unreasonable and the mortgage could be redeemed.

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35 *Tool Metal Mfg. Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657.

36 Chitty on Contract (24th Ed.) Para 979.

37 Per Lord Reid in *Esso Petroleum* v. *Harpers Garage Ltd.* (1967) 1 All E.R. 699, 707 (H.L.); Explained in *Cleveland Petroleum Co. Ltd.* v. *Darstone Ltd.* (1969) 1 All E.R. 201, 202.

38 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1967) 1 All E.R. 699 (H.L.); (1966) 1 All E.R. 725; (1966) 2 Q.B. at p. 555 (C.A.) affd.

39 *ESSO Petroleum Ltd.* v. *Harpers Garage Ltd.* (1965) 2 All E.R. 933 (Reversed on appeal (1966) 1 All E.R. 725); (1967) 1 All E.R. 699 (H.L.); *Regent Oil Co. Ltd.* v. *Aldon Motors Ltd.* (1965) 2 All E.R. 644 (but injunction was discharged on appeal on ESSO case being allowed.) See (1966) 2 All E.R. 454.

40 *ESSO Petroleum Co.* v. *Harpers Garage* (1966) 1 All E.R. 725, 730-1; *Petrofina (Gt. Britain) Ltd.* v. *Martin* (1966) 1 All E.R. 126; (1966) 2 W.L.R. 318; *Foley* v. *Classique Coaches Ltd.* (1934) 2 K.B. 1; (1934) All E.R. Rep. 88 (a case of sale); *Horwood* v. *Millars Timber & Trading Co. Ltd.* (1917) 1 K.B. 305; (1916-17) All E.R. 847 (a case of mortgage): *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181; (1934) All E.R. Rep. 38 (a case of loan) refd. to; *Knightsbridge Estates Trusts Ltd.* v. *Byrne* (1939) Ch. 441, 457; (1938) 4 All E.R. 618, 626 (case of mortgages) dist.

And therefore injunction was granted *qua M* garage but refused *qua C* garage.[41] Normal covenants imposed on a sale or lease of land are not within the principle of this decision and their validity is not affected. If, however, a covenant imposed on land such an occasion were essentially personal trading covenants, the principle would apply.[42] In a later case the Court of Appeal explained the principle thus:[43]

If an owner in possession ties himself up for more than 5 years to take all his supplies from one oil company that is unreasonable restraint of trade but if a man out of possession is let into possession by the oil company on the terms that he is to tie himself to that company such a tie is good.

Cleveland case[44] *was* this:

S an owner of a garage leased the premises to the plaintiff for 25 years. The plaintiff granted an under-lease to another company with a covenant that the under-lessee will at all times carry on the business of petrol filling station and to sell and distribute motor fuel supplied by the plaintiff. After several assignments the defendants became under-lessees and undertook to observe and perform the covenants, and then challenged the validity of the ties. The plaintiffs obtained an interim injunction on the ground that it was not an unreasonable restraint of trade because the defendants not having been in possession previously, took possession under a lease and entered into a restrictive covenant knowing about such covenants and were bound.

In *Petrofina case*[45]:

An agreement by a filling station owner to sell only one brand of petrol, not to dispose of the premises without first offering them to the Oil Company, the agreement being for 12 years and thereafter to be determined by 3 months' notice with the additional condition of selling 600,000 gallons of motor fuel before termination was held void as in restraint of trade because it imposed on the owner a more onerous restraint than necessary for protecting the company's competitive position and the agreement interfered with the freedom of choice of the owner as to whether and how long he shall continue to trade at the filling station.

If the negative covenant is not opposed to public policy, it will be enforced by injunction. An injunction restricted as to time, the nature of employment and area cannot be said to be too wide or unreasonable or unnecessary for the protection of the interests of the covenantee.[46]

In *Niranjan Shankar Golikari* v. *The Century Spinning & Manufacturing Co. Ltd.*,[47]

the respondent company entered into collaboration with a German company who agreed for a consideration to transfer their technical know-how to it to be used exclusively for the company's tyre cord yarn plant at Kalyan. The agreement provided that the company would keep secret during the period of agreement and during three years after all technical information, knowledge, know-how, experience, data and documents passed by the German company to the respondent company. The covenantor was appointed as Shift Supervisor on the condition that he would have to sign a contract in the standard form for a term of 5 years which was accepted by the covenantor, the covenant being that the covenantor would devote wholly all his time and energy to the business and affairs of the respondent company and shall not engage directly or indirectly in any business or serve in any capacity in any business whatsoever other than that of the company.

Under another paragraph, it was provided that in the event of the covenantor leaving the service of the covenantee before the expiry of the period, he shall not engage himself in or carry on the business be-

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41 *ESSO Petroleum Co. Ltd.* v. *Harpers Garage* (1967) 1 All E.R. 699; (1968) A.C. 369; (1967) 2 W.L.R. 871; *Petrofina (Gt. Britain) Ltd.* v. *Martin* (1966) 1 All E.R. 699 dist.; *Knightsbridge Estates Trust Ltd.* v. *Byrne* (1938) 4 All E.R. 618, 626; (1939) Ch. 441, 457 dist.

42 *ESSO Petroleum Ltd.* v. *Harpers Garage* (1967) 1 All E.R. 699, 724 (Lord Pearce).

43 *Cleveland Petroleum Co. Ltd.* v. *Dartstone Ltd.* (1969) 1 All E.R. 201, 202; *ESSO Petroleum Co. Ltd.* v. *Harper Garage Ltd.* (1968) A.C. 269, 298, 309, 325; (1967) 1 All E.R. 699, 707, 714, 724-5; folld.

44 *Cleveland Petroleum* v. *Dartstone* (1969) 1 All E.R. 201; also *ESSO Petroleum Co. Ltd.* v. *Harper's Garage Ltd.* (1967) 1 All E.R. 699; (1968) A.C. 269 expd.

45 *Petrofina Ltd.* v. *Martin* (1965) 2 W.L.R. 1299, 1317; on app. (1966) 1 All E.R. 126; (1966) 2 W.L.R. 318.

46 *Niranjan Shankar Golikari* v. *The Century Spinning & Manufacturing Co. Ltd.* (1967) 2 S.C.R. 367; (1967) A.S.C. 1098; See Restraint during term of service, *supra;* Chitty: *On Contracts* (24th Ed.) para 982; *Karamchand Thapar & Bros.* v. *H.H. Jethanandani,* 76 Cal. W.N. 338 (11 years period); *Gopal Paper Mills* v. *Surendra K. Ganeshdas* (1962) A. Cal. 61 (period of 20 years) disting.

47 *Ibid.*

ing carried on by the company nor shall he serve in any capacity any person for the remainder of the period of service and, in addition, he was to pay liquidated damages amounting to the amount spent by the company on the covenantor's training. The covenantor, after receiving training, resigned and took a similar employment with another company.

The covenantor was sued for injunction by the covenantee and in the circumstances it was granted. The circumstances taken into consideration were that the covenant was restricted to the period of service, to work similar or substantially similar to the one carried on by the covenantor and it was necessary and reasonable for the protection of the employer's interest. Then there was nothing to show that the enforcement of the covenant would lead to the idleness or his being compelled to go back to the employer and it was not a valid consideration that in another employment the covenantor would get a lesser remuneration than the one paid by his new employers.[47]

Under the plaintiffs' scheme of training apprentice engineers the defendant was trained and employed by them according to the terms of the agreement for eleven years inclusive of 3-year training period. The agreement also provided for liquidated damages amounting to half the salary drawn during the period of training in case of breach of this period of agreement. It was held that the agreement was not in restraint of trade and the amount of damages prescribed therein was not a penalty but the limit of liquidated damages under section 74, the essence being a genuine pre-estimate of damages and the plaintiff will have to prove the damages suffered by him. The gain made by the defendant was the loss suffered by the plaintiff.[48]

Trade combinations.—An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the profits in certain proportions, is not avoided by this section, and cannot be impeached as opposed to public policy under s. 23.[49] The question whether an agreement whereby manufacturers agree with one another to carry on their works under special conditions, or traders agree amongst themselves to sell their wares at a fixed price, is in restraint of trade has frequently arisen in English Courts. Such agreements have in some instances been disallowed, and in others upheld, according as the restraints were or were not deemed to be in excess of what was reasonably sufficient to protect the interests of the parties concerned.[50] Agreements of this description do not appear to be common in India. In two decisions of the Bombay High Court, the question, though raised, was not decided.[51] In a later case however in the Allahabad High Court it was held that a combination among traders in a particular place to do business only among their members, paying part of their profits to a common fund and levying fines upon their members for breach of conditions laid down by the combination did not offend against s. 27 and was not actionable merely because it brought profit to the combination and indirectly damaged their trade rivals.

"It is perfectly clear that the defendants did not unlawfully or by illegal means procure any breaches of contract in favour of the plaintiffs. There was no conspiracy on the part of the defendants to compel the plaintiffs' vendors not to supply goods to the plaintiffs. A certain amount of pressure was brought to bear upon their constituents, the object of which was that if the latter wished to continue to be members of the association they had to obey the edicts of the association and to cease to deal with outsiders. The persons had a choice of action. They were not the victims of any coercion on the part of the defendants. Where a person has a choice of one or other of two courses with their attended advantages or disadvantages, coercion is not necessarily one of the elements involved in the transaction. There was no organized conspiracy on the part of the defendants to do harm to the plaintiffs. The association of the defendants was formed with the primary object of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs. The association therefore was not unlawful and there was no cause of action for a claim founded upon conspiracy. The plaintiffs are, therefore, not entitled to the relief claimed."[52]

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48 *Karamchand Thapar & Bros.* v. *H.H. Jethanandani* 76 Cal. W.N. 338; *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co. Ltd.* (1967) A.SC. 1098 folld. (1967) 2 S.C.R. 367; *Gopal Paper Mills Ltd.* v. *Surendra Kumar Ganesh Das Malhotra.* (1962) A. Cal. 61 disting.

49 *Fraser & Co.* v. *Bombay Ice Manufacturing Co.* (1904) 29 Bom. 107.

50 The law is reviewed by the House of Lords in the case of *Crofter Hand Woven, etc. Co.* v. *Veitch* (1942) A.C. 433, where earlier cases are considered and discussed.

51 *Haribhai Maneklal* v. *Sharafali Isabji* (1897) 22 Bom. 861; *Fraser & Co.* v. *Bombay Ice Manufacturing Co., supra,* note 58.

52 *Bholanath Shankar Das* v. *Lachmi Narain* (1930) 53 All. 316, at pp. 333-4; (1931) All L.J. 34; 1931 A.A. 83; a full discussion of the authorities will be found in the judgment.

An agreement in the nature of a trade combination for mutual benefit for the purpose of avoiding competition is not necessarily unlawful, even if it may damage others.[53] The agreement which was held void in *Shaikh Kalu* v. *Ram Saran Bhagat*[54] was clearly not for the mutual benefit of the parties and was an attempt to create a monopoly.

The present section certainly does not reproduce the Common Law, as we have seen. It seems, therefore, that it should be construed according to its literal terms. When so construed, we submit that the proper inference to draw from the authorities is that it only strikes at agreements which operates as a total bar to the exercise of a lawful business, for however short a period or however limited the area, and does not avoid agreements which merely restrain freedom of action in detail in the actual exercise of a lawful business. A stipulation not to sell for less than a fixed rate is an agreement of this character. It does not restrain any party to the contract from selling; in other words, none of the parties is restrained from exercising his business of selling, but only that in the exercise of the business certain terms shall be observed.[55]

"To that extent."—The meaning of these words is that if the agreement can be broken up into parts, it will be valid in respect of those parts which are not vitiated as being in restraint of trade. In English cases, there has been a variety of opinions as to the basis upon which severance can be allowed. It is reasonably clear that the test for cases where the covenant has been entered into by the seller of a business is the "blue pencil" test, a formal test of verbal divisibility. If by eliminating objectionable phrases, though without adding or altering any words, there remains a covenant which is reasonable, this will be enforced. This is the view of the Court of Appeal,[56] although severance has been permitted only of area, class of customer or subject-matter. In case where the covenant has been exacted from an employee, the Courts adopt a more stringent test: severance will be permitted only if there is really a combination of several distinct covenants, and the elimination of the objectionable phrases does not alter the entire scope and intention of the agreement.[57] Where the agreement is not so divisible, it is wholly void.[58]

Injunctions.—A breach of a valid covenant[59] in restraint of trade may be restrained by injunction even though the covenant gives an alternate remedy.[60] But no injunction will be granted which will have the effect of specific performance of the contract of personal service although[61] a negative covenant not to serve elsewhere may be enforced[62] but will not enforce it if it deprives the employee of his means of livelihood.[63] Even if the covenantor is a minor; a

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53 *Daulat Ram* v. *Dharam Chand,* 1934 A.L. 110; 146 I.C. 1030.

54 *Supra,* note 34, p. 285.

55 *Kuber Nath* v. *Mahali Ram* (1912) 34 All. 587. See also *English Hop Growers* v. *Dering* (1928) 2 K.B. 174.

56 *Goldsoll* v. *Goldman* (1915) 1 Ch. 292. C.A. (Sale of goodwill in imitation jewellery business. Seller covenants not to deal in *real* or imitation jewellery in any part of the United Kingdom, *France, U.S.A., Russia or Spain*. The italicised words were severed as the seller's business had been confined to imitation jewellery in the United Kingdom. Otherwise the covenant would be unreasonable and void); *Ronbar Enterprises* v. *Green* (1954) 1 W.L.R. 815; C.A.

57 *Attwood* v. *Lamont* (1920) 3 K.B. 571, C.A. (*A* had a multiple store. *L* was an employee in the tailoring department. *L* covenanted not to carry on the trade of tailor, *dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter* within ten miles. As it stood the covenant was unreasonable. A Divisional Court applied the "blue pencil" test, and excised the italicised words: (1920) 2 K.B. 146. The Court of Appeal reversed this decision, refusing severance as this would alter the entire scope and intention of the agreement, and holding the original covenant unreasonable and void). For the position as regards severance in the United States, see 64 L.Q.R. 347, 366-8.

58 *Parasullah* v. *Chandra Kant* (1917) 21 C.W.N. 979, 983, 39 I.C. 177.

59 Chitty: On Contracts (24th Ed.) para 973.

60 *National Provincial Bank* v. *Marshall* (1888) 40 Ch. D. 112; *Texaco Ltd.* v. *Mulberry Filling Station* (1972) 1 W.L.R. 814; (1912) 1 All E.R. 543.

61 *Rely-a-Bell Burglar & Fire Alarm Co.* v. *Eisler* (1926) Ch. 609; *Lumley* v. *Wagner* (1852) 1 DeG.M. & G. 604, 619; 90 R.R. 125; 21 L.J. Ch. 898; (1843-60) All E.R. Rep, 368, *Whitewood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416; *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671.

62 *Warner Bros.* v. *Nelson* (1937) 1 K.B. 209; (1936) 3 All E.R. 822; *Page One Records Ltd.* v. *Britton* (1967) 3 All E.R. 922; (1968) 1 W.L.R. 57.

63 *Palace Theatre* v. *Clensy* (1909) 26 T.L.R. 28 (Interim injunction).

negative covenant may be enforceable[64] if it is for his benefit, so also in covenants of apprenticeships.[65] But if the plaintiff is unable or unwilling to fulfil his part of the contract, no injunction will be granted.[66]

Doctrine of Severance.—The rule against severance of a restrictive clause in an agreement of service applies where the covenant is bad in law but it does not apply to granting of limited injunctions necessary to protect the employers' interests where the negative covenant is not wholly void. It would be the former if the covenantor is driven to idleness or would be compelled to serve the covenantee, the contract is void.[67] But the rule does not apply to protect the employer's interest where the negative covenant is not wholly void, e.g. if the covenantor is not permitted to get himself employed in another similar employment or he might perhaps get a lesser remuneration than the one agreed to by his new employers. That is no consideration against enforcing the covenant.[68]

Lex loci contracts.—The Courts of this country will not enforce a contract made abroad, to be performed in this country, contrary to the policy of the law of this country. An agreement, therefore, in restraint of trade, made abroad and to be performed in India, is void in India, though it may be valid by the *lex loci contractus.*[69]

Covenant binding on transferees.—On a dissolution of partnership the retiring partner covenanted not to carry on the same business as was carried on by the firm on his own adjoining land or in the area adjoining the factory. He, however, sold the land to his father who in partnership with the son and wife of the former partner started the same business on the land. It was held that the agreement was reasonable and binding on the transferees and could be enforced against them and there was nothing indefinite in the covenant.[70]

Judicial Notice of Illegality.—The court will take judicial notice of illegality of a covenant, which is on the face of it in restraint of trade even though it is not pleaded; but if it is not a restraint *ex facie,* the court in the absence of evidence cannot decide against a covenantor.[71] If the contract read as a whole appears on the face of it not to be unreasonable in the interest, either of the parties or of the public, that is enough and the question is not of evidence. The question is one of law for the Court.[72] A sum of money can generally be shown to be advantageous to a businessman, but his liberty to trade is not an asset with which the law will permit him to barter for money except in special circumstances and within wellknown limitations.[73] No contract was ever an offence at common law merely because it was in restraint of trade.[74]

Exception 1.—This exception deals with a class of cases which had a leading part in causing the old rule against agreements in restraint of trade to be relaxed in England. The rule arose apparently from a popular dislike of all combinations tending to raise prices, which may

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64 *Bromley* v. *Smith* (1909) 2 K.B. 235. *Trevor Andre* v. *Bashford* (1965) C.L.Y. 1984 (provided the contract is beneficial to the minor).

65 *Gadd* v. *Thompson* (1911) 1 K.B. 304.

66 *Measures Bros.* v. *Measures* (1910) 2 Ch. 248.

67 *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co. Ltd.* (1967) 2 S.C.R. 367; (1967) A.S.C. 1098; *Nordenfelt* v. *Maxim Nordenfelt Arms & Ammunition Co. Ltd.* (1894) A.C. 535, 574; *Burn & Co.* v. *Mcdonald,* 36 Cal. 354 (a case of engineer with a firm); *Charlesworth* v. *Mcdonald,* 23 Bom. 103 (case of surgeons Asst.); *Subba Naidu* v. *Haji Badsha Sahib,* 26 Mad. 168 (a case of trade agent); *Madras Rly. Co.* v. *Rust,* 14 Mad. 18 (a case of an engineer); *Brahmaputra Tea Co.* v. *Scarth,* 11 Cal. 545 (not to serve after term of engagement).

68 (1967) 2 S.C.R. 367; (1967) A.S.C. 1098, 1105.

69 *Oakes & Co.* v. *Jackson* (1876) 1 Mad. 134, 144; *Rousillon* v. *Rousillon* (1880) 14 Ch.D. 351, 369. See *supra* "Foreign Contracts & Foreign Merchants."

70 *Hukmichand* v. *Jaipur Rice & Oil Mills Co.* (1980) A. Raj. 155, 160, 164, 165.

71 *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co.* (1914) A.C. 461, 476; (1914-15) All E.R. Rep. 752; *Haynes* v. *Doman* (1899) 2 Ch. 13; *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1913) A.C. 724, 732-33; (1911-13) All E.R. Rep. 400.

72 *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1914) A.C. 461; (1914-15) All E.R. 752, 757; *Gopal Paper Mills* v. *Malhoutra* (1962) A. Cal. 61, 65; *Att.-Gen. of Australia* v. *Adelaide Steamship Co.* (1913) A.C. 781; (1911-1913) All E.R. Rep. 1120.

73 *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1934) A.C. 181, 191; (1934) All E.R. Rep. 38, 42 (P.C.).

74 *Att.-Gen. of Australia* v. *Adelaide Steamship Co.* (1913) A.C. 781; (1911-13) All E.R. Rep. 1120 (P.C.).

be compared with the agitation in America against the modern system of "trusts." It has been laid down in quite modern cases, as the governing principle, that "no power short of the general law." not even the party's own bargain, should be allowed to restrain a man's discretion as to the manner in which he shall carry on his business,[75] and originally the rule was without exceptions. "In time, however, it was found that a rule so rigid and farreaching must seriously interfere with transactions of everyday occurrence",[76] and from the early part of the sixteenth century onwards restrictions "for a time certain and in a place certain," to prevent the seller of a business from competing with the buyer, were allowed. In the nineteenth century it was settled that a limit of time was not necessary, and contracts for the preservation of trade secrets were held to be outside the rule, altogether; and finally the House of Lords has declared that there is no hard and fast rule at all. The question is always whether the restraint objected to is reasonable with reference to the particular case and not manifestly injurious to the public interest.[77]

The law of India, however, is tied down by the language of this section to the principle, now exploded in England, of a hard and fast rule qualified by strictly limited exceptions; and, however, mischievous the economical consequences may be, the Courts here can only administer the Act as they find it. A.P. Sen J. has observed that neither the test of reasonableness or the restraint being partial apply to a case governed by s. 27, Contract Act, unless they fall within the exception of that section. A service covenant extending beyond the term of service is void.[78]

The kind of cases covered by this exception may be illustrated by a decision some years earlier than the Act. A covenant by the defendants on the sale of the goodwill of their business of carriers to the plaintiff not to convey passengers to and fro on the road between Ootacamund and Mettapalayam was not in restraint of trade. "So partial a restraint is not really adverse to the interests of the public at large".[79] In a rather similar later case where the business disposed of was that of a ferry, the restraint on the seller being limited to three years, the Privy Council held without difficulty that there was a sale of a real goodwill.[80]

Assignability.—A covenant in restraint of trade is, in the absence of anything to the contrary in the covenant, assignable. Thus a purchaser of the "goodwill" of a business is entitled to enforce it. Wrongful dismissal puts an end to the covenant and frees the employee from such restraint unless the contract of employment obliges the employer to provide work for the employee.[81]

Agreements in restraint of legal proceedings void.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

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75 *Hilton* v. *Eckersley* (1856) 6 E.&. B. 47, 74; 106 R.R. 507, 522.

76 Lord Macnaghten in *Nordenfelt's Case* (1894) A.C. 535, 564; See his judgment at large for a full critical discussion of the Common Law.

77 *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1894) A.C. 535. See under "Confidence to be protected", *supra*.

78 *Superintendence Co. of India* v. *Krishan Murgai* (1980) A.SC. 1717, 1728.

79 *Auchterlonie* v. *Charles Bill* (1868) 4 M.H.C. 77.

80 *Chandra Kanta Das* v. *Parasullah Mullick* (1921) L.R. 48 I.A. 508; 48 Cal. 1030; 65 I.C. 271. The High Court at Calcutta had held otherwise, it is not easy to see why. The mere fact that before the agreement the seller and the b er were competing for the custom of passengers will clearly not do.

81 Chitty: On Contracts (24th Ed.) Para 972.

Suits barred by such contracts.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

(Repealed by Specific Relief Act, s. 2 and Sch. except in the scheduled districts where that Act is not in force; for these districts see footnote to s. 1 of Specific Relief Act, below.

Exception 2.—Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

Agreement in restraint of legal proceedings.—In a Calcutta case[86] Garth C.J. said:

"This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of s. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals, and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law; that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts, but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded."[82]

Thus a contract whereby it is provided that all disputes arising between the parties should be referred to two competent London brokers, and that their decision should be final, does not come within the purview of this section.[83] Nor does a contract whereby it is provided that all disputes arising between the parties "should be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to the contract";[84] still less is it wrong for the parties to a pending suit to give the Court itself, if they choose so to agree, full power to decide the whole matter without further appeal.[85] But a stipulation that parties to a reference shall not object at all to the validity of the award on any ground whatsoever before any Court of law does restrict a party absolutely from enforcing his rights in ordinary tribunals, and, as such, is void. The Courts have power, in spite of such a stipulation, to set aside an award on the ground of misconduct on the part of the arbitrator. It was so held by the Madras High Court in a case[86] in which the agreement to submit to arbitration contained a restrictive stipulation of the above character. The agreement in that case was filled in Court under the provisions of the then Code of Civil Procedure,[87] and the decision was put on the ground that the very filing of the agreement in Court gave the Court

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82 Per Garth C.J. in *Coringa Oil Co. Ltd.* v. *Koegler* (1876) 1 Cal. 466, 468, 469, in appeal from same case in 1 Cal. 42; *Mulji Tejsing* v. *Ransi Devraj* (1909) 34 Bom. 13.

83 *Coringa Oil Co. Ltd.* v. *Koegler, supra.*

84 *Ganges Manufacturing Co. Ltd.* v. *Indra Chand* (1906) 33 Cal. 1169; *Champsey* v. *Gill & Co.* (1905) 7 Bom. L.R. 805. In such a case the rules of the Association are imported in the contract; 33 Cal. 1169; *Chaitram* v. *Bridhichand* (1915) 42 Cal. 1140; 30 I.C. 681; *Gainda Lal* v. *Rameshwar Das,* 1937 A.A. 650; (1937) All. L.J. 823; 171 I.C. 584.

85 *Bashir Ahmad* v. *Sadiq Ali* (1929) 120 I.C. 826; 6 O.W.N. 771; 1929 A.O. 451.

86 *Burla Ranga Reddi* v. *Kalapalli Sithaya* (1883) 6 Mad. 368.

87 See now Arbitration Act, 1940, s. 20.

jurisdiction the arbitration chapter to set aside the award on the ground of the arbitrator's misconduct.[88] But the decision, it is submitted, ought not to be different even if the agreement were not filed in Court. For though, in that case, the provisions of the Code would not apply, the award may be set aside in a regular suit on that ground. A party to an arbitration agreement has now the right to have an award set aside on the ground of misconduct on the part of the arbitrator,[89] and a stipulation whereby the binds himself to accept the award as final in all cases has the effect of restricting him absolutely from enforcing his right and is, therefore, void under the provisions of this section.[90] A clause in an agreement that except where otherwise provided in the contract the decision of the Superintending Engineer "shall be final, conclusive and binding" upon certain matters therein mentioned does not constitute him an arbitrator and the clause is not contrary to s.28 of the Contract Act and is not hit by s. 21 of the Specific Relief Act.[91]

For the rest the section before us affirms the Common Law. Its provisions "appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust jurisdiction of the Courts".[92] In English law it is, however, possible to oust the jurisdiction of the Courts by expressly declaring that the agreement shall not give rise to any legal relationship.[93] An agreement by a joint decree holder not to intervene in execution under Order XXI, rule 15, of the Civil Procedure Code, is invalid.[94] The section does not affect the validity of compromises of doubtful rights, and this view is supported by the provisions of the Civil Procedure Code, which enable parties to a suit to go before the Court and obtain a decree in terms of a compromise.[95] In a case before the Contract Act was passed, it was held by the Privy Council that an agreement whereby the parties to a suit bind themselves before judgment is passed in the Court of first instance to abide by the decree of that Court and forgo their right of appeal is valid and binding.[96] Following the principle of this decision a Full Bench of the Allahabad High Court[97] held that an agreement whereby a judgment-debtor engaged himself not to appeal against a decree passed against him in consideration of the judgment-creditor giving him time for the satisfaction of the judgment debt is not prohibited by this section. "By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is in our judgment prohibited neither by the language nor the spirit of the Contract Act, and an Appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with the appeal".[98] But an agreement between the parties to a suit on a contract that the suit should be decided in accordance with the result of another suit between the same parties is void under this section, as it restricts the parties absolutely from enforcing their rights by the "usual legal proceedings".[99] It is competent, however, to parties to a suit under the provisions of the Indian Oaths Act, 1873, to enter

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88 See now Arbitration Act, 1940, ss. 30, 25.

89 Arbitration Act, 1940, s. 30.

90 *Abdul Majid* v. *Bahawal Baksh,* 1950 A.L. 174; *Union Construction* v. *Chief Engineer,* 1960 A.A. 72; *Coringa Oil Co.* v. *Koegler,* 1 Cal. 466; *Mulji Tajsingh* v. *Ransi Devraj,* 34 Bom. 13 refd. to; *Rambilas* v. *Durga Bijai Prasad* (1965) A.P. 239.

91 *State of Bihar* v. *Rama Bhushan,* 1964 A.P. 326; *Aghore Nath Bannerjee* v. *Calcutta Tramway Co.,* 11 Cal. 232; and *Arthur Andrew Cipriani* v. *Macdonald Burnett,* 1933 A.P.C. 91 dist.

92 *Anant Das* v. *Ashburner & Co.* (1876) 1 All. 267. See also *Kistnasamy Pillay* v. *The Municipal Commissioners for the Town of Madras* (1868) 4 M.H.C. 120, 123; *Baker* v. *Jones* (1954) 1 W.L.R. 1005.

93 *Rose & Frank Co.* v. *Crompton & Bros. Ltd.* (1925) A.C. 445, H.L.; *Jones* v. *Vernon's Pools, Ltd.* (1938) 2 All E.R. 626; *Appleson* v. *Littlewood* (1939) 1 All E.R. 464.

94 *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (1921) 44 Mad. 919; 69 I.C. 337.

95 *Anant Das* v. *Ashburner & Co., supra* note 90. See also the Civil Procedure Code, 1908, Order 23, r. 3.

96 *Munshi Amir Ali* v. *Maharani Inderjit Koer* (1871) 9 B.L.R. 460.

97 *Anant Das* v. *Ashburner & Co., supra,* note 90.

98 *Anant Das* v. *Ashburner & Co. supra; Bhirgunath* v. *Mst. Annapurna,* 1934 A.P. 644; 153 I.C. 1098.

99 *Raja of Venkatagiri* v. *Chinta Reddy* (1914) 37 Mad. 408; 15 I.C. 378.

into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. If the oath is made and evidence is given on such oath, it is, under s. 11 of that Act, conclusive as to the matter stated. But if a party, after entering into such agreement as aforesaid, refuses to make the oath, all that the Court has to do is to record under s. 12 the refusal together with the reasons if any and the trial should proceed. It is to this extent only that agreements of this character are recognised under the Indian Oaths Act. An agreement, therefore, between *A* and *B* that if *A* made certain statements on the special oath, *B* would be bound by those statements, and that if *A* refused to take the oath, and suit instituted by *A* against *B* should be dismissed, is void, as the Oaths Act does not empower a Court to dismiss a suit for such refusal.[1]

"Rights under or in respect of any contract."—Note that this section applies only to cases where a party is restricted from enforcing his rights under or in respect of any *contract*. It, therefore, presumably does not apply if the Court hold that the parties did not intend that their agreement should give rise to any legal relations.[2] It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression "contract" does not include rights under a decree.[3] The Code of Civil Procedure contains express provisions as to adjustment of a decree and postponement of rights under a decree by mutual agreement of parties to a suit (see Order 21, rule 2). An endorsee for value in Calcutta is not entitled to special privileges which the original parties were not entitled to. Parties must be held to their bargain.[4]

Limitation of time to enforce rights under a contract.—Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may *enforce* his rights, but which provide for a *release or forfeiture* of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which provides that "if the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be *forfeited,*" is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the *Baroda Spg. & Wvg. Co.'s case;*[5] and similarly where a bill of lading provided that "in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods," it was held that the clause was valid.[6] But this cannot be said of a clause in a policy in the following form: "No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues." Such a clause does not operate as a release or forfeiture of the rights of the assured on non-fulfilment of the condition, but it is to limit the time within which the assured may enforce his rights under the policy, and it is therefore void under the present section. The contrary, however, was held by the High Court of Bombay, the ground of the decision being that the clause amounted in effect to an agreement between the parties that if

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1 *Moyan* v. *Pathukutti* (1908) 31 Mad. 1.
2 See *Rose & Frank* v. *Crompton* (1925) A.C. 445, H.L.
3 *Ramghulam* v. *Janki Rai* (1884) 7 All. 124, 131.
4 *South East Asia Co. Ltd.* v. *Herman & Mohatta Ltd.* (1962) A. Cal. 601.
5 *Baroda Spg. & Wvg. Co. Ltd.* v. *Satyanarayen Marine & Fire Insurance Co.* (1914) 38 Bom. 344. Foll. in *Girdharilal* v. *Eagle Star & British Dominions Insurance Co.* (1923) 27 C.W.N. 955; 80 I.C. 637; *G. Rainey* v. *Burma Fire & Marine Insurance Co.* (1925) 3 Ran. 383; 91 I.C. 622; 1926 A.R. 3.
6 *Haji Shakoor Gany* v. *Hinde & Co.,* 1932 A.B. 330; 34 Bom. L.R. 634; 138 I.C. 793; *Governor-General in Council* v. *Badri Das,* 1951 A.A. 702; *Dominion of India* v. *Rupchand,* 1953 A.N. 169; *Western India Prospecting Syndicate* v. *Bombay Steam Navigation Co. Ltd.,* 1951 A. Sau. 83; *Ruby General Insurance Co. Ltd.* v. *Bharat Bank.* 1950 A.E.P. 352; *Dawood Tar Mahomed* v. *Queensland Insurance Co. Ltd.* (1945) 1 Cal. 638, 1949 A. Cal. 390.

no suit were brought within a year, then neither party should be regarded as having any rights against the other.[7] This decision was adversely criticized in the *Baroda Spg. & Wvg. Co.'s case*[8] by Scott C.J., it seems rightly. The third judge, Batchelor J., who was also a member of the Court in the *Hirabhai case*, acknowledged that it was difficult to hold that the words before the Court in the *Hirabhai case* were susceptible of the meaning attributed by the Court.[9] In a Calcutta case,[10] one of the conditions of a policy of marine insurance was that no suit by the assured should be sustainable in any Court, unless the suit was commenced within six months next after the loss, and that if any suit was commenced after the expiration of six months, the lapse of time should be taken as conclusive evidence against the validity of the claim. It was held that the assured could not sue on the policy after the expiration of six months. No reference was made either in the argument of counsel or in the judgment of the present section. Under s.28, it is the limiting of the time for enforcing rights which is void. But a term in the contract that rights accruing thereunder to a party will be forfeited or released, if the party does not sue within such shorter time as given in the contract, will not fall within s. 28. Thus under the contract itself the right accruing to the party ceases to exist by the expiry of the time stipulated in the contract and there is a simultaneous relinquishment of the rights accruing under the contract and the remedy to enforce it.[11] The Supreme Court has held that a clause in a policy to the effect that the insurer will not be liable for any loss if the claim is made 12 months after the loss is not hit by s. 28 and is valid.[12] An agreement providing that a person in whose favour a provision for maintenance was made is not entitled to sue for maintenance which had been in arrears for more than one year is void.[13] A rule under s. 35 of the Post Office Act limiting the liability in respect of sums specified by remittance unless a claim is preferred within one year from the date of the posting of the article is void as beyond the powers conferred by the section. And even if it be treated as a contract it is void under s. 28 of the Contract Act.[14] A contract which does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive, is not hit by s. 28 of the Contract Act.[15] In short, an agreement providing for the relinquishment of rights and remedies is valid, but an agreement for the relinquishment of remedies only falls within the mischief of s. 28. A clause in an insurance policy making an award by an arbitration as a condition precedent to the right of action against the insurer is not hit by s.28, Contract Act (A case of car accident).[16]

No provision is made in the section for agreements extending the period of limitation for enforcing rights arising under it. In a case before the Privy Council[17] their Lordships expressed their opinion that an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry is no bar to the plea of limitation, though an action might be

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7 *Hirabai* v. *Manufacturer's Life Insurance Co.* (1912) 14 Bom. L.R. 741 (a case of a life policy). *Ramji Karamsi* v. *The Unique Motor & General Insurance Co. Ltd.*, 1951 A.B. 347, 352.

8 38 Bom. 344, at pp. 348, 353.

9 Ibid at p. 358.

10 *South British and Marine Insurance Co.* v. *Brojo Nath* (1909) 36 Cal. 516, pp. 535-536, 539-542.

11 *Kerala Electrical & Allied Engineering Co. Ltd.* v. *Canara Bank* (1980) A. Ker. 151, 152-3; *Shakoor Gany* v. *Hinde & Co.* (1932) A.B. 320; *Dawood Tar Mahmoud Bros.* v. *Queensland Insurance Co.* (1949) A. Cal. 390; *Ruby Insurance Co. Ltd.* v. *Bharat Bank Ltd.* (1950) A. EP. 352; *Pearl Insurance Co.* v. *Atma Ram* (1960) A. Punj. 236 (F.B.); *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.SC. 1634 (not case under s. 28) reld on.

12 *Vulcan Insurance Co. Ltd.* v. *Maharaj Singh* (1976) 2 S.C.R. 62.

13 *Saroj Bandhu Bhaduri* v. *Jnanada Sundari*, 1932 A. Cal. 720; 36 C.W.N. 555; 140 I.C. 263; cf. *Nathu Mal* v. *Ram Sarup* (1931) 12 Lah. 692; 1932 A.L. 169; 135 I.C. 778.

14 *Union of India* v. *Mohd. Nazim* (1966) 64 All. L.J. 675.

15 *Pearl Insurance Co.* v. *Atma Ram*, 1960 A. Punj. 236 (F.B.); *Girdharilal Hanuman Baksh* v. *Eagle Star & British Dominion Insurance Co.*, 1924 A. Cal. 186; *Nathumal Ramdas* v. *Ram Sarup*, 12 Lah. 692; 1932 A.L. 169.

16 *National Insurance Co. Ltd.* v. *Calcutta Dock Labor Bd.* (1977) A. Cal. 492, 494; *Scott* v. *Avery* (1856) 5 H.L.Cas. 811; 25 L.J. Ex. 308; 10 E.R. 1121 appld.; *British Dominions Insurance Co. Ltd.* v. *Dina Nath*. 47 Bom. 509; (1923) A.B. 225 disting. See also: *Jagadhari Bhandar & Jagadhatri Oil Mills* v. *Commercial Union Assurance Co. Ltd.* (1979) A. Cal. 56; *Aghor Nauth Banerjee* v. *Calcutta Tramways* 11 Cal. 232 appld.; *Heyman* v. *Darwins Ltd.* (1942) A. SC. 356; (1942) 1 All E.R. 337 appld.

17 *East India Co.* v. *Oditchun Paul* (1849) 5 M.I.A. 43, 70.

brought for breach of such an agreement. There is hardly any doubt that an agreement which provides for a longer period of limitation than the law allows does not lie within the scope of this section. Such an agreement certainly does not fall within the first branch of the section. There is no restriction imposed upon the right to sue; on the contrary, it seeks to keep the right to sue subsisting even after the period of limitation. Nor is this an agreement limiting the time to enforce legal rights. It would, however, be void under s. 23 as tending to defeat the provisions of the Limitation Act, 1908.[18]

Ordinary tribunals.—Settlement of disputes by arbitration is a recognised mode of settlement and is not opposed to public policy.[19] But parties cannot by agreement oust the jurisdiction of any court or to confer jurisdiction on a court not otherwise competent.[20] A clause in a bill of lading whereby it was agreed that questions arising on the bill should be heard by the High Court of Calcutta instead of the Court at Mirzapur, which was the proper tribunal to try the questions, is void, and cannot be pleaded in bar of a suit brought in the Mirzapur Court.[21] Where, however, two Courts have jurisdiction to try a case, there is nothing contrary to law in an agreement between parties that disputes between them should be tried at the one Court rather than the other.[22] A contract with the words "Madras jurisdiction" would signify agreement to get the matter adjudicated at Madras and the clause is valid.[23] Similarly a clause in an insurance policy providing for adjudication by Bombay courts;[24] or in any other contract.[25]

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18 *Ballepragada* v. *Thammana* (1917) 40 Mad. 701; 35 I.C. 575. By s. 3 of 1908 Act, subject to certain exceptions contained in the Act "every suit instituted after the period of limitation prescribed (by the Act) *shall* be dismissed, although limitation has not been set up as a defence." See also *Jawahar Lal* v. *Mathura Prasad,* 1934 A.A. 661; (1934) All. L.J. 1035; 151 I.C. 585 (F.B.) S.3 of 1963 Act is the same. *East India Co.* v. *Oditchun Paul, supra,* note 12, decided many years before the Contract Act, proceeded on the English Statutes of Limitation.

19 *Ram Lal* v. *Punjab State* (1966) A. Punj. 436 (F.B.).

20 *Mohammad Kasim Haji Ahmad* v *Hanuman Industries,* 1956 A.T.C. 200; *Lakshminarayan Ramniwas* v. *N.V. Vereenigde,* 1960 A. Cal. 45; *Lakshminarayan Ramniwas* v. *Lloyds Trestino,* 1960 A. Cal. 155; *Hakam Singh* v. *Gammon (India) Ltd.* (1971) A.S.C. 740.

21 *Crawley* v. *Luchmee Ram* (1866) 1 Agra. 129 *c.p.* and dist; *Achratlal & c.* v. *Vijayam* (1925) 49 Mad. L.J. 189; 90 I.C. 1019; 1925 A.M. 1145 (an ill-drawn clause saved by its obscurity, not really reportable); *Dhanmal Marwari* v. *Messrs. Jankidas Baijnath* (1944) 49 C.W.N. 123.

22 *A. Milton & Co.* v. *Ojha Automobile Co.* (1930) 57 Cal. 1280; 130 I.C. 252; 1931 A. Cal. 279; *Khandesh Lakshmi Vilas Mills Co.* v. *Vinayak,* 1935 A.B. 198; 37 Bom. L.R. 157; 156 I.C. 277; *Gopal Das Agarwala* v. *Hari Kishan,* 1936 A.A. 514; (1936) All. L.J. 704; 163 I.C. 919; *National Petroleum Co.* v. *Meghraj,* 1937 A.N. 334, (1939) Nag. 641; *Musaji Lukmanji* v. *Durga Das* (1945) Lah. 281, 223 I.C. 284, (1946) A.L. 57 (F.B.); *Raghavayya* v. *Vasudevayya,* 1944 A.M. 47, 211 I.C. 480; *Vastiram Manmal & Co.* v. *Ramaswamy Iyer,* 1947 A.M. 99, 230 I.C. 228; *H.K. Dada (India) Ltd.* v. *M.P.S. Mills Co. Ltd.,* 1954 A.M. 845; *Tilakram Chaudhuri* v. *Kodumal Jethanand,* 1928 A.B. 175, 156 I.C. 277; *Ram Bahadur Thakur* v. *Devi Dayal,* 1954 A.B. 176; *A.K. Kaliyappa Chettiyar* v. *Currimbhoy Laljee,* 1954 A.T.C. 461; *Becharam Babu Ram.* v. *Baldeosahai Surajmal* (1940) All. 232; *Balwant Singh* v. *S.H. Mian Mohamed,* 1947 A. Pesh. 48; *Beni Pershad* v. *Narayan Glass Works,* 1949 A.Ajm. 19; *Bhagat Ram* v. *Ramniwas,* 1949 A.Ajm. 44; *Sharma* v. *Sunder Talkies Distributors,* 1944 A.O. 275; *Unique Motor & General Insurance Co. Ltd.* v. *Rayma Isa,* 1950 A. Kutch 32.

The only High Court where there is any doubt is that of Calcutta. In *Ramnicklal* v. *Vivekanand Mills Co. Ltd.* (1944) 49 C.W.N. 58, it was held that although such an agreement was not void, it did not take away the jurisdiction of the prohibited Court. In *Chittaranjan* v. *Parul Rani* (1946) 1 Cal. 257, 1946 A. Cal. 112, 221 I.C. 633, Henderson J., inclined to the view that such an agreement was void. In *Dhan Mal Marwari* v. *Jankidas Baijnath* (1947) 1 Cal. 412, 424, Latifur Rahman J. was of the opinion that such an agreement was normally valid, but not in the case before him as the chosen tribunal had only a limited jurisdiction. In *Continental Drug Co.* v. *Chemoids & Industries Ltd.,* 1955 A. Cal. 161, there is a bench decision, where after considering the different views, it is held that the agreement is valid as in 57 Cal. 1280 (*supra*), and deprives the prohibited court of its jurisdiction. *Bajrang Electric Steel Co.* v. *Commissioners of Ports of Calcutta,* 1957 A. Cal. 240; *Australian Lloyd Steamship Co.* v. *Gresham Life Assurance Society* (1903) 1 K.B. 249 (A case of insurance and submission was held to mean submission to any tribunal of choice of the parties and not merely arbitration). Pollock & Mulla: *Contract Act* (7th Ed.) 211. *Singhal Transport* v. *Jesaram* (1968) A. Raj. 89.

23 *S. Mannel Raj & Co.* v. *Manilal & Co.* (1963) A. Guj. 148.

24 *New India Insurance Co. Ltd.* v. *Nanjunda Setty & Sons* (1964) A. My. 147.

25 *Libra Mining Works* v. *Baldota Bros.* (1962) A.AP. 452, 455; *Ram Bahadur Thakur* v. *Devidayal Sales Ltd.,* 1954 Bom. 334; (1954) A.B. 176 folld.; *Patel Bros.* v. *Vadilal Kashidas,* 1959 A.M. 227; and *Dawood Rowther* v. *S.I. Ry. Co.,* 1944 A.M. 444 dist.

A bill of lading in connection with a contract of affreightment of goods to be carried to Calcutta entered into between two Swedish parties in Sweden provided for the decision of the disputes arising out of the contract according to Swedish Law in Sweden.

The clause was held to be valid and not against public policy.[26] A clause in a bill of lading limiting jurisidiction in respect of disputes to Italian courts was upheld as the Italian Court mentioned had jurisdiction to try the suit under the ordinary law.[27] Nor is it any objection to an arbitration agreement that it contains a stipulation that any arbitration proceedings under the agreement shall take place in a specified country or city.[28] See under S. 1 under the heading "Rule in International Trade", *supra*. See also the arbitration (Protocol and Convention) Act, 1937

Ousting Courts jurisdiction.—In *Hyman* v. *Hyman*[29] there was a covenant in the separation deed providing that the wife would not apply to the Divorce Court for maintenance and it was held that it was void as being contrary to public policy. On the basis of this it was argued in a later case that a wife's covenant not to invoke the jurisdiction of the Divorce Court in respect of maintenance for the child and herself was wholly void.[30] But it was held that the covenant ousting the jurisdiction of the Court was void but the rest of the agreement could be enforced.

The House of Lords did not apply *Hyman* v. *Hyman*[31] in a case where the spouses had agreed after the decree nisi to a financial arrangement providing for the matrimonial house to be given to the wife and she agreed to waive and relinquish all claims to maintenance.[32] In *L* v. *L*[33] it was held that the rule in *Hyman* v. *Hyman* does not apply where the arrangement is brought before the Court and the Court passes an order in terms of the arrangement.

An agreement was entered into between a husband and a wife for the payment of maintenance after divorce proceedings were instituted. The agreement provided that if the husband or the wife obtained a divorce in California the provisions of the agreement shall continue in force. Neither the husband nor the wife would apply to any court for any different relief and if any judgment of any court shall otherwise provide with respect to any of the matters in the agreement the provisions of the agreement shall control notwithstanding the terms of any such judgment. The courts of California pronounced an interlocutory judgment of divorce and the maintenance agreement was embodied in the judgment of the court.

In an action by the wife for arrears under the deed, the husband contended that the deed was void as being contrary to public policy in that it purported to oust the jurisdiction of the court.

It was held that the deed would have been contrary to public policy and void if it had purported to oust the jurisdiction of the English courts but it was not contrary to public policy to allow the wife to sue on it merely because it purported to oust the jurisdiction of a foreign court.[34]

Limiting jurisdiction to one of more competent Courts.—Where two or more Courts have jurisdiction to try a suit the agreement between the parties limiting the jurisdiction to one Court is neither opposed to public policy nor a contravention of s.28, Contract Act.[35] But

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26 *South East Asia Co. Ltd.* v. *B.P. Herman & Mohatta Ltd.*, 1962 A. Cal. 601.

27 *Lakshminarayan Ramniwas* v. *Lloyds Trestino Societa*, 1960 A. Cal. 155 on appeal from (1959) A. Cal. 669; *Singhal Transport* v. *Jesaram* (1968) A. Raj. 89; *Lakshminarayan Ram Niwas* v. *Compagnia Genovese*, 1960 A. Cal. 545; *Motibhai Gulabdas & Co.* v. *Mahalakshmi Cotton Mills Ltd.*, 91 Cal. L.J. 1; *St. Pierre* v. *South American Stores* (1936) 1 K.B. 382; *Adam Abdul Shakoor* v. *Ali Mohammad* (1940) 1 Cal.497; 1941 A. Cal.236 *Maritima Italiana* v. *Burjor Framroze*, 54 Bom. 278; 1930 Bom. 185; *The Fehmarn* (1957) 1 W.L.R. 815; (1957) 2 All E.R. 707 (Reference to U.S.S.R. courts).

28 *William Jacks & Co.* v. *Harrowing S.S. Co.*, 1932 A.S. 111; 139 I.C. 769.

29 (1929) A.C. 601; (1929) All E.R. Rep. 245.

30 *Bennett* v. *Bennett* (1952) 1 K.B. 249, (1952) 1 All ER 413.

31 (1929) A.C. 601; (1929) All E.R. Rep. 245.

32 *Minton* v. *Minton* (1979) 1 All E.R. 79, 85. See *L.* v. *L.* (1961) 3 All E.R. 834; (1962) p. 101 appd.

33 (1961) 3 All E.R. 834; (1962) p. 101, 108.

34 *Addison* v. *Brown* (1954) 2 All E.R. 213; (1954) 1 W.L.R. 779; *Bennett* v. *Bennett* (1952) 1 All E.R. 413 dist.

35 *Hakam Singh* v. *M/s Gammon (India) Ltd.* (1971) A.SC. 740 (Contract in Bombay); *Prakash Stores* v. *Karnataka Maharashtra Transport Co.* (1973) Knt. 1132, 1134 (Bombay's jurisdiction); *Rangappa Thimappa & Co.* v. *Prakash Road Lines Pvt. Ltd.* (1973) Knt. 1401, 1403 (way bill containing the

where a transaction was through brokers and the invoice contained the words "Subject to Shimoga jurisdiction" and the purchaser was not aware of it, the exclusive jurisdiction of Shimoga Courts cannot be held to have been agreed to. Previous course of dealings was not considered enough.[36]

If the parties choose by their contract to give jurisdiction to one of the two or more Courts competent to try the suit, there is no breach of S. 28. In this case there was no clear indication that the jurisdiction of Courts outside the City of Madras was excluded.[37]

In a contract between Indian Oil Corporation and the contractors there was an agreement giving Baroda Courts jurisdiction to the exclusion of all other Courts. Disputes arose and the contractors appointed their arbitrator and called upon the oil company to appoint its arbitrator which was refused. They made an application to the Calcutta High Court under s. 20, Arbitration Act. It was held that Calcutta High Court[38] had no jurisdiction under the agreement and that the agreement did not militate against s. 28 as it did not absolutely bar the contractors from enforcing their rights. But in the Case of international trade the agreement of the parties is not conclusive but depends on money factors. The Law was stated thus by the Andhra Pradesh High Court. Considering all these cases and authorities the Andhra Pradesh High Court has laid down the law which may be stated thus:[39] "It is open to the Court to consider the balance of convenience, the interest of justice and the circumstances when it decides the question of jurisdiction of the Court in the light of the clause in the agreement between the parties choosing one of the several Courts or forums which were available to them. Indeed such a consideration is essential in the interest of international trade and commerce for the better relation between the countries and the people of the world."

Looking to the balance of convenience, the law applicable to the facts of the case, the Calcutta High Court stayed an action[40] and directed the dispute to be decided in Bulgaria. The circumstances were the proper law of contract in the case, the nature of dispute, the availability of evidence and the respective convenience of the parties.

The Gujarat High Court has however, held that in spite of a term of a contract in a consignment note specifying one of the Courts with jurisdiction where all disputes thereunder will be litigated, another Court which also has jurisdiction can entertain a suit relating to the consignment note if under the circumstances of the case it is more convenient to do so and would be oppressive to send the matter for disposal by the specified Court. In that case the goods were consigned at Ahmedabad, the witnesses were at Ahmedabad and the amount claimed was comparatively small. It is submitted that the view requires reconsideration.[41]

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words subject to Bangalore jurisdiction); *Nanahchand* v. *T.T. Supply Co.* (1975) B.M. 103 *Salem Refractories & Ceramics Ltd.* v. *Bird & Co. (P). Ltd.* 1979 A.M. 16; *distinguishing Mehta & Co.* v. *Vijayam & Co.* (1925) A.M. 1145; *Hoosen Kasam Dada (India) Ltd.* v. *M.P.S. Mills Co.* (1954) A.M. 845; and *Jhun Jhunwala Bros* v. *Subbaramier* (1968) A.M. 164; *Savani Transport (P.) Ltd.* v. *Chinnaswami Mudaliar* (1979) A.M. 21; *Balsukh Refractories & Ceramics Ltd* v. *Hindustan Steel Ltd* (1971) A. Cal. 20, 24; *National Tar Products* v. *Himachal State Electricity Board* (1979) A.D. 155; *Nanakchand Shadurain* v. *Tinneveli Tuticorn Electric Supply Co. Ltd.* (1975) A.M. 103, 107 (no specific Court specified). *Surajmal Shiwbhagwan* v. *Kalinga Iron Works* (1979) A.M. 26; *Beacon Pharmaceuticals* v. *Dunichand Khosla & Sons* 1973 A. Punj. 60, 163 (Courts in Maharashtra without specifying any particular jurisdiction—valid).

36 *M.G. Venkatappa & Sons* v. *Ramalingam Pillai & Co.* (1974) A.M. 186, 190. Chitty: On Contracts (23rd Ed.) p. 227 appld.

37 *Nanakchand Shadurain* v. *The Tinnelveli-Tuticorn Electric Supply Co. Ltd.* (1975) A.M. 103, 107.

38 *Indian Oil Corporation Ltd.* v. *Stewarts & Lloyds of India Ltd.* (1973) 2 Cal. 485; *Motabhai Gulabdas & Co.* v. *Mahaluxmi Cotton Mills Co. Ltd.* 91 Cal. L.J.1; *Pachhablall Keshablall Mehta* v. *Vijayam & Co.* 49 M.L.J. 185; *Austrian Lloyds Steamship Co.* v. *Gresham Life Assurance Society Ltd.* (1903) 1 K.B. 249 reld on. *G.W. Davis* v. *Maung Shwe Co.*, 38 I.A. 155 refd. to.

39 *Black Sea Steamship U.L. Lastochkina Odessa* v. *The Union of India.* (1976) A.AP. 103, 104.

40 *Union of India* v. *Navigation Maritime Bulgare* (1973) A Cal. 526, 528; *Lakshminarayana Ram Niwas v. Lloyd Triestino Societa* (1960) A. Cal. 155 reld on; *Swedish East Asia Co. Ltd.* v. *B.R. Herman & Mohatta (India) Pvt. Ltd.* (1962) A. Cal. 60 refd. to.

41 *The Rajasthan Golden Transport Co. Ltd.* v. *United India Fire & General Insurance Co. Ltd.* (1980) A. Guj. 184; *Rai & Sons (P) Ltd.* v. *Trikamji Kanji* (1975) 16 Guj. L.J. 31; and *Sehalkumar Sarabhai* v. *K.T. Organisation* (1975) A. Guj. 72 reld. on; *Hakam Singh* v. *Gammon (India) Ltd.* (1971) A.SC. 740; *Kanak Chand* v. *T.T. Supply Co.* (1975) A.M. 103; *Salem Chemical Industries* v. *Bird & Co.* (1979) A.M. 16; *Ghatge & Patil (Transport) Ltd.* v. *Bird & Co.* (1977) A.B. 299 disting.

The Bombay High Court has recently held that where a consignment note contains a clause restricting the jurisdiction to one of the two courts having jurisdiction over the subject matter of the dispute and the note is not signed by the consignor and the consignee then that clause will not be binding on the consignor or the consignee unless his attention is specially drawn to the condition, say by printing it in red or by a sign in red indicating the condition. This is based in some English cases.[42]

Exception 1.—This exception "applies only to a class of contracts, where (as in the cases of *Scott* v. *Avery*[43] and *Tredwen* v. *Holman,*[44] cited by Phear J.,[45] the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only says the plaintiff's hand till some particular amount of money has been first ascertained by reference".[46] It is not essential for the purpose of excluding the jurisdiction of the Court that the contract should in terms provide that the award of the selected tribunal shall be a condition precedent to legal proceedings. A condition on a sweepstake ticket that the decision of the stewards of a Turf Club should be accepted as final in the event of any dispute was therefore held to be a condition precedent which must be fulfilled before any action could be brought to recover the amount of a prize in the sweepstake.[47] An agreement between a tramway company and a conductor, that the manager of the company shall be the sole judge as to the right of the company to retain the whole or any part of the deposit to be made by the conductor as security for the discharge of his duties, and that his certificate in respect of the amount to be retained shall be conclusive evidence between the parties in Courts of justice, comes within this exception. Such an agreement does not oust the jurisdiction of the Courts. Its effect is merely to constitute the manager the sole arbitrator between the company and the conductor, as to whether, in the event of the conductor's misconduct, the company is entitled to retain the whole or any part of the deposit. The point is very similar to those, which so frequently occur in England, where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him, as to what should be allowed in case of dispute for extras or penalties.[48] It must not be supposed that the use of such terms as "sole judge" necessarily imposes any duty of proceeding in a quasi-judicial manner.

This class of cases must be distinguished from those where the obligation of a promisor, such as the duty of paying for work to be done or goods to be supplied, is made, by the terms of the contract, to depend on the consent or approval of some person, as in a builder's contract, the certificate of the architect that the work has been properly done. Here there is no question of referring to arbitration, or anything like arbitration, a dispute subsequent to the contract, but the contract itself is conditional, or, in the language of the Act, contingent (ss. 31-36, below).

Exception 1, Second Clause.—This clause was repealed by the Specific Relief Act. Section 21 of that Act (S.14 (2) of 1963 Act) provides that, "save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who had made such a contract other than an arbitration agreement

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42 *Road Transport Corporation* v. *Kirlosker Bros. Ltd.* (1981) A.B. 299, 312; *Luison* v. *Patent Steam Carpet Cleaning Co. Ltd* (1977) 3 All E.R. 448 *Thorton* v. *Shee Lane Parking Ltd* (1971) 1 All E.R. 686; *Ofley* v. *Mertborough Court Ltd.* (1949) 1 All E.R. 127 applied.

43 (1885) 5 H.L.C. 811.

44 (1862) 1 H. & C. 72.

45 *Koegler* v. *The Coringa Oil Co. Ltd.* (1876) 1 Cal. 42, 51.

46 Per Garth C.J. in *Coringa Oil Co. Ltd.* v. *Koegler* (1876) 1 Cal. 466, 369; *Cooverji* v. *Bhimji* (1882) 6 Bom. 528, 536.

47 *Cipriani* v. *Burnett* (1933) A.C. 83.

48 *Aghore Nath Bannerjee* v. *The Calcutta Tramways Co. Ltd.* (1885) 11 Cal. 232, following *London Tramways Co.* v. *Bailey* (1877) L.R. 3 Q.B.D. 217; *Kuppusami Naidu* v. *Smith & Co.* (1895) 19 Mad. 178; *Secretary of State* v. *Saran Brothers,* A.I.R. 1932 Oudh 265; 139 I.C. 362 and see *Perry* v. *Liverpool Malt Co.* (1900) 1 Q.B. 339, C.A.; *Central Government of India* v. *Chhotalal Chhaganlal,* 1949 A.B. 359, (1949) 51 Bom. L.R. 615; as to the immunity of the person appointed a quasi-arbitrator from being sued for negligence, see *Chambers* v. *Goldthrop* (1901) 1 K.B. 624, C.A.; *Motilal Tejsi* v. *Ramchandra Gajanan,* 1942 A.B. 334; 44 Bom. L.R. 745.

to which the provisions of the said Act apply and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." If a suit is brought in respect of any such subject, it must be shown by the defendant, before he could rely upon the section as a bar to the suit, that the agreement is still operative,[49] and that the plaintiff has refused to perform it. The mere act of filing the plaint is not such a refusal.[50]

Remedies for breach of agreement to refer.—There are two remedies open to a party to a reference for breach of the agreement. He may sue for damages for the breach,[51] or he may plead the agreement in bar of any suit that may be brought against him in violation of the terms of the agreement, as provided by the Specific Relief Act, 1963, s. 14(2). But the provisions of that Act have no operation wherever the Arbitration Act, 1940, applies, and by far the greater number of arbitrations take place under the convenient machinery of the latter.

Conventional restrictions of evidence.—An agreement purporting to prevent the ordinary evidence of payment between the parties from being received has been disregarded as being an unwarrantable interference with the jurisdiction of the Court. Where a bond contained a stipulation enabling the obligee to treat as a nullity payments not endorsed in writing on the bond, it was held that the stipulation was against good conscience, and did not preclude the obligor from proving payments alleged to have been made by him by oral evidence.[52] Such a stipulation "cannot be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law which would warrant our Courts in excluding direct oral evidence of payment."

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.[53]

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in coconut oil only, agrees to sell to *B* "one hundred tons of oil". The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of coconut oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

Attempts have been made to impugn pre-emption agreements of a kind quite common in India on the ground of uncertainty.[54] The objection is not intelligible to a merely English legal mind. These cases were complicated with objections on the ground of perpetuity, see notes on s. 37 "succession to benefit of contract", below.

Ambiguous contracts.—The text and (with one addition) the illustrations of his section follow the draft of the Indian Law Commissioners with only formal variation. As the illustra-

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49 *Tahal* v. *Bisheshar* (1885) 8 All. 57; *Sheoambar* v. *Deodat* (1886) 9 All. 168, 172.

50 *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1879) 5 Cal. 498; *Tahal* v. *Bisheshar* (1885) 8 All. 57.

51 See Arbitration Act, 1940, ss. 21, 25 See *Doleman & Sons* v. *Ossett Corporation* (1912) 3 K.B. 257, 267, C.A.; Halsbury's *Laws of England,* 4th Ed. Vol. 2, para 542, p. 276, Bacon on *Arbitration,* 46.

52 *Narayan Undir Patil* v. *Motilal Ramdas* (1875) 1 Bom. 45.

53 It is really too obvious that where a proposal is accepted by acting upon it the absence of an express acceptance does not make the contract uncertain, see notes on s. 8, "acting an offer", above: *Indraraj Singh* v. *Chait Ram,* 1929 A.N. 194; 117 I.C. 271.

54 See *Aulad Ali* v. *Ali Athar* (1927) 49 All. 527; 100 I.C. 683; *Basdeo Rai* v. *Jhagru Rai* (1924) 46 All. 333, 83 I.C. 390.

tions are plain, and sufficient to explain the meaning of the section, it seems useless to add others from English decisions.

Section 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. See also ss. 94-97 of the same Act. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties, but to make a new contract for them.[55] A court cannot supply lacunae to perfect an imperfect arbitration agreement wherein the language used is not clear or meaningful or unambiguous.[56] According to Gujarat High Court, it should further be shown that it is incapable of being made certain.[57] The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price. This was probably introduced in England on the assumption that there was an ascertainable market price, and then extended to all cases. A condition for the purchase of a motor van to be partly paid on "hire purchase terms" over a period of two years was held to be indefinable and too vague to constitute a binding contract. It is for the parties and not the Court to define them.[55] But in commercial documents connected with trade with which the parties are familiar the Court, if satisfied that the parties thought they had made a binding contract, is willing to imply terms and in particular terms as to the mode of carrying out the contract.[58]

Implying term to give efficacy.—A contract which is intended to be binding may be enforceable even though certain terms have not been precisely agreed, if the nature of the terms can be ascertained by implication.[59] In business transactions what the law desires to give effect by implied warranty is to give such business efficacy to the transaction as must have been intended, at all events, by both parties who are businessmen.[60] A business agreement must be construed fairly and broadly and there must be implied, if necessary, a term to give business efficacy to the document which must have been intended by the parties.[61] This implication to be made is to be no more than is necessary for giving business efficacy to the transaction.[62]

Section 14(2) of the Specific Relief Act, 1963, overlaps this section; see our Commentary thereon below. In a suit for specific performance the contract must be specific and precise and if it is uncertain it is void under section 29, Contract Act and it must be correct and precise and no oral evidence is admissible to add to the terms of the agreement.[63]

Where the defendants, describing themselves as residents of a certain place, executed a bond and hypothecated as security for the amount "our property, with all the rights and interest",[64] it was held that the hypothecation was too indefinite to be acted upon. The mere fact that the defendants describe themselves in the bond as residents of a certain place is not enough to indicate their property in that place as the property hypothecated. If they had described themselves as the owners of certain property it would then have been reasonable to refer the indefinite expression to the description.[65] And where the defendant passed a document to the Agra Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs. 10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note,[66] as it was im-

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55 *Scammell* v. *Ouston* (1941) A.C. 251; (1941) 1 All E.R. 14.
56 *Teamco (Pvt.) Ltd.* v. *T.M.S. Mani* (1967) A. Cal. 168.
57 *Bai Mangu* v. *Bai Vijli* (1967) A. Guj. 81.
58 *Ibid; Hillas & Co.* v. *Arcos Ltd.*, 147 L.T. 503.
59 Halsbury's *Laws of England,* Vol. 9 (4th Ed.) paras 266-267, pp. 148-149, *Gulabchand* v. *Kudilal* (1959) A.M.P. 151, 161, on app. (1966) A.SC. 1734; *Hillas & Co. Ltd.* v. *Arcos Ltd.* (1932) 147 L.T. 503 H.L. (particulars of option not defined but intention of parties ascertained from commercial usage so that there was a concluded contract).
60 *The Moorcock* (1889) 14 P.D. 64, 68; (1886-90) All E.R. 530, 534-5.
61 *Gulabchand* v. *Kudilal,* 1959 A.M.P. 151, 161, on app. (1966) A.SC. 1734.
62 *Bell* v. *Lever Bros. Ltd.*, 1932 A.C. 161; (1931) All E.R. Rep. 1, 32 (Lord Atkin).
63 *Smt. Phuljhari Devi* v. *Mithai Lal* (1971) A.A. 494, 498.
64 The original words were *hakiyat apne kul haq haquk.*
65 *Deojit* v. *Pitambar* (1876) 1 All. 275.
66 "A 'promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to

possible from its language to say for what period it was to subsist and what amount was to be paid under it.[67] Similarly it has been held that stipulation in a *patta* (lease) whereby the tenant agreed to pay whatever rent the landlord might fix for any land not assessed which the tenant might take up (presumably without permission) is void for uncertainty. Under such a *patta*, the landlord might fix any rent he liked, and the tenant might be liable for an unreasonable rent beyond the value of the land.[68] Similarly, where in an agreement for the sale of goods, the seller reserves the right to vary the price at will, there is no contract.[69] A compromise stating: "The following five gentlemen shall decide all matters relating to our movable and immovable property" was held to be too ambiguous to be enforced.[70] An agreement to grant a lease when no date of commencement is expressly or impliedly fixed cannot be enforced.[71] But when the commencement of a lease is dependent upon a contingency, which has occurred, the agreement can be enforced,[72] e.g. payment of half-yearly rent in advance from a particular date.[73] An agreement to pay a certain amount, after deductions as would be agreed upon between the parties is void for uncertainty.[74] It has also been held that an agreement to refer an arbitration to a person, who has been described in uncertain terms is void.[75]

An arbitration agreement to refer to the "sole arbitration' of *A/B* would indicate, and that because the word sole has been used, that the matter is to be referred to either *A* or to *B*. But as it does not indicate how the choice is to be made and who is to have the option the agreement is void for vagueness.[76]

But where the proprietor of an indigo factory mortgaged to *B* all the indigo cakes that might be manufactured by the factory from crops to be grown on lands of the factory from the date of the mortgage up to the date of payment of the mortgage debt, it was held that the terms of the mortgage were not vague, and that the mortgage was not void in law.[77] It has been suggested that an agreement is too uncertain to be enforced if no limit to the time for performance is expressed or can be inferred from the nature of the case. This does not appear acceptable as a general proposition.[78]

Contracts held to be vague and therefore void.—

A renewal clause in a lease

"on such terms and conditions as may be agreed to between the parties"

is uncertain and vague and does not form a valid contract for renewal of the lease.[79]

In *Rattayya's* case[80]

An agreement for felling trees of a forest and removing them contained a clause to the effect that the grantor reserved to himself the right to terminate the agreement for any reason which he considered to be sufficient or adequate

is not in conformity with s. 62 (C) of Easements Act and does not constitute defeasance of the grant. A manufacturer who had agreed to supply goods wrote to the buyer—

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the order of, a certain person, or to the bearer of the instrument." See Negotiable Instruments Act, 1881, s. 4.

67 *Carter* v. *The Agra Savings Bank* (1883) 5 Ali. 562.

68 *Ramasami* v. *Rajagopala* (1887) 11 Mad. 200.

69 *Bengal Agency & Stores Syndicate* v. *Khanna* (1945) 1 Cal. 87, 1949 A. Cal. 231. But if a reasonable price is to be fixed, there is no uncertainty: *Rajkishor* v. *Banabehari,* 1951 A. Or. 291; or if it is to be at the market rate: *Haji Ayub* v. *Devji Bhanji,* 1953 A. Sau. 91.

70 *Jai Gobind* v. *Bagal Lal,* 1950 A.P. 445.

71 *Giribala Dasi* v. *Kalidas Bhanja* (1920) 22 Bom. L.R. 1332, 57 I.C. 626, 1921 A.P.C. 71; *Central Bank Yeotmal Ltd.* v. *Vyankatesh* (1949) Nag. 106, 1949 A.N. 286; *Marshall* v. *Berridge* (1881) 18 Ch.D. 233, C.A.; *Khushi Ram* v. *Munshilal* (1940) A.L. 225.

72 *Sitlani* v. *Viroosing* (1947) 225 I.C. 264, 1947 A.S. 6.

73 *U.P. Government* v. *Nanhoo Mal* (1960) A.A. 420; *Sandil* v. *Franklin* (1875) 10 C.P. 377.

74 *Kalappa Devara* v. *Krishna Mitter* (1945) Mad. 521, 219 I.C. 231, 1945 A.M. 10. Distinguished in *East Asiatic Co.* v. *Rugnath,* 1953 A. Sau. 122.

75 *Governor-General in Council* v. *Simla Banking & Industrial Co. Ltd.,* 1947 A.L. 215, 226 I.C. 444.

76 *D.L.F. & Construction Co.* v. *Brij Mohan Shah,* 1956 A. Punj. 205.

77 *Baldeo Parshad* v. *Miller* (1904) 31 Cal. 667, 676-678.

78 See *Muhammad Jan* v. *Fazal-ud-din* (1924) 46 All. 514; 85 I.C. 482; 1924 A.A. 657 (opinions divided). See also *Rajammal* v. *Gopalaswami,* 1951 A.M. 767.

79 *Hitkarni Sabha Jabbalpur* v. *Corporation of Jabbalpur* (1961) A.M.P. 324; *Ramaswami* v. *Rajagopala,* 11 Mad. 200 folld.; *Mangalmurti* v. *State of Bombay,* 1959 A.SC. 639 dist.

80 *Rattayya* v. *Venkataramayya,* 1959 A. AP. 551.

"We cannot fulfil the orders placed by you in time ... please note that the delivery time of all your pending contracts with us shall be automatically understood as extended for the period the working is stopped and till the normal state of affairs recurs."

There were thus two conditions for extension of time and unless both of them were agreed to by the parties, there could be no extension of time within s. 63 of Contract Act. The two conditions even if accepted by the buyers were held to be so vague and uncertain that it was not possible to ascertain definitely the period for which the time for performance was intended to be extended. The agreement was therefore vague and uncertain and void under s. 29 of Contract Act.[81] Similarly a contract for sale of goods will be unenforceable where the contract is subject to "*force majeure* conditions",[82] or a contract for sale of woollen goods is subject to "war clause".[83]

An agreement to pay on a promissory note a specified interest or such higher rate of interest which the directors of the creditor association may from time to time decide is not contrary to s. 29. Contract Act.[84]

Where an intending vendor and intending purchaser entered into a binding contract for the sale of land with completion in phases, there is no general law under which a term could be implied that the power to select which part was to be included in each phase. It was not a mere matter of machinery which could readily be implied for, should the power be vested in the purchaser the vendor might be severely prejudiced thereby. It followed therefore that in the absence of any express term as to how the land to be included in each phase was to be selected, the contract was void for uncertainty.[85] An agreement to pay a certain sum of money when able to pay is void for uncertainty.[86] This case *Myam Ply Ltd.* v. *Teskera*[87] concerned a contract made in 1967 whereby the plaintiff purported to sell the defendants a hotel with its contents and licence and other appurtenances. The contract was repudiated by the defendants and the plaintiffs sued for damages being the loss sustained on resale. The defendants pleaded that the contract was void for uncertainty because one of the clauses of the deed of sale was vague. The relevant words of the clause were "The purchaser agrees to execute in favour of *Carlton & United Breweries Ltd* a registrable charge over the land the subject matter of this contract of sale in the form commonly employed by Carlton and United Breweries Limited." In the absence of production of such a document it was impossible to discover the real nature of the defendant's liability and the clause was uncertain and since it was an integral part of the contract, the contract was held to be void.

If the terms of an agreement are so vague or indefinable that it cannot be ascertained with reasonable certainty as to what is the intention of the parties there is no contract enforceable at law; e.g. the period for which the time for performance of the contract is intended to be extended.[88] But this severance can take place where the clause in question has been agreed but is meaningless and not where the clause is yet to be agreed.[89]

In arrangements between husband and wife, parents and child or uncle and nephew and other close relations—any arrangement in relation to an allowance, there is a presumption

81 *Keshava Lal* v. *Lalbhai Trikamlal Mills* (1958) A.SC. 512; *Nicolene Ltd.* v. *Simonds* (1953) 1 Q.B. 543, 552; (1953) 1 All E.R. 822; *G. Scammell and Nephew* v. *Ouston* (1941) A.C. 251; (1941) 1 All E.R. 14.

82 *British Electrical & Associated Industries Ltd.* v. *Patley Pressings Ltd.* (1953) 1 All E.R. 94; (1953) 1. W.L.R. 280.

83 *Bishop & Baxter* v. *Anglo-Eastern Trading Co. & Industrial Ltd.* (1944) K.B. 12; (1943) 2 All E.R. 598.

84 *Lohiah Chetty* v. *M.P.H.J.S. Nidhi* (1972) A.M. 407; *Fathuma Bivi* v. *Hanumantha Rao.* 17 Mad. L.J. 296.; *Gopal* v. *Achut Sadashiv* (1941) A.N. 271; *Raghunath Prasad* v. *Mangilal* (1960) A. Raj. 20 disting.

85 *Bushwall Properties Ltd.* v. *Vortex Properties Ltd.* (1976) 2 All E.R. 283; (1975) 2 All E.R. 214 reversed.

86 *Pushpabala Roy* v. *Government of India* (1978) A. Cal. 221, 223.

87 (1971) V.R. 725.

88 *Keshav Lal* v. *Lalbhai T. Mills Ltd.* (1959) S.C.R. 213, 223; (1958) A.SC. 512, 517; *Scammell & Nephew Ltd.* v. *Ouston* (1941) A.C. 251, (1941) 1 All E.R. 14; reld on. Halsbury's *Laws of England* (3rd Ed.), Vol. 8, p. 83; *Jones* v. *Padavatton* (1969) 1 W.L.R. 328; (1969) 2 All E.R. 616 (Oral family arrangement vague and uncertain showing absence of intention to contract).

89 *Nicolene Ltd.* v. *Simmonds* (1953) 1 Q.B. 543, 551; (1953) 1 All E.R. 822, 825 (C.A.).

against an intention of creating any legal relationship which is a presumption of fact, not of law. Human experience shows that in such circumstances man and woman do not intend to create legal rights and obligation but intend solely to rely on family ties of mutual trust and affection. But the presumption being one of fact can be rebutted.[90]

A contract of which there can be more than one meaning or which when construed can produce in its application more than one result is not void for uncertainty. So long as the language applied by the parties is

> "not so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention"

the contract is not void or uncertain or meaningless. In the search for that intention no narrow or pedantic approach is warranted particularly in the case of commercial arrangements. Thus will uncertainty of meaning as distinct from absence of meaning or of intention be resolved.[91]

In an agreement for supply of electricity in bulk cl. 5 provided "It is agreed that during the term of this agreement if the suppliers' costs shall vary in other respects than as has been hereinbefore provided the suppliers shall have the right to vary the maximum demand charge..."

The clause was held not to be void for uncertainty and the expression "suppliers' costs" was not meaningless however wide might be the area of possible disagreement as to its denotation in a particular case.[92]

A husband's promise to let his deserted wife stay in the matrimonial home was not binding because it was not intended to or understood by him to have contractual effect.[93] The promise was too vague, it did not state for how long or on what terms the wife could stay in the house.[94] But the case of a promise by an estranged husband will be binding.[95]

Where a property developer reached an understanding with a firm of Solicitors to employ them in connection with a proposed development but neither side entered into a definite commitment, it was held that there was no contract.[96]

A statement made on behalf of the Government in time of war that a neutral ship would be allowed to leave a British port if certain conditions were fulfilled was held not to amount to a contract.[97]

Agreements not vague.—The following agreements are not vague:

A contract of guarantee though oral is not vague if its terms are ascertainable with precision, e.g. by being mentioned in the plaint with precision.[98] A clause in the arbitration agreement referring the dispute to the Superintending Engineer is not vague merely because the reference is to the officer holding the office for the time being.[99] The term "approximating to" does not make a contract vague as it means rounding off, in the case of money, to a few pounds to a round figure.[1] An arbitration clause that all disputes shall be referred to arbitra-

90 *Jones* v. *Padavatton* (1969) 2 All E.R. 616 (Dankwerts L.J.) *Balfour* v. *Balfour* (1919) 2 K.B. 571. (Atkin L.J.)

91 *Upper Hunter County District Council* v. *Australian Chilling & Freezing Co. Ltd.* (1967-68) 41 A.L.-J.R. 348, 351 (Barwick, C.J.); *Hilas & Co. Ltd.* v. *Arcos Ltd.* (1932) 147 L.T. 503, 512; (1932) All E.R. Rep. 494 (per Lord Tomlin); *Scammell & Nephew Ltd.* v. *Ouston* (H.C. & J.G.) (1941) A.C. 241; (1941) 1 All E.R. 14 (per Lord Wright).

92 *Council of Upper Hunter County District* v. *Australian Chilling & Freezing Co. Ltd.* (1967-68) 41 A.L.J.R. 348; *Vardon* v. *The Commonwealth,* 67 C.L.R. 434; and *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth.* 71 C.L.R. 184; and *Cann's (Pty.) Ltd.* v. *The Commonwealth,* 71 C.L.R. 210 dist.

93 *Vaughan* v. *Vaughan* (1953) 1 Q.B. 762, 765, cf. *Booker* v. *Palmer* (1942) 2 All E.R. 674.

94 *Cf. Jones* v. *Padavatton* (1969) 2 All ER 616; 1969 1 W.L.R. 328; *Gould* v. *Gould* (1970) 1 Q.B. 275; (1969) 3 All E.R. 728.

95 *Merritt* v. *Merritt* (1970) 2 All E.R. 760 (C.A.) (husband's promise to pay £40) per month and transfer matrimonial house to the wife).

96 *J.H. Milner & Son* v. *Percy Bilton Ltd.* (1966) 1 W.L.R. 1582; (1966) 2 All E.R. 494.

97 *Rederiaktiebolaget Amphitrite* v. *R.* (1921) 3 K.B. 500.

98 *Suresh Narain Sinha* v. *Akhauri Balbhadra Prasad* (1957) A.P. 256.

99 *Daulat Ram* v. *Punjab State,* 1958 A. Punj. 19; *Basantlal* v. *Dominion of India* (1952) A. Cal. 340 folld.

1 *Edwards* v. *Skyways Ltd.* (1964) 1 W.L.R. 349, 357.

tion "in accordance with the rules of the Millowners' Association for the time being in force" is not vague and uncertain on the ground of want of mode of reference. The words "for the time being in force" had reference to the time when reference shall be made.[2] In a contract for reconveyance, it was provided that besides the purchase price, costs of execution and "other necessary and indispensable expenses" shall be deposited. This expression does not, it was held, make the contract void for uncertainty or render it incapable of performance.[3] But a condition in a letter of acceptance that it was subject to a "satisfactory mortgage" makes it vague and unenforceable[4]; but 22,000 Standards of soft wood of fair specification over the season are not.[5]

In *Talbot* v. *Talbot*[6] it was held that the provision in a will giving option to the beneficiaries under the will to purchase the farms in which they lived "at a reasonable valuation was enforceable", but the High Court of Australia in *Hall* v. *Busst*[7] held by majority the words "reasonable sum to cover depreciation as uncertain and therefore unenforceable". In *Milnes* v. *Gery*[8] it was said that the agreement to sell at a fair valuation is uncertain.

Where the representative of a firm of forwarding agents in course of a courtesy call assured a customer that containers in which the latter's goods were stowed would be carried under deck it was held to be enforceable promise. The Court held that it was necessary to look not merely at the words used in isolation but also the concerning circumstances to see what the bargain was which was struck between the parties.[9]

In *D. T. Mangalmurti* v. *State of Bombay* the renewal clause contained a provision "subject to such fair and equitable enforcement as the lessor shall determine". The clause was held not to be vague or uncertain. It does not oust the jurisdiction of the court and make the lessor's determination final and binding.[10]

A week after the sale deed, by *A* and his grandfather an agreement of reconveyance was executed in favour of four persons *A* and 3 others, a sister of *A* and *D* and *E* anyone of whom could pay the price mentioned in the sale deed and get the reconveyance executed. *A* then executed a deed of release in favour of *D* and *E* without affecting the rights of the others. In a suit for specific performance, the agreement was held not to be void for vagueness for any one of them or all of them could exercise the option of purchase, and the priorities would have to be determined *inter se* nor was there lack of mutuality.[11]

A commercial contract for the sale and purchase of African cotton is not void for vagueness or uncertainty by reasons of its containing a clause "subject to the usual *force majeure* clause" and it is not void on the ground that there was no *consensus ad idem* for non-specification of which *force majeure* clause the party had in mind. Such a clause is capable of being made certain and definite by proving that the parties in the trade or in dealing with the parties in British East Africa there was invariably included a *force majeure* clause of a particular kind.[12] The addition of the word 'usual' in a commercial contract refers to something invariably to be found in contracts of a particular type. Commercial documents are sometimes

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2 *Bhagwati Prosad* v. *Kamala Mills*, 1959 A. Cal. 687; *Ganpatrai Gupta* v. *Moody Bros. Ltd.*, 8 C.L.J. 136 not followed; *Basant Lal* v. *Dominion of India*, 1952 A. Cal. 340 appd.

3 *Dasarath Gayen* v. *Satyanarayan Ghosh*, 1963 A. Cal. 325 agreement of sale when not uncertain. *Smt. Sohbat Dei* v. *Devi Phal*, (1971) A.S.C. 2192. Fry. on *Specific Performance of Contracts*, p. 181, Art. 382.

4 *See Parker* v. *Izzat* (1972) 1 W.L.R 775.

5 *Nilas & Co.* v. *Arcos Ltd* (1932) All E.R. Rep. 494.

6 (1968) Ch. 1.

7 (1960) 104 C.L.R. 206; 34 A.L.J.R. 322.

8 (1807) 14 Ves. 400; 33 E.R. 574.

9 *J. Evans & Son (Portsmouth)* v. *Andrea Merzario* (1976) 1 W.L.R. 1078.

10 1959 A.SC. 639; *New Beerbhoom Coal Co.* v. *Boloram Mahata*, 7 I.A. 107; *Secretary of State* v. *Volkart Bros.*, 50 Mad. 595 refd. to. The minority view was that the lessor's valuation was final. See also *Gourlay* v. *Duke of Somerset*, 34 E.R. 576.

11 *Kanakasabhapathi* v. *Govindarajulu*, 1964 A.M. 219.

12 *Dhanrajamal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1035; (1961) A.SC. 1285, see also *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co.* (1944) K.B. 12 dist. (There the words were subject to war clauses and there was no evidence that the parties had any particular form in mind and there was no *consensus ad idem.)*

expressed in language which does not on its face bear a clear meaning. The effort of the courts is to give a meaning if possible.[13]

Where an agreement of sale as pleaded showed that (a) the price was fixed at Rs. 10,000/-, (b) the items of properties agreed to be sold were definite, (c) the plaintiff was put in possession in pursuance of the agreement of sale; (d) the entire sale price was to be paid by a fixed date, and (e) any amount already paid by the plaintiff was to be adjusted towards the sale price, and on receipt of this balance, a sale deed was to be executed, the agreement cannot be said to be vague or uncertain within s. 29. Contract Act. The mere fact that the plaintiff pleaded the sale of her property without indicating the dependence of payment of the price on that sale does not make the contract vague or uncertain.[14]

By a contract the plaintiff agreed to buy land from the defendant. The price was to be paid in phased instalments and proportionate area of land was to be released to the plaintiff. The defendant in breach of contract sold the land to *M* who offered to sell it to the plaintiff on payment of the whole price which the plaintiff paid. He brought an action for damages and interest on damages. The defendant pleaded the contract to be void for uncertainty. It was held that the contract was not void for uncertainty and the plaintiff was entitled to damages.[15] The expression "proportionate part of the land" referred to the sum to be paid for it i.e. to the relevant instalment of the purchase price and the plaintiff was to select the area of land to be included. Further the damages were to be calculated by reference to the interest which the plaintiff had had to pay as interest. The sum claimed was not in any relevant sense interest. It is submitted that although the quantum was calculated in accordance with a statute in that case, the amount in equity will be the same. But this decision was reversed on appeal.[16]

Agreements by way of wager void.

30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected.

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

Wagering contracts.—This section represents the whole law of wagering contracts now in force in India, supplemented in Bombay State by the Act for Avoiding Wagers (Amendment) Act, 1865. It amended the Act for Avoiding Wagers, 1848. That Act was based principally on the English Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, and was repealed by the Contract Act (see the schedule to the Act). Before the Act of 1848 the law relating to wagers in force in British India was the Common Law of England. By that law an action might be maintained on a wager, if it was not against the interest or feelings of third persons, did not lead to indecent evidence, and was not contrary to public policy.[17] The nature of gambling is inherently vicious

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13 *Dhanrajamal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020, 1035; (1961) A.SC. 1285; *Hillas & Co.* v. *Acros Ltd.* (1932) All E.R. 494 (H.L.); *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* (1959) A.C. 133, 158; (1958) 1 All E.R. 725, 733.

14 *Smt. Sobhat Dei* v. *Devi Phal* (1971) A.SC. 2192, 2196. See also under section 6, Specific Relief Act, post.

15 *Bushwell Properties Ltd.* v. *Vortex Properties Ltd.* (1975) 2 All E.R. 214, 223, 225.

16 *Bushwell Properties Ltd.* v. *Vortex Properties Ltd;* (1976) 2 All E.R. 283.

17 *Ramloll Thackoorseydass* v. *Soojunmull Dhondmull* (1848) 4 M.I.A. 339; *Doolubdas Pettamberdass* v. *Ramloll Thackoorseydass* (1850) 5 M.I.A. 109; *Rughoonauth* v. *Manickchund* (1856) 6 M.I.A. 251; *Gherulal* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.SC. 781.

and pernicious.[18] The Hindu Law relating to gambling has not been introduced into the law of contract in India.[19] Gambling is not trade and commerce but *res extra commercium* and therefore is not protected within Art. 19 (1) or Art 301.[20] Gambling activities which have been condemned in India from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and Australia.[21] Prize competitions or crossword puzzles are of a gambling nature and were held subject to regulatory and taxing provisions of Bombay Lotteries & Prize Competition Control & Tax Act.[22]

There is no technical objection to the validity of a wagering contract. It is an agreement by mutual promises, each of them conditional on the happening or not happening of an unknown event. So far as that goes, promises of this form will support each other as well as any other reciprocal promises. It would have been better if the Courts in England had refused, on broad grounds of public policy, to admit actions on wagers; but this did not occur to the Judges until such actions had become common; and, until a remedy was provided by statute, they could only find reasons of special public policy in special cases, which they did with almost ludicrous ingenuity.[23] The expression "forward contract" as defined in the Punjab Forward Contract Tax Act (VII of 1951) does not fall within the term "wagering contract" and therefore that piece of legislation does not fall within Entry 62 of List II of the State List or Entry 7 of the Concurrent List and is unconstitutional.[24]

Gaming Debt.—A customer laid bets at one of the plaintiffs betting shops and he lost a sum of £1000/- and did not pay. The owner sued the manager of the shop for damages but failed. It was held that a sum of money won on a wager could not be recovered and no action was maintainable. Besides they could not recover damages as they had suffered no loss.[25]

What is a wager?—A wager has been defined as a contract by *A* to pay money to *B* on the happening of a given event, in consideration of *B* paying (this should be "promising to pay") to him money on the event not happening.[26] But Sir William Anson's definition,

> "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event," is nearer and more accurate. To constitute a wager "the parties must contemplate the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee": Anson, *Law of Contract*, 17th ed., 221, 222. There must therefore be two parties, or two sides, and mutual chances of gain and loss.[27] "But if one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager."[28] "It is of the essence of a wager that each side should stand to win or loss according to the uncertain or unascertained event in reference to which the chance or risk is taken."[29]

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18 *State of Bombay* v. *Chamarbaughwala R.M.D.* (1957) A.S.C. 699, 721; (1957) S.C.R. 874.

19 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 443; (1959) A.SC. 781. (Mulla's *Hindu Law*, para 3, p. 2.)

20 *Chamarbaughwala R.M.D.* v. *Union of India* (1957) A.S.C. 628, 631; 1957 S.C.R. 930; *State of Bombay* v. *Chamarbaughwala* (1957) A.S.C. 699, 720; (1957) S.C.R. 874.

21 *State of Bombay* v. *Chamarbaughwala R.M.D.* (1957) A.S.C. 699, 720.

22 *State of Bombay* v. *Chamarbaughwala R.M.D.* (1957) A.S.C. 699, 721.

23 Pollock, *Contract*, 13th ed., 292, and see for the history of English legislation, Anson, 20th ed., 210 *sqq*.

24 *The Bullion & Grain Exchange Ltd.* v. *State of Punjab* (1961) 1 S.C.R. 943; (1961) A.S.C. 268.

25 *A.R. Dennis & Co.* v. *Campbell* (1978) 1 All ER 1215, (1977) 1 All ER 158 revd.; *Thomas Cheshire & Co.* v. *Vaughan Bros & Co* (1920) 2 KB 240 applied.

26 *Hampden* v. *Walsh* (1876) 1 Q.B.D. 189, 192. See also per Lord Brampton in *Carlill* v. *Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, 490.

27 Anson's *Law of Contract*, 22nd Ed., p. 301 24th Ed p 322; Cheshire and Fifoot, *Law of Contract*, 6th Edn., p. 262; 9th Edn pp. 295-299.

28 Per Birdwood J. in *Dayabhai Tribhovandas* v. *Lakshmichand Panachand* (1885) 9 Bom. 358, 363 (after citing the passage from Sir W. Anson as it stood in an earlier edition).

29 Per Jenkins C.J. in *Sassoon* v. *Tokersey* (1904) 28 Bom. 616, at p. 621. Definition in See *Carlill* v. *Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, 490 definition approved in *Weddle, Beck & Co.* v. *Hackett* (1929) 1 K.B. 321, 329 and in *Ellesmere* v. *Wallace* (1929) 2 Ch. 1, 24; cf. *Tote Investors Ltd.* v. *Smoker* (1968) 1 Q.B. 509, 516, 518.

In *Gherulal Parakh* v. *Mahadeodas,*[30] the Supreme Court quoted with approval the principles applicable to wager as given in Anson's *Law of Contract:*

"Wagers being only void, no taint of illegality attached to a transaction, whereby one man employed another to make bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case."

A contract which is 'void' and unenforceable is not "forbidden by law" within section 23. What is "void" cannot be equated with what is "forbidden by law".[31]

In *Alamia* v. *Positive Government Security Life Assurance Co.,*[32]a case of life insurance, Fulton J. said:

"What is the meaning of the phrase 'agreements by way of wager' in s. 30 of the Contract Act?... Can it be that the words mean something different in India from what the corresponding words 'agreements by way of wagering' mean in England? I do not see how such an argument can be maintained, or how the fact that 14 Geo. III. c. 48 is not in force in India affects the question. In *Hampden* v. *Walsh*[33] Cockburn C.J. defined a wager as a contract by *A* to pay money to *B* on the happening of a given event in consideration of *B* paying money to him on the event not happening, and said that since the passing of 8 & 9 Vict. c. 109 there is no longer as regards action any distinction between one class of wager and another, all wagers being made null and void at law by the statute. In *Thacker* v. *Hardy,*[34] Cotton L.J. said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough, including the majority of forward purchases and sales.[35]

"A certain class of agreements such as bets, by common consent, come within the expression 'agreements by wagers'. Others, such as legitimate forms of life insurance, do not, though, looked at from one point of view, they appear to come within the definition of wagers. The distinction is doubtless rather subtle, and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that when a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India."[36]

There is no wager unless both parties run the risk of loss and both parties have a chance of gain. Where two wrestlers therefore agreed to a contest with a stipulation that the wrestler who failed to appear should forfeit Rs. 500 and that the winner, if the contest took place, should receive a fixed sum out of the gate-money, in a suit to recover the Rs. 500 the defence of gaming and wagering failed.[37]

"By way of wager."—There is no distinction between the expression "gaming and wagering," used in the English Act and the Act for Avoiding Wagers, 1848, and the expression "by way of wager," used in this section.[38] The cases,[39] therefore bearing on the expression used in those Acts are still useful in construing the expression "by way of wager," used in the present section.

Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of differences[40] in stock transactions, with or without colourable provisions for the completion of purchases. Such provisions, if inserted, will not prevent the Court from examining the real nature of the agreement as a whole.[41] "In order to constitute a wagering contract neither party should intend to perform

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30 (1959) Supp. 2 S.C.R. 406, 416-417; (1959) A.S.C. 781.
31 *Ibid,* 415, 421; 792 (A.I.R.). See the High Court judgment (1958) A. Cal. 703, 707 (Wagering contract is not opposed to public policy or immoral or unlawful).
32 (1898) 23 Bom. 191, at pp. 209-10.
33 (1875) 1 Q.B.D. 189.
34 (1878) 4 Q.B.D. 685, 695; *Ismail Lebbe* v. *Bartleet & Co.* (1942) 199. I.C. 574; 1942 A.P.C. 19.
35 See notes below, "Speculative transactions".
36 See *Trimble* v. *Hill* (1879) 5 App. Ca. 342; and *Kathama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 186.
37 *Babasaheb Rahimsaheb* v. *Rajaram,* 1931 A.B. 264; 133 I.C. 254; 33 Bom. L.R. 260.
38 *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (1901) 28 I.A. 239; 29 Cal. 461.
39 See especially *The Universal Stock Exchange Ltd.* v. *Strachan* (1896) A.C. 166, and *In re Gieve* (1899) 1 Q.B. 794, both decided under the English Act of 1845.
40 *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1889) 24 Bom. 227, 229.
41 *Re Gieve* (1899) 1 Q.B. 794, C.A.

the contract itself, but only to pay the differences" [42] Though in form an agreement for sale purports to contemplate delivery of goods and payment of price therefor yet both parties may contemplate merely the payment and receipt of differences according to variation of prices in the market. Such a transaction is not a commercial transaction but a wager, which will be inferable by a consideration of all the surrounding circumstances.[43] It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. "Contracts are not wagering contracts unless it be the intention of *both* contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other".[44] It is not necessary that such intention should be expressed.

"If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market."

This was laid down by the Privy Council in *Kong Yee Lone & Co.* v. *Lowjee Namjee*[45] on appeal from the Court of the Recorder of Rangoon.

The plaintiff in that case was a rice trader; the defendants were rice millers, having a small mill capable of putting out 30,000 bags in a month. During seven weeks in June, July, and August, 1899, the defendants entered into several contracts with the plaintiff for the sale to him of 199,000 bags of rice at various prices, aggregating upwards of five crores of rupees, and the latest delivery was to be on 7th October, 1899. The rice was to be delivered from amongst a number of specified mills, in which the defendants' mill was not included. In the same year, by fourteen contracts, ranging in time from January to the end of August, the defendants sold to the plaintiff 22,250 bags of rice, to be delivered from the defendants' mill. The latter contracts were all duly fulfilled by delivery and payment. None of the former contracts were performed and the defendants passed to the plaintiff a promissory note for "difference on rice."

In a suit upon the note it was held by the Recorder of Rangoon that there was no common intention to wager and that the plaintiff was entitled to succeed. The judgment was reversed by the Privy Council on appeal, on the ground that the consideration for the note was a number of wagering contracts within the meaning of the present section. Their Lordships observed:

"Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they (defendants) had dealings with other persons besides the plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundredfold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact, they never completed, nor were they called on to complete, any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared, the one class suitable to traders, such as the defendants, and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment, the rational inference is strengthened into a moral certainty."

Similarly in *Doshi Talakshi* v. *Shah Ujamsi Velsi*[46]

certain contracts were entered into in Dholera for the sale and purchase of Broach cotton, a commodity which, it was admitted, never found its way either by production or delivery to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton mer-

42 *Perosha* v. *Manekji* (1898) 22 Bom. 899, 903; *The Universal Stock Exchange* v. *Strachan* (1896) A.C. 166; *Eshoor Doss* v. *Venkatasubba Rau* (1895) 18 Mad. 306; *Sukhderdoss* v. *Govindoss* (1928) 55 I.A. 32; 107 I.C. 29; 1928 A.P.C. 30, a case of *patta patti* transactions in Madras; *Chimanlal Purshottamdas* v. *Nyamatrai,* 1938 A.B. 44; 39 Bom. L.R. 1083; 173 I.C. 205; *Ram Krishna Das* v. *Mutsaddi Lal* (1942) All. L.J. 131; 1942 A.A. 170; *Khimii Punja & Co.* v. *Devshi Bhanji.* 1950 A. Kutch 24; *Narayanan* v. *Alleppey Chamber of Commerce,* 1952 A.T.C. 435; *Sheo Narain* v. *Bhallar* 1950 A.A. 352; *Ebrahim* v. *Austin,* 1946 A.P.C. 63, 224 I.C. 466; *Bullion & Grain Exchange Ltd.* v. *State of Punjab* (1961) 1 S.C.R. 668, 671; (1961) A.SC. 268; *F Buddulal* v. *F. Srikishan* (1961) A.M.P. 57; *Jethmal Madanlal* v. *Nevatia & Co.* (1962) A.AP. 350; *Sukhram* v. *Baldeodas* (1957) A.MP. 138 (onus on party pleading contract is a wagering contract; *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 415; (1959) A.SC. 781, 784.

43 *The Bullion & Grain Exchange Ltd.* v. *State of the Punjab* (1961) 1 S.C.R. 668; (1961) A.SC. 268; *F. Buddulal* v. *F. Shrikisan* (1961) A.MP. 57.

44 *J.H. Tod* v. *Lakhmidas* (1892) 16 Bom. 441, 445, 446; *Ajudhia Prasad* v. *Lalman* (1902) 25 All. 38; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616; *Motilal* v. *Govindram* (1905) 30 Bom. 83; *Hurmukhrai* v. *Narotamdas* (1907) 9 Bom. L.R. 125; *Kesarichand* v. *Merwanjee* (1899) 1 Bom. L.R. 263; *Meghji* v. *Jadhowji* (1910) 12 Bom; L.R. 1072. Therefore a contract cannot be made a wager by matter subsequent; *Rangasa* v. *Hukumchand* (1929) 120 I.C. 406.

45 (1901) 28 I.A. 239, at p. 244; 29 Cal. 461, 467.

46 (1899) 24 Bom. 227.

chants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The course of dealings was, however, such that none of the contracts was ever completed except by payment of differences between the contract price and the market price in Bombay on the *vaida* (settlement) day.

It was held upon these facts that the contracts were by way of wager within the meaning of this section. Jenkins C.J. said:

"Here in each case the contract was made at Dholera, between men of Dholera, and under the rules of Dholera, and from the evidence we know that the witnesess who have been called have not been able to indicate with certainty or even to suggest, with one doubtful exception, a single instance since the formulation of those rules in 1892 in which any one of the numerous contracts similar to that with which we are now dealing has been completed otherwise than by payment of differences. Is it an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without any intention of performing them otherwise than they have consistently and without exception been performed, that is to say, by payment of differences? In my opinion that is the reasonable and natural inference to be drawn; it agrees with the experience of the past; and it represents the actual results in the particular instances we are now considering."[47]

On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This infrequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contact with each other, nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed. Under circumstances such as these, when a party launches his contract orders he does not know with whom the contracts would be made.[48] And this presumption is considerably strengthened when the broker is authorised by the principal to contract with third persons in his (the broker's) own name; for the third person may in such case remain undisclosed even after the contract is made.[49] The fact that in the past transactions no delivery was given or taken cannot alone be sufficient to presume the wagering nature of a later transaction.[50] But the presumption may be rebutted by evidence of a common intention to wager, though the contract has been brought about by a broker. Thus in *Eshoor Doss* v. *Venkatasubba Rau*[51]:

the same broker had acted for both the plaintiff and the defendant, and it was found that, though the parties were not brought into contact at the time defendant contracted to sell Government paper to the plaintiff, *each* had made inquiry beforehand of the broker, not whether the other would be able to deliver Government paper, but whether he would be able to pay differences.

and this circumstance, along with other circumstances, was deemed sufficient to establish that the intention on either side was to pay differences only. The presumption against a wager was applied in a case where the transactions were in Government paper to the extent of about half a crore of rupees, and the plaintiff was both stockbroker and stockjobber, and the defendant was a stockjobber. The magnitude of the transactions in the case was set up by the defendant to support the contention that the transactions were by way of wager, and reliance was placed on the Privy Council decision in *Kong Yee Lone's case,*[52] already cited above. But the contention was overruled and the Court said:

"In the Privy Council case the defendant was a rice miller or a producer by trade, and the wager related to quantities of rice enormously out of proportion to his output and capital, deliverable at option from a number of specified mills. Here there is, I think, sufficient proof that the defendant was known in the market as the largest of jobbers,[53] and the capital available for the purchases which he bargained for was

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47 Cf. *Bashi Ram* v. *Ram Sahai,* 1934 A.L. 85; 154 I.C. 384; *Chimanlal Purshottamdas* v. *Nyamatrai,* 1938, A.B. 44; 39 Bom. L.R. 1083, 173 I.C. 205.
48 *J.H. Tod* v. *Lakhmidas* (1892) 16 Bom. 441, 446.
49 *Perosha* v. *Manekji* (1898) 22 Bom. 899; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616.
50 *Sukhram* v. *Baldeodas,* 1957 A.MP. 138.
51 (1895) 18 Mad. 306.
52 (1901) 28 I.A. 239; 29 Cal. 461.
53 The evidence showed that seven lacs would be a small day's turnover for a big jobber in an active market.

at least presumably to be supplied by the constituents for whom a jobber is ordinarily supposed to be acting."[54]

Exception has been taken to the words "under no circumstances" which occur in the following passage in the judgment of Farran J. in the case of *J.H. Tod* v. *Lakhmidas,*[55] referred to above: "Contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts *under no circumstances* to call for or give delivery from or to each other."

On this Bachelor J. observed in *Motilal* v. *Govindram:*[56]

"It may perhaps be doubted whether the phrase 'under no circumstances' which does not appear to have been prominently brought before the Court of Appeal in *Doshi Talakshi's* case,[57] is not rather an overstatement of the requirements of the law; and upon this point I would refer to the decision in *In re Gieve.*"[58]

And Davar J. said in *Hurmukhrai* v. *Narotamdass*[59]:

"I have no hesitation in saying that the expression 'under no circumstances' is much too wide, and if the words of Mr. Justice Farran were to be taken too literally, their effect would be to render the provisions of s. 30 of the Contract Act more or less nugatory."

On the other hand, Beaman J. said in a later case,

"I think that the dictum of Farran J., subjected to rigorous analysis, will be found to be perfectly correct. I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gieve*[60] was, to be a wagering contract, the Court must be satisfied that the intention of the parties was in no circumstances either to give or take delivery."[61]

In *In re Gieve,* referred to above, the contract in terms gave the buyer an option to demand delivery upon the payment of a small excess commission. It was argued that even if the contracts were for the payment of differences only, the power in either party to turn them into real contracts by insisting upon delivery prevented them from being wagering contracts, but the Court of Appeal disallowed the contention. Lindley M. R. said: "It is a gaming transaction plus something else." The case must be distinguished from that of a forward contract for the sale of goods, with the condition that if the seller fails to give the delivery order in time the contracts shall be settled by *payment of the difference* between the contract rate and the market rate prevailing on the due date. In such a case, if the seller forwards the delivery order in time to the buyer, no question arises as to payment of differences, and the contract, it has been held, is not a wagering contract. As observed by Scott C.J., "There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager, *if that event does not arise.* Such a result would be inconsistent with the principle underlying s. 57 of the Indian Contract Act".[62] But what if the seller fails to send the delivery order in time, in which case the contract is to be settled by payment of difference? The point arose in *Champsey* v. *Gill & Co.,*[63] where it was held that in such a case the agreement was by way of wager. That was a case of a forward contract for the sale of cotton with the condition that "if before the maturity of the contract either party thereto shall suspend payment or become bankrupt or insolvent, the other party ... shall be bound to forthwith close the contract, and

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54 *Dady* v. *Madhuram* (1903) 5 Bom. L.R. 768; *Babasaheb Rahimsaheb* v. *Rajaram,* 1931 A.B. 264; 133 I.C. 254; 33 Bom. L.R. 260.
55 (1892) 16 Bom. 441, 445.
56 (1906) 30 Bom. 83, at p. 90.
57 (1899) 24 Bom. 227.
58 (1899) 1 Q.B. 794, C.A.
59 (1907) 9 Bom. L.R. 125, at pp. 136, 137.
60 (1899) 1 Q.B. 794.
61 *Mathuradas* v. *Narbadashankar* (1909) 11 Bom. L.R. 997, at p. 1004.
62 *Narbadashankar* v. *Mathuradas* (1910) 12 Bom.L.R. 1058, in appeal from *Mathuradas* v. *Narbadashankar, supra.*
63 (1905) 7 Bom. L.R. 805, in appeal from 7 Bom. L.R. 154.

when the contract is thus closed, the measure of damages shall be the difference between the market price current at the time of closing for similar goods for delivery at the time named in the contract so closed and the rate named in the contract ... the damages ascertained as aforesaid shall become at once payable to or by the party closing the contract." The seller suspended payment before the due date, and subsequently sued the buyer to recover the difference. Tyabji J. held that the contract was not a wager. In appeal it was held that the contract was a wager.[64]

Teji mandi transactions.—*Teji mandi* contracts were thus described in *Pirthi Singh-Jamiat Rai* v. *Matu Ram*[65]:

"It would appear that what happens in a contract of this nature is that one party pays a premium to the other party thus acquiring an option to buy and sell, as he decides, a certain quantity of gold at a certain rate on a certain date. Either on, or some date prior to, that date the purchaser decides whether he will buy or sell. According to his decision; communicated to his broker, the broker enters into a contract with some third person in order to meet the situation. On the due date the parties can either take or give delivery of the stipulated quantity of gold or settle on the difference."

In a Bombay case Beaman J. held that these transactions were by way of wager, and they were void under this section,[66] and adhered to this view in a later case.[67] But at the present time the presumption is that a *teji mandi* is not a mere wagering transaction;[68] and this, it is submitted, is the correct rule. *Nazarana or Gali* transactions in Ujjain are similar to *teji mandi* contracts of the Bombay market and by themselves are not necessarily wagering contracts.[69]

Agreements between Pakka Adatia and his constituents.—It was at one time held in some Bombay cases that a *Pakka adatia* was merely the agent of his constituent, and that therefore no transaction between them could be a wagering transaction. In *Bhagwandas* v. *Kanji,*[70] however, it was held on the evidence of custom that as regards his constituent the *pakka adatia* was a principal and not a disinterested middleman bringing two principals together. Since that decision it has been held by the High Court of Bombay in two cases that a transaction between a *pakka adatia* and his constituent may be by way of wager like any other transaction between two contracting parties, and that the existence of the *pakki adat* relationship does not of itself negative the possibility of a contract being a wagering contract as between them.[71] One of those cases was taken to the Privy Council, and though the decree of the High Court of Bombay was reversed, the Privy Council taking a different view of the facts, the principle laid down by the Bombay High Court was affirmed by that tribunal.[72] The same view has been taken by the High Court of Allahabad,[73] and the East Punjab High Court,[74] and Madhya

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64 *Hira Lal Umrao Singh* v. *Sri Ram-Brij Mohan Lal* (1925) 86 I.C. 656; 1925 A.A. 102 is merely on the question of fact whether the plaintiff was principal or agent.

65 (1932) 13 Lah. 766, at p. 771; 138 I.C. 241; 1932 A.L. 356. A *teji mandi* transaction need not of course relate only to gold. *Sukhram* v. *Baldeodas* (1957) A.M.P. 138.

66 *Ramchandra* v. *Gangabison* (1910) 12 Bom. L.R. 590.

67 *Jesiram* v. *Tulsidas* (1913) 37 Bom. 264, at p. 272.

68 *Narandas S. Rathi* v. *Ghanshyamdas,* 1933 A.B. 348; 35 Bom. L.R. 640; 147 I.C. 412; *Lakshmi Narain* v. *Bala Parshad,* 1938 A.L. 825; *Baldeosahai Surajmal & Co.* v. *Radhakishan,* 1939 A.B. 225; 41 Bom. L.R. 308; 183 I.C. 22; *Hasanali* v. *Ratilal,* 1953 A. Sau. 141, 142-3. Earlier cases are: *Manilal Dharamsi* v. *Allibhai Chagla* (1922) 47 Bom. 263; 68 I.C. 481; 1922 A.B. 408; *Manubhai* v. *Keshavji,* 1922 A.B. 66; 24 Bom. L.R. 60; 65 I.C..682; *Sobhagmal Gianmal* v. *Mukundchand Balia* (1926) 53 I.A. 141, 51 Bom. 1; *Ram Prasad* v. *Ranji Lal* (1927) 50 All. 115; 103 I.C. 218; 1927 A.A. 795.

69 *Sukhram* v. *Baldeodas,* 1957 A.M.P. 138; *Suganchand* v. *Fulchand,* 1957 A.M.P. 194.

70 (1905) 30 Bom. 205.

71 *Burjorji* v. *Bhagwandas* (1914) 38 Bom. 204; 20 I.C. 834; *Chhogmal* v. *Jainarayan* (1915) 39 Bom. 1; 24 I.C. 743; *Sagarmal* v. *Bishambar Sahai,* 1947 A.A. 14, 230 I.C. 23.

72 *Bhagwandas* v. *Burjorji* (1918) 45 I.A. 29; 42 Bom. 373; 44 I.C. 284, applied in *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons* (1975) A.SC. 1223, 1233 (1975) 3 SCR 1. See also *Manilal Raghunath* v. *Radha Kisson Ramjiwan* (1921) 45 Bom. 386; 62 I.C. 361; and *Harcharan Das* v. *Jai Jai Ram* (1940) All. 136; 188 I.C. 29; 1940 A.A. 182; *Ram Gopal* v. *Uggersain* (1942) Kar. 38; 1942 A.S. 115; 201 I.C. 513; *Dhruv Chhotalal* v. *Gulabray Pragji,* 1954 A. Sau. 99, 102.

73 *Ram Krishna Das* v. *Mutsaddi Lal* (1942) All. L.J. 131; 1942 A.A. 170; *Shanti Lal* v. *Madan Lal,* 1954 A.A. 789.

74 *Ram Dev Jai Dev* v. *Seth Kaku,* 1950 A.E.P. 92 (F.B.).

Pradesh High Court.[75] The rule as to wagering contracts can apply to contracts between a *pucca adatia* and his constituents.[76] In a case decided by the Supreme Court the facts were these: The defendant appointed the plaintiffs as his commission agents to do business according to custom of '*badla*' of the Bombay market. He also authorised the plaintiff to do business through sub-agents on commission basis. Both parties knew that their object was to indulge in speculative transactions. It was held that there was no wagering contract between the plaintiffs and the defendant. In a wagering contract there has to be mutuality in the sense that the gain of one party would be the loss of the other on the happening of a certain event which is the subject matter of a wager.[77] The following was quoted with approval from the judgment of the Privy Council in *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji*.[78]

> "Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. No such intention has been proved."

On this basis it was further held that the contract between the plaintiff and the defendants was not a wagering contract.

Agreements collateral to wagering contracts.—Thus far our observations are confined to suits between the principal parties to a contract. Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of transactions entered into by him as such, or for indemnity for losses[79] incurred by him in such transactions, on behalf of his principal. Section 30 of the Contract Act is based upon the provisions of section 18 of the Gaming Act, 1845, and though a wager is void and unenforceable it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under section 23 of the Contract Act.[80] But it is otherwise under the Gaming Act, s. 18 of that Act being wider and more comprehensive in phraseology.[81]

Apart from a Bombay enactment to be presently noticed, there is no statute which declares agreements collateral to wagering contracts to be void.[82] Nor is there anything in the present section[83] to render such agreements void. The policy of Law in India has been to sustain the legality of wagers and not to hit at collateral contracts.[84] It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage,[85] commission,[85] or the losses sustained by him, even though contracts in respect of which the claim is made are contracts by way of wager.[86]

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75 *Baddulal* v. *Srikissan* (1961) A.M.P. 57 dealing in shares; *Shuganchand* v. *Fulchand* (1957) A.MP. 194.

76 *Jethmal Madanlal* v. *Nevatia & Co.* (1962) A.AP. 350.

77 *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons etc.* (1975) A.S.C. 1223, 1227; (1975) 3 SCR 1.

78 (1918) I.A. 29, 33; (1917) A.PC. 101, 106 applied.

79 See s. 222 below, which provides that the principal is bound to indemnify the agent against the consequences of all *lawful* acts. Since a wagering contract is void, and not unlawful, the principal, when sued, cannot be discharged from liability on the ground that the loss on betting paid by his agent was the consequence of an *unlawful* act: *Telu Mal* v. *Subha Singh* (1880) Punj. Rec. No. 90; *Ragnath Sahal* v. *Mam Raj* (1895) Punj. Rec. No. 80. See also *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 416-7; (1959) A.SC. 781.

80 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; 1959 A.SC. 781, folld in.

81 *Ibid*, S.C.R. p. 432; A.SC. p. 792.

82 An arbitration clause in a wagering contract is a part of the contract and not collateral to it and cannot therefore be enforced: *Karunakumar* v. *Lankaran* (1933) 60 Cal. 856; 1933 A. Cal. 759, where the authorities are reviewed by Ameer Ali J.

83 The expression "void" in the section does not mean unlawful: *Pringle* v. *Jafer Khan* (1883) 5 All. 443, 445; *Shibhomal* v. *Lachman Das* (1901) 23 All. 165, 166, *Juggernauth Sew Bux* v. *Ram Dayal* (1883) 9 Cal. 791, 796.

84 Per Subba Rao J. in *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 442; (1959) A.S.C. 781, 795.

85 *Hagami Lal Ram Parshad* v. *Bhuralal Ram Narain* (1961) A. Raj. 52 following *Sobhagmal* (1926) A.PC. 119; 53 I.A. 241; 51 Bom. 1.

86 *Shibho Mal* v. *Lachman Das* (1901) 23 All. 165; *Jagat Narain* v. *Sri Kishan Das* (1910) 33 All. 219; *Bisheshar Dayal* v. *Jwala Prasad* (1914) 35 All. 426; *Bidshi Chand* v. *Kacchhu Mal* (1923) 45 All. 503; *Daya Ram* v. *Murli Dhar* (1927) 49 All. 926; 102 I.C. 605; 25 All. L.J. 693; *Chekka* v. *Gajjila* (1904) 14 Mad. L.J. 326; *Ragnath Sahal* v. *Mam Raj* (1895) Punj. Rec. No. 80; *Telu Mal* v. *Subha Singh* (1880) Punj. Rec. No. 90; *Bankey Lal* v. *Bhagirath Mal*, 1940 A.A. 95; (1939) All. L.J. 1073; 186 I.C. 511; *Bhagwandas* v. *Deochand*, 1951 A.N. 392, 394. Much more can the principal recover from the

A principal entered into several forward contracts for the purchase and sale of bullion through his agent at Indore. These contracts resulted in a loss which the agent had, on behalf of the principal, to pay to third parties. The agent sued the principal for the amount paid. The defence *inter alia* was illegality due to prohibition of forward contracts under the Marwar Law applicable to Jodhpur where the profits, if any, were payable and where the suit was filed.

The Supreme Court held that all the transactions took place outside Marwar and the payments by the agent were lawful.[87] In *Suganchand* v. *Fulchand*[88] it was held that the contracts in gold made in the Indore Market are not wagering contracts. It does not follow because a wagering contract is void that contracts collateral to it cannot be enforced. "The fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter, but on behalf of the former (the principal) amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions"[89] and if such payment is made, the agent is entitled to recover the amount from him. Conversely, an agent who has received money on account of a wagering contract is bound to restore the same to his principal.[90] A deposit made by one gambler with another, as security for the observance of the terms of a wagering agreement, can be recovered, unless the amount has in fact been appropriated for the purpose for which it has been deposited.[91] On the same principle a suit will lie to recover a sum of money paid by the plaintiff for the defendant and at his request, though such sum represents the defendant's loss on a bet.[92] Similarly money lent for gaming purposes,[93] or to enable the defendant to pay off a gambling debt[94] is recoverable. Such transactions are neither against the provisions of the present section nor of s. 23.[95] The law is, however, different in the State of Bombay. In that State, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of the Act for Avoiding Wagers (Amendment) Act, 1865 (Bom. Act III of 1865).[96] "That Act was passed to supply the defect which *Joravermal Sivlal* v. *Dadabhai Beramji*[97] and other similar cases disclosed in the Act for Avoiding Wagers, 1848 (XXI of 1848) (which excluded suits on wagering transactions), and to close the doors of the Courts of Justice in the Presidency to suits upon contracts collateral to wagering transactions where such collateral contracts have been entered into or have arisen since the Act came into force, a purpose which it has effectually answered".[98] Ss. 1 and 2 of the Act run as follows:—

Sec. 1: "All contracts, whether by speaking, writing or otherwise knowingly made to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all con-

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agent money deposited with him as security: *Hardeo Das* v. *Ram Prasad* (1926) 49 All. 438; 100 I.C. 774; 1927 A.A. 238; *Pringle* v. *Jafar Khan*, 5 All 443; *Kishanlal* v. *Bhanwar Lal* (1955) 1 S.C.R. 439, 447; (1954) A.SC. 500 (Losses on Bullion transactions at Indore; defence of prohibition at Jodhpur, where profits, if any, were payable, was held not applicable).

87 *Kishan Lal* v. *Bhanwar Lal* (1955) 1 S.C.R. 439, 447; (1954) A.SC. 500.

88 *Suganchand* v. *Fulchand*, 1957 A.MP. 194.

89 *Parakh Govardhanbai Haribhai* v. *Ransordas Dulabhdas* (1875) 12 B.H.C. 51, 57. This case, though decided in 1875, was not decided under the Bombay Act for Avoiding Wagers (Amendment) Act, 1865, as the agreement sued upon was entered into before that Act came into operation. The agent's right to recover is, of course, limited to payments actually made and enforceable liabilities incurred, see *Mutsaddi Lal Sewa Ram* v. *Bhagirth* (1929) 115 I.C. 424; 10 Lah. L.J. 522; A.I.R. 1929 Lah. 375; *Bhagwandas* v. *Deochand*, 1951 A.N. 392, 394, and note on s. 222, below.

90 *Bhola Nath* v. *Mul Chand* (1903) 25 All. 639; *Debi Sahai* v. *Ganeshi Lal* (1901) Punj. Rec. No. 46; *Maung Po Htaik* v. *Bramadin* (1929) 7 Rang. 300; 119 I.C. 740; 1929 A.R. 244; *Muthuswami* v. *Veeraswami*, 1936 A.M. 486; 70 Mad. L.J. 433; 163 I.C. 251; *Khitendra Nath* v. *Madaneswar* (1936) 63 Cal. 1234; 169 I.C. 177; 1937 A. Cal. 297.

91 *Bhoominathan* v. *K.S.N. Chari* (1944) Mad. 713; 1944 A.M. 321; 216 I.C. 183.

92 *Pringle* v. *Jafar Khan* (1883) 5 All. 443; appd. in *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781, 791.

93 *Subbaraya* v. *Devandra* (1884) 7 Mad. 301.

94 *Bani Madho Das* v. *Kaunsal Kishor Dhusar* (1900) 22 All. 452.

95 22 All. 452, *supra*.

96 This Act is still in force, though the Act for Avoiding Wagers, 1848, of which it formed part, has been repealed, and must be read with the present section so far as the Bombay State is concerned: *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1885) 9 Bom. 358, 362; *Perosha* v. *Manekji* (1898) 22 Bom. 899, 902; *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1899) 24 Bom. 227, 232.

97 Decided by Sir M. Sausse C.J. in the Supreme Court of Bombay on its Plea Side, on 14th April 1859.

98 Per Westropp C.J. in *Parakh Govardhanbhai Haribhai* v. *Ransordas Dulabhdhas* (1875) 12 B.H.C. 51, at p. 58.

tracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void; and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts, or any such agreements as aforesaid."

Sec. 2: "No suit shall be allowed in any Court of Justice for recovering any commission, brokerage, fee, or reward in respect of the knowingly effecting or carrying out, or of the knowingly aiding in effecting or in carrying out, or otherwise claimed or claimable in respect of, any such agreements by way of gaming or wagering or any such contract as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage, fee, or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid:"

But the transaction in respect of which the brokerage, commission, or losses are claimed must amount to a wagering agreement, and it is no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payment and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons.[99] It has also been held that a deposit paid on a wagering contract cannot be recovered in a case subject to the provisions of s. 1 of the Bombay Act, whether the person suing is a winner or a loser in the transaction.[1] Nor can such a deposit be recovered under s. 65 of the Contract Act; "for if the agreement was one merely to pay differences, its nature must necessarily have been known to the plaintiff and defendant at the time when they entered into it, and they must be presumed to have known also that it was void".[2] An agreement to settle differences arising out of a nominal agreement for sale which was really a gamble is no less void than the original wagering transaction.[3]

The result therefore is that though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is not void except in Bombay State. There is nothing illegal in the strict sense in making bets. They are merely void and there would be no illegality in paying them or giving a cheque though payment cannot be compelled.[4] A collateral agreement is not unlawful under s. 23 of the Contract Act. The Calcutta High Court[5] has held that a *hundi* given to a bookmaker, in consideration of his withdrawing the maker's name from the Calcutta Turf Club and so preventing the maker being posted as a defaulter was valid, although the amount of the *hundi* was the same as that of the unpaid bet; but in Bombay such a *hundi* would be void. The House of Lords in *Hill* v. *William Hill (Park Lane) Ltd.* has held in a similar case that such an agreement would fall under second branch of s. 18 of the Gaming Act of 1845 and therefore the contract is unenforceable.[5] In England also, before the enactment of the Gaming Act, 1892 (55 Vict. c. 9), agreements collateral to wagering contracts were not void. Thus in *Read* v. *Anderson*[6] a betting agent at the request of the defendant made bets in his own name and on behalf of the defendant. After the bets were made and lost the defendant revoked the authority to pay conferred upon the betting agent. Notwithstanding the revocation the agent paid the bets, and sued the defendant to recover the amounts thereof. It was held, that the defendant having empowered the agent to bet in his name, the authority was irrevocable, and that the agent was entitled to judgment. The statute of 1892, passed in consequence of this decision, is almost to the same effect as the Bombay

99 *Perosha* v. *Manekji* (1898) 22 Bom. 899, 907; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616; *Chimanlal Purshottamdas* v. *Nyamatrai*, 1938 A.B. 44; 39 Bom. L.R. 1083; 173 I.C. 205.

1 *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1885) 9 Bom. 358; *Ramchandra* v. *Gangabison* (1910) 12 Bom. L.R. 590.

2 (1885) 9 Bom. 358, at p. 362.

3 *Jivanchand Gambhirmal* v. *Laxminarayan* (1925) 49 Bom. 689; 89 I.C. 885; 1925 A.B. 511.

4 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 421; (1959) A.S.C. 781; *Hyams* v. *Stuart King* (1908) 2 K.B. 696; overruled in *Hill* v. *William Hill* (1949) A.C. 530; (1949) 2 All E.R. 452.

5 *Leicester & Co.* v. *S.P. Mullick* (1922) 27 C.W.N. 442; followed in *W. Banvard* v. *M.M. Moolla* (1928) 7 Rang. 263; 119 I.C. 215; 1929 A.R. 241. But see *Hill* v. *William Hill (Park Lane) Ltd.* (1949) A.C. 530; (1949) 2 All E.R. 452 overruling *Hyams* v. *Stuart King* (1908) 2 K.B. 696, where the facts were similar to Calcutta case. *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2. S.C.R. 406, 421; (1959) A.S.C. 781.

6 (1887) 13 Q.B.D. 779.

Act. It is interesting to note that the statute was not passed until twenty-seven years after the Bombay Act. It may be hoped that in any future revision of the Contract Act the provisions of the Bombay Act will be incorporated in the present section, so as to render the law uniform on this subject in the whole of India.

Contracts void and illegal.—In English law a clear distinction is kept between a contract which is void and that which is illegal. It has been held that though a wagering contract is "void" and "unenforceable" between the parties, it is not illegal and therefore it does not affect the validity of a collateral contract.[7]

The same principle has been applied to collateral contracts of partnership also and on dissolution accounts may be ordered,[8] but according to English law each partner is entitled to recover the share of capital unspent, but cannot claim an account of profits because of the Gaming Act nor repayment of amounts advanced by him and actually applied in paying bets of the partnership.[9] And according to English law, the payment of a wager cannot be compelled even though there is new consideration; e.g. agreement to pay by instalments and promise by the bookmaker not to report to Tattersal's Committee as Gaming Act section 18 applies.[10] Section 2 of the Betting & Gaming Act of 1960 did not require that every partner in a bookmaker's business must obtain a permit although it did require that every partner who acted as a bookmaker in the course of that business must have a permit. Therefore, a partnership in which it was not decided before starting the business what the respective functions of the partners were except that the defendant should and the plaintiff should not deal with clients over the betting counter, is an agreement of partnership which is not in conflict with the provisions of the Act and is valid. It will not affect the validity of the agreement if any infringement of the Act may have occurred in the conduct of the business after the establishment of the partnership such as handling credit betting over the telephone which might be in breach of the Act.[11] Partnership being an agreement within the meaning of section 23 of the Contract Act, it is not unlawful within that section although its object is to carry on wagering transactions.[12]

The Supreme Court has held that[13] if an agreement which is collateral to another or of aid facilitating the carrying out of the object of the other agreement which though void is not in itself prohibited within the meaning of section 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand it is part of a mechanism meant to defeat what the law has actually prohibited. Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by section 23 of the Contract Act. An agreement cannot be said to be forbidden or unlawful merely because it results in a void contract. A void agreement when coupled with other facts may become part of a transaction which creates legal rights but this is not so if the object is prohibited or *mala in se*.

Partnership to Carry on Wagering Contracts.—In *Gherulal's case*[7] a partnership was entered into to carry on wagering contracts. The partnership was held not to be unlawful and a decree passed on taking accounts was upheld and amounts paid to third parties by a partner were held recoverable from the other partners.

The ordinary course of business in jute trade is by "chain contracts" to pay against shipping documents, which amounts to delivery of possession of goods and which pass from one buyer to another and the ultimate buyer gets physical possession of goods. This was held not

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7 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 421; (1959) A.S.C. 781, 788.

8 *Ibid; Thwaites* v. *Coulthwaite* (1896) 1 Ch. 496; *Brookman* v. *Mather* (1913) 29 T.L.R. 276; *Thomas* v. *Dey* (1909) 24 T.L.R. 272 dist.

9 *Thwaites* v. *Coulthwaite* (1896) 1 Ch. 496. Such an account was ordered but Gaming Act was missed; *Saffery* v. *Mayer* (1901) 1 K.B. 11; Chitty; On Contract, Vol. 2 (23rd Edn.), para 780.

10 *Hill* v. *William Hill (Park Lane) Ltd.* (1949) A.C. 530; (1949) 2 All E.R. 452 (H.L.).

11 *Dungate* v. *Lee* (1967) 1 All E.R. 241.

12 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 432; (1959) A.S.C. 781, 792, also 788; See *post; Thwaites* v. *Coulthwaite* (1896) 1 Ch. 496; and *Saffery* v. *Mayer* (1901) 1 K.B. 11; dist. Chitty; Contract, page 495, para 908 refd. to (23rd Edn.), para 780 (Vol. II). (24th Ed) Vol. II para 3838.

13 *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons etc.* (1975) A.SC. 1223, 1228: (1975) 3SCR 1.

to be a speculative transaction with the intention of dealing in differences in rates only,[14] but was "actual delivery" within West Bengal Jute Goods Future Ordinance (5 of 1949) which included symbolical as well as constructive delivery and not merely actual physical delivery which would be too narrow an interpretation. The contract, it may be added, did not provide for the payment or receipt of margins and the seller did not possess or have control over a godown, other means and equipments necessary for the storage and supply of jute goods.[15] Contracts for delivery of groundnuts at a future date, if they are for specific quality, for specific price and for specific delivery under the rules of the Veraval Merchants' Association and if they are not transferable, are not forward transactions within the Saurashtra Order.[16] Under the scheme of Forward Contract (Regulation) Act, 1952, contracts for sale of goods are divided into two categories "ready delivery contracts" and "forward contracts". "Forward contracts" are divided into specific delivery contracts and those that are not. Specific delivery contracts are transferable and non-transferable and the latter are exempted from the operation of the Act, s. 18 (1). All forward contracts except non-transferable specific delivery contracts can be declared illegal by a notification under the Act.[17]

SILVER TRANSACTIONS

Forward transactions in silver by the Calcutta Marketing & Forward Market Association is not prohibited under the Forward Contracts (Regulation) Act, 1952 as the Association was a registered body and its bye laws approved by the Central Government. The concept of a wagering contract is a mixed concept depending upon law and also on facts. There is no wager unless both sides intend not to make or give delivery.[18]

Transferability.—From the mere absence of a provision in a contract expressly prohibiting transfer against delivery orders, railway receipts or bills of lading, it cannot be inferred that the contract is transferable. Transferability of a contract would depend upon the language of the contract interpreted in the light of surrounding circumstances. This also applies to Saurashtra Groundnut Control Order, 1949,[19] and to an order under Forward Contract (Regulation) Act of 1952 relating to jute goods.[20] The circumstances from which non-transferability was concluded were[20]:

1. The contract could not be sublet or assigned by the contractor; the bags were intended for foodgrains which were arriving in bulk at an Indian port.
2. Shipment had to be made by a vessel to be nominated by the buyers.
3. A provision of prior inspection of the goods by Inspector of A.T.I.G.S.
4. Arrangements for shipping of goods approved by Inspectors.
5. The consignee of the goods was the Asstt. Director of Storage.
6. Price was to be paid by Government.
7. This was in spite of Bill of Lading being transferable.

The contract was therefore not void and illegal under s. 30 of Contract Act.[21]

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14 *Dunichand Rateriya* v. *Bhuwalka Bros.* (1955) 1 S.C.R. 1071, 1081, (1955) A.SC. 182.

15 *Dunichand Rateriya* v. *Bhuwalka Bros.* (1955) 1 S.C.R. 1071, 1081; (1955) A.SC. 182, 187.

16 *Hemraj Keshavlal* v. *Haridas Jethabhai* (1964) 2 S.C.R. 686; (1964) A.SC. 1526; *Uma Satyanarayana* v. *Sitaramayya* (1950) 1 M.L.J. 557; *B. Seetharamaswami* v. *Bhagwati Oil Co.* (1951) Mad. 723; *Hanumanthiah* v. *Thimmaiah* (1954) A.M. 528.

17 *Modi Co.* v. *Union of India* (1969) A.SC. 9; (1968) 2 S.C.R. 565.

18 *Calcutta Ready & Forward Market Association* v. *State* (1973) Knt. 1292, 1303; *Lockwood* v. *Cooper* (1903) 2 K.B. 428,431 (Players must have even chance of winning or losing); *Ismail Lebbe Marikar Ebrahim Lebbe Marikar* v. *Bartleet & Company* (1942) A.PC. 19, 21 (Ordinary commercial transaction); *Balwant Vishnu* v. *Mishrilal Shivnarayan* (1925) A.B. 115; *Chimanlal Parshottamdas* v. *Nyamatrai Madhavlal* (1938) A.B. 44; *Shewkishen Mohata* v. *Mangalchand Maloo* (1944) A. Cal. 341; *G. Sirur* v. *A.M. Bhamia* (1925) A.M. 330; *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji.* 45 I.A. 29, 33 (speculation not necessarily a wager); *Sukdevdoss Ramprasad* v. *Govindoss Chaturbhujdoss & Co.* 55 I.A. 32 (No wager as payment of differences not proved); *Dunichand Rateriya* v. *Bhuwalka Brothers Ltd.* (1955) A.SC. 182 (Symbolical or constructive delivery enough) relied on.

19 *Hemraj Keshavji* v. *Haridas Jethabhai* (1964) 2 S.C.R. 686; (1964) A.SC. 1526; *Khardah Co. Ltd.* v. *Raymon & Co.* (1962) A.SC. 1810, 1820; (1963) 3 S.C.R. 183, 207.

20 *Modi Co.* v. *Union of India* (1969) A.SC. 9; *Khardah Co. Ltd.* v. *Raymon & Co.* (1964) 2 S.C.R. 686; (1964) A.SC. 1526 refd. to.

21 *Modi Co.* v. *Union of India* (1969) A.SC. 9.

Speculative transactions.—Speculative transactions must be distinguished from agreements by way of wager. This distinction comes into prominence in a class of cases where the contracts are entered into through brokers. The *modus operandi* of the defendant in this class of cases is, when he enters into a contract of purchase, to sell again the same quantity deliverable at the same time in one or more contracts, either to the original vendor or to some one else, so as either to secure the profit, or to ascertain the loss, before the *vaida* day; and, when he enters into a contract of sale, to purchase the same quantity before the *vaida* day. This mode of dealing, when the sale and purchase are to and from the same person, has the effect, of course, of cancelling the contracts, leaving only differences to be paid. When they are to different persons, it puts the defendant in a position vicariously to perform his contracts. This is, no doubt, a highly speculative mode of transacting business; but the contracts are not wagering contracts, unless it be the intention of *both contracting parties* at the time of entering into the contracts. neither to call for nor give delivery from or to each other. "There is no law against speculation, as there is against gambling".[22] It may well be that the defendant is a speculator who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that does not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.[23] It is in cases of the above description that "there is a danger of confounding speculation, or that which is properly described as gambling, with agreements by way of wager; but the distinction in the legal result is vital".[24] This *modus operandi* was adopted by the defendant in *Tod* v. *Lakmidas,*[25] where the dealings were in Broach cotton, *Perosha* v. *Manekji,*[26] where the dealings were in Government paper and shares of a spinning and weaving company, and in *Sassoon* v. *Tokersey,*[27] where the dealings were in American futures. In all these cases the contracts were entered into through a broker. In the first of these cases the contracts were made by bought and sold notes, so that the principals would not be brought into contract with each other until after the bought and sold notes were executed. This would at once raise a presumption against the existence of a *common* intention to wager. In the second and third cases the contracts were made by the broker with third persons in his own name on behalf of the defendant according to the practice of the trade. Here the presumption against the existence of a *common* intention to wager is still stronger, for the defendant may not know at all with whom the broker had contracted on his behalf. The broker may be a *sutta* broker or a mere agent for gambling, but this fact is immaterial, for he is not a contracting party, and it is the intention of the *contracting* parties alone that is material in these cases.[28] In each of the above cases it was contended for the defendant that the contracts sued upon were wagering contracts. but in each it was held that, though the transactions were of a highly speculative character, and though, so far as the defendant personally was concerned, he entered into the contracts as gambling transactions, there was no evidence to show that the *other* contracting party had also the intention to gamble.

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22 *J.H. Tod* v. *Lakhmidas* (1892) 16 Bom. 441, at pp. 445, 446, *A fortiori,* dealing between stock brokers, whose regular course of business is periodical settlement of differences, are not presumed to be wagering agreements: *Sirur* v. *Bhamia* (1924) 85 I.C. 410, appld, in *Pratapchand Nopaji* v. *Burjorji Rattonji Bomanji* (1975) A.SC. 1233, 1227; (1975) 3 SCR 1. 1925 A.M. 320.

23 *Bhagwandas* v. *Burjorji* (1917) 45 I.A. 29, 33; 42 Bom. 373; 44 I.C. 284; *Kanwar Bhan Sukha Nand* v. *Ganpat Rai Ram Jiwan* (1926) 7 Lah. 442; 94 I.C. 304; 1926 A.L. 318; *Mahomed Valli Patel* v. *East Asiatic Co.* (1936) 14 Rang. 347; 164 I.C. 654; 1936 A.R. 319; *Aya Ram* v. *Sadhu Lal,* 1938 A.L. 781; *Sitaram* v. *Chamanlal,* 1952 A. Hyd. 95; *F. Hagamilal Ram Prashad* v. *Bhuralal Ram Narain* (1961) A. Raj. 52.

24 *Sassoon* v. *Tokersey* (1904) 28 Bom. 616, 621.

25 (1892) 16 Bom. 441.

26 (1898) 22 Bom. 899.

27 (1904) 28 Bom. 616.

28 *Perosha* v. *Manekji* (1898) 22 Bom. 899, 907; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616, 624. The observation in the judgment in *Tod* v. *Lakhmidas,* 16 Bom. 441, at p. 446, that the broker there "was not shown to be a *sutta* broker though no doubt a good many of the contracts he negotiated were settled by differences", does not imply that the decision would in any way have been affected if the broker had been proved to be a *sutta* broker. *Khimji Punja & Co.* v. *Devshi,* 1950 A. Kutch 24.

"The Indian Contract Act in section 30 provides that agreements by way of wager are void; but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and *both* sides must be parties to that wager."[29]

In the last two cases the suit was by the broker as plaintiff to recover from the defendant the loss paid by the plaintiff on behalf of the defendant.

Oral evidence of agreement being by way of wager.—Though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of the parties was only to pay the difference, the burden of proof, of course, being on the party who alleges that it was a wager.[30] Such "intention" is a "fact" within the meaning of s. 3 of the Evidence Act (see cl. 1, illustration (d), and it may be proved by oral evidence under s. 92, proviso 1, of the same Act, as, if proved, it would invalidate the agreement under the provisions of the section now under consideration.[31] The same principle has been reiterated in recent cases, following the English case of *Universal Stock Exchange* v. *Strachan*.[32] Thus in a Bombay case[33] Tyabji J. said:

"In order to ascertain the real intention of the parties the Court must look at all the *surrounding circumstances*, and would even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction."

And in another Bombay case[34] Jenkins C.J. said:

"The law says that we must find, as best we can, the true intention of the parties; we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant.... We are not, and we must not be, bound by the mere formal rectitude of the documents if in fact there lurks behind them the common intention to wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intention. The (surrounding circumstances) and the *position of the parties* and the *history of dealings* of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties.

In a still later case[35] Davar J. said:

"What the Court has to do is not simply to look at the transactions as they appear on the face of them, but to go behind and beyond them, and ascertain the true nature of the dealings between the parties by probing into surrounding circumstances and minutely examining the position of the parties and the *general character of the business* carried on by them." "In this class of suits it would be almost idle to expect to get at the truth unless the Court takes the widest possible outlook consistent with the provisions of the Indian Contract Act; otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts."[36]

Thus the conduct of the parties in the matter of the transaction in question is relevant, for if no delivery is asked for or offered, the presumption is that the transaction was a wager on the rise or fall of the market.[37] There can be no question of a wager, if a substantial part of the goods has been delivered.[38] In *Motilal* v. *Govindram*,[39] the fact that the plaintiff took the *panch* rate as the measure of his damages, and not the market rate, was held to be a plain indication that the parties never intended to give and take delivery. The means and ability of the parties to perform the contract in question are also relevant.[40] The general character of the plaintiff's business is also material, for if it appears that the normal and regular course of the plaintiff's transaction was to pay and receive differences only, the presumption is that the

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29 *Sassoon* v. *Tokersey* (1904) 28 Bom. 616, at p. 621.
30 *Gangadas* v. *Jekisondas* (1923) 25 Bom. L.R. 520; 73 I.C. 1032.
31 *Anupchand Hemchand* v. *Champsi Ugerchand* (1888) 12 Bom. 585, dissenting from *Juggernauth Sew Bux* v. *Ram Dyal* (1883) 9 Cal. 791. See also *Maganbhai* v. *Manchhabhai* (1866) 3 B.H.C.O.C. 79.
32 (1896) A.C. 166; (1895-99) All E.R. Rep. 751.
33 *Perosha* v. *Manekji* (1898) 22 Bom. 899, at p. 903.
34 *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1899) 24 Bom. 227, at p. 230.
35 *Hurmukhrai* v. *Narotomdas* (1907) 9 Bom. L.R. 125, at p. 137.
36 Per Bachelor J. in *Motilal* v. *Govindram* (1906) 30 Bom. 83, at p. 99.
37 *Motilal* v. *Govindram* (1906) 30 Bom. 83, 95; *Eshoor Doss* v. *Venkatasubba Rau* (1895) 18 Mad. 306, 309.
38 *Shew Kissen Mohata* v. *Mangalchand Maloo*, 1941 A. Cal. 341; 45 C.W.N. 478; 195 I.C. 885.
39 (1906) 30 Bom. 83, 96.
40 *Kong Yee Lone & Co.* v. *Lowji Nanjee* (1901) 29 Cal. 461, 467, 469; *Kesarichand* v. *Merwanjee* (1899) 1 Bom. L.R. 263, 264, *Perosha* v. *Manekji* (1898) 22 Bom. 899, 907.

transaction in question was merely a bargain for differences. This presumption was applied in a case where the plaintiff dealt in several lakhs of Government paper, and the evidence showed that he neither delivered nor received Government paper except on one single occasion just before he brought the suit.[41] It was also applied in a case where the plaintiff's transactions in linseed amounted to about 350,000 cwts. in two years, and the only linseed actually delivered during that period was 2,219 cwts., and that, too, under exceptional circumstances.[42] To determine the general character of the plaintiff's business, the Court ought to inquire how other contracts that may have been entered into by the plaintiff with the same defendant, or even with third parties, and relating to the goods in question, were previously performed by the plaintiff, whether by payment of differences or by delivery of goods. Thus where it appeared that at the *vaida* for which the contracts in question had been made the plaintiff had neither given nor taken any delivery of any cotton, it was held that the evidence tendered by the plaintiff to show that at *other vaidas* he had given and taken delivery of cotton was admissible, and that the lower Court was wrong in excluding this evidence.[43] Upon the same principle, evidence is admissible to show that in the case of a particular class of contracts, or of contracts relating to a particular commodity, the normal course of dealing is to pay differences only. Thus in *Motilal* v. *Govindram,*[44] Where the question was whether certain forward contracts between two Marwari firms for the sale and delivery of linseed were gambling transactions, evidence was admitted which showed that contracts of similar form were commonly made in the Marwari Bazar in Bombay in Samvat 1957 with no intention of giving or taking delivery of linseed, but with the sole object of gambling in differences. This evidence was objected to on the ground that it was *res inter alios acta,* but the objection was overruled, Bachelor J. observing,

"In admitting this evidence as to the real character of precisely similar agreements made under the same conditions of time and place and circumstances I do not think that I am straining the provisions of the Evidence Act, e.g., s. 7,[45] and I may call in aid a passage from the judgment of Jenkins C.J. in *Doshi Talakshi's case;*[46] there the learned Chief Justice, in speaking of the 'surrounding circumstances' of the agreements in that case, says that these circumstances 'and the position of the parties and *the history of dealing of this class* are legitimate, though not exclusive, matters for our investigation into the true intention of the parties.' "

In *Doshi Talakshi's case,*[47] it will be remembered, the question was whether certain contracts entered into in Dholera for the sale of Broach cotton and the delivery thereof in Bombay were wagering contracts, and evidence was admitted to show that, with one doubtful exception, no contracts similar to those in the suit were completed otherwise than by payment of differences. In *Sassoon* v. *Tokersey*[48] evidence was admitted which showed that under contracts for the sale and purchase of American cotton incorporating the rules of the Liverpool Cotton Association delivery does take place to a considerable extent.

Wagering Policies.—The cases of life insurance and marine insurance afford illustrations of another variety of wagering contracts. In England a policy of insurance on the life of a person in which the insurer has no interest is void by the Life Assurance Act, 1774 (14 Geo. III. c. 48). That Act forbids insurance "on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or whose account such policy or policies shall be made shall have no interest or by way of wagering or gaming." This statute does not appear to apply to India.[49]

In *Alamai* v. *Positive Government Security Life Insurance Co.*[50] the High Court of Bombay held that in India an insurance for a term of years on the life of a person in whom the in-

41 *Eshoor Doss* v. *Venkatasubba Rau* (1895) 18 Mad. 306, 308, 309.
42 *Motilal* v. *Govindram* (1906) 30 Bom. 83, 93.
43 *Chandulal* v. *Sidhruthrai* (1905) 25 Bom. 291.
44 (1906) 30 Bom. 83, 92.
45 Facts which ... constitute the state of things under which they (facts in issue) happened. are relevant."
46 (1899) 24 Bom. 227, at page 231.
47 (1899) 24 Bom. 227, at p. 230.
48 (1904) 28 Bom. 616, 624.
49 It is not in the Collection of Statutes relating to India, published by the Government of India; India Code Index 1958.
50 (1898) 23 Bom. 191; reld. on in *Brahm Dutt* v. *Life Insurance Corporation* (1966) A.A. 474.

surer had no interest was void under this section.

In that case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehbub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after Mehbub Bi assigned the policy to the plaintiff. Mehbub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants.

It was held on the evidence that the policy was not effected by Mehbub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mehbub Bi.

In a somewhat later Madras case[51]

the plaintiff lent a sum of money to the defendants on the risk of a ship belonging to them. On 3rd August, 1896, the defendants passed a writing to the plaintiff which, after reciting the loan on the risk of the ship "now under sail to Nicobars" from Negapatam, provided for the payment by the defendants to the plaintiff on 20th March, 1897, of the loan, with interest thereon at the rate of 18 per cent per annum, if the ship returned safe to Negapatam after the completion of her voyage, but that if she did not return the plaintiff lost his money. The ship had left Negapatam on 23rd July, 1896, and was lost at sea three days later.

In a suit by the plaintiff to recover the amount of the loan on the ground that the ship was lost before the date of the agreement, it was held that the agreement was by way of wager and void under this section. Davies J. said that agreements similar to this were in vogue in England up to the time of the passing of 19 Geo II. c. 37 under the names sometimes of *foenus nauticum* and sometimes *usura maritima,* but as they were considered to give an opening for usurious and gaming contracts, they were forbidden by that statute.

Wagering policy negatived.—A truck owned by *A* was transferred benami to *B* who got it insured in his own name. The truck was involved in an accident and it seriously injured a young Army Officer who claimed heavy damages from the owner, driver and the benamidar and the Insurance Company. It raised the plea that an ostensible owner (a benamidar) had no insurable interest and that it was a wager for that reason. Both these pleas were negatived by the High Court.[52]

Promissory note for debt due on a wagering contract.—Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note be regarded "as made without consideration"; for "a contract which is itself null and void cannot be treated as any consideration for a promissory note".[53] Similarly a cheque given cannot be compelled to be paid although there is nothing illegal in paying the bet.[54]

No action on cheque governed by English law.—A cheque drawn on an English Bank cannot be sued on in England even though the lender gave the cheque to repay loan made in a foreign country to enable the borrower to bet on a game legal in the foreign country e.g. to play baccarat there the country being France.[55]

Loans: Money paid by a lender straight to Winner.—Money paid by a third party to the winner of a bet direct cannot be recovered from the loser.[56]

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51 *Vappakandu Marakayar* v. *Annamalai Chetti* (1901) 25 Mad. 561.

52 *Northern India General Insurance Co. Ltd.* v. *Lt. Kanwarjeet Singh Sobti* (1973) A.A. 357, 360; *Alamia* v. *Positive Government Securities Assurance Co. Ltd.* 23 Bom. 191. disting.

53 *Trikam Damodar* v. *Lala Amirchand* (1871) 8 B.H. C.A.C. 131. See also *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1899) 24 Bom. 227; *Perosha* v. *Manekji* (1898) 22 Bom. 899; *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (1901) 28 I.A. 239; 29 Cal. 461; *Badridas Kothari* v. *Meghraj Kothari* (1967) A. Cal. 25; *Rajaram* v. *Sha Kapoorchandji* (1964) A.A.P. 537; *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406; (1959) A.S.C. 781 dist. In England the law is complicated by a series of statutory provisions and various decisions thereon which have sometimes had unexpected results as given above. It seems better on consideration, to say nothing more here.

54 *Gherulal Parakh* v. *Mahadeodas* (1959) Supp. 2 S.C.R. 406, 421; (1959) A.SC. 781; *Hill* v. *William Hill* (1949) A.C. 530; (1949) 2 All E.R. 452; *Hyam* v. *Stuart King* (1908) 2 K.B. 696 overruled.

55 *Moulis* v. *Owen* (1907) 1 K.B. 746 *cf. Browne* v. *Bailey* (1908) 24 T.L.R. 644.

56 *C.H.T. Ltd.* v. *Ward* (1965) 2 Q.B. 63; (1963) 3 All E.R. 835; *Woolf* v. *Freeman* (1937) 1 All E.R. 178 folld. Chitty: On Contracts (24th Ed.) Para 3853.

New Promise to pay.—Even if a loser makes a new promise to pay for his losses in consideration of his not being posted, the promise cannot be enforced. But if he gives a cheque in discharge of his liability the cheque may not be tainted with illegality because of the winner's promise not to have the name posted.[57] In that case *Hill* v. *William Hill & Co. Ltd.*[58] may not be applicable. But the cheques will not be enforceable by the original payee but may be enforced by a third party holder of the cheque even if he knew of the facts leading upto giving of the cheque.

Loan governed by foreign law.—The lender can bring an action for recovery of loan made in a foreign country to bet in a foreign country where the game is legal, e.g., for playing roulette in Monte Carlo which was legal under the law of Monaco.[59]

Foreign Country loan.—A lender can sue in England to recover a loan made in a foreign country where the loan was given to enable the lenders to bet on a game legal in the foreign country and thus disregarding a cheque on an English Bank given by the borrower. In *Baumgart's case*[60] a man borrowed a sum of money to play roulette at Le Touquet which by the law of France was legal. He brought an action in England on the cheque and the loan but later abandoned the claim on the cheque and the action on the loan succeeded as the loan was governed by French Law.

Suit to recover deposit.—The prohibition contained in this section as regards the recovery of money deposited pending the event of a bet applies only to the case of winners. The winner of a wager or a bet cannot sue to recover the amount deposited by the loser with the stakeholder, but it is quite competent to the loser to recover back his deposit before the stakeholder has paid it over to the winner.[61] In a case, however, governed by the provisions of Bombay Act for Avoiding of Wagers (Amendment) Act, 1865, even a loser cannot recover back the deposit.[62]

Lotteries.—S. 294A of the Indian Penal Code makes it penal to keep any office of place for the purpose of drawing any lottery not authorised by Government or to publish any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery.

Before the enactment of this section of the Code, lotteries not authorised by Government were prohibited in India by the Private Lotteries Act, 1844. The Act declares all such lotteries "common and public nuisances and against law." The Act was repealed by the Indian Penal Code (Amendment) Act, 1870, and in its place s. 294A was inserted in the Code (see s. 10 of the amending Act).

Where a particular association was authorised by the Government of India by a letter to hold a lottery, the effect was that no prosecution would lie under the criminal law. But a sale or purchase of a ticket in such a lottery would still be a wagering contract under this section as well as under the Bombay Act; for the Government could not by a letter overrule the Central Act or the Acts of the Provincial Legislature.[63]

What is a Lottery?—

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57 Chitty: On Contracts (24th Ed.) Para 3850.
58 (1940) A.C. 530.
59 *Saxby* v. *Fulton* (1909) 2 K.B. 208
60 (1927) 96 L.J.K.B. 789
61 Of course not after payment: *Maung Po Hmein* v. *Maung Aung Mya* (1925) 3 Ran. 543; 93 I.C. 105; 1926 A.R. 48; *Ratnakalli Guranna* v. *Vachalipu Appalanaidu,* 1928 A.M. 434; 109 I.C. 377; nor will the Court discuss the correctness of the umpire's decision.
62 *Ramachandra* v. *Gangabison* (1910) 12 Bom. L.R. 590; *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1885) 9 Bom. 358. English decisions to the same effect are collected in *Burge* v. *Ashley and Smith* (1900) 1 Q.B. 744.
63 *Dorabji Tata* v. *Bance* (1918) 42 Bom. 676; 41 I.C. 689. The lottery in this case was a War Loan lottery.

"Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils."

It was so stated in a Madras case[64]

where an agreement was entered into between twenty persons whereby it was provided that each should subscribe Rs. 200 by monthly instalments of Rs. 10, and that each in his turn, as determined by lot, should take the whole of the subscriptions for one month. The defendant contributed Rs. 10 every month for a period of ten months, and in the tenth month he got his lot of Rs. 200. Thereupon a bond was taken from him by the plaintiff, who was the agent in the business, for the remaining Rs. 100 in order to ensure the future regular payment of monthly instalments for the further period of ten months.

In a suit upon the bond it was contended that the transaction was illegal as being a lottery within the meaning of the Private Lotteries Act, 1844, and that the suit therefore could not be maintained. It was held that the transaction did not amount to a lottery. The Court said:

"Here no such lottery appears to have taken place. It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all got a return of the amount of their contribution. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance."

A "chit fund" plan under which all subscribers are repaid their capital by a fixed date, though some determined by lot get more and sooner, is not a lottery.[65]

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64 *Kamakshi Achari* v. *Appavu Pillai* (1863) 1 M.H.C. 448.

65 *Narayana Ayyangar* v. *Vellachami Ambalam* (1927) 50 Mad. 698; 103 I.C. 318; 1927 A.M. 583. For a curious case in which members subscribed for the purpose of obtaining a gramophone a week, the weekly winner to be ascertained by lot, until all were supplied, see *Venkataramana* v. *Setti Sanyasayya,* 1934 A.M. 136; 66 Mad. L.J. 76; 149 I.C. 489. The scheme was held not to be a lottery.

CHAPTER III

OF CONTINGENT CONTRACTS

"Contingent contract" defined.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay *B* Rs. 10,000 if *B*'s house is burnt. This is a contingent contract.

Of the section in general.—This short chapter of the Act appears to be the original work of the Legislative Department. There are some clauses on the subject in the draft prepared in England, but their language is quite different. We do not know why the word "contingent," familiar to English lawyers only in the law of real property, was preferred to "conditional." A promise is said to be absolute or unconditional when the promisor binds himself to performance in any event, conditional when performance is due only on the happening of some uncertain event in the future, or if some state of facts not within the promisor's knowledge now exists. Some learned authors extend the name of conditional to promises to be performed only after a lapse of time;[1] but this, with great respect, seems not correct, for the lapse of time cannot be regarded as uncertain or contingent. Some deny it to contracts dependent on the present existence of unknown facts, but this also seems untenable; an unknown present fact is as uncertain for the contracting parties as any future event.[2]

In the text of the Act the words "some event collateral to such contract" are not very clear. They seem on the whole to mean that the event is neither a performance directly promised as part of the contract nor, the whole of the consideration for a promise. Thus, if I offer a reward for the recovery of lost goods, there is not a contingent contract; there is no contract at all unless and until some one, acting on the offer, finds the goods and brings them to me. So, if I tell *B* I will pay him Rs. 1,000 if he marries *C*, this is not a contingent contract but merely an offer which will become a contract if, without any revocation of it in the meantime, *B* does marry *C;* and therefore illustration (c) to s. 32, and the illustration to s. 34 below, must be read as implying that the agreement is made for some present and independent consideration. Again, a contract to pay a man for a piece of work is very commonly made on the terms that he is to have no pay till the work is all done; but the completion of the work, being the very thing contracted for, is not collateral to the contract, and the contract is not properly said to be contingent, though the performance of the work may be, and often is, a condition precedent to the payment of the wages.

The words "as soon as delivered to us" do not imply any term of contingency.[3] The term in a contract for sale of goods stating "the goods have been purchased by us from *X* and will be shipped to you as soon as delivered to us" creates an absolute and not a conditional obligation and denotes the mode or manner of performance.[4] *A* entered into a contract with *B* that he would sell certain shares belonging to *A* within a year and if he did not or could not do so he would buy them himself at a stipulated price. In the latter case the contingent liability would ripen into a perfect obligation at the end of the year and then the contract would have to be performed immediately or within a reasonable time. There is no obligation to perform at all at the date of the contract.[5]

A contract containing an undertaking by the vendor that he will pay ten times the rent of Sirdari lands is not a contingent contract. In the instant case there was no condition that the

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1 See Leake on *Contracts,* 8th ed., Part III, chap. ii, p. 474.
2 See Holmes, *The Common Law,* 304, 329.
3 *Navnitlal & Co.* v. *Kishan Chand & Co.* (1956) A.B. 151.
4 *Ibid, Hurnandrai* v. *Pragdas* (1923) A.PC. 54; 50 I.A. 9; *Gangasaran* v. *F. Ramchandra* (1952) A.SC. 9.
5 *Jethalal* v. *R.N. Kapur* (1956) A.B. 74.

sale of the land depended upon the deposit of the stipulated amount i.e.. ten times the Sirdari rent.[6]

The illustration to the section is the ordinary one of a contract of fire insurance. All contracts of insurance and indemnity are obviously contingent and that is also the law in England where it is termed "conditional contract".[7] So are many other kinds of contracts in both great and small matters. A wager is a contingent agreement, but s. 30 prevents it from being a contract. A contract between *A* and *Z* that if *A* succeeds in his suit with regard to certain land in the possession of *Z* he shall purchase the land from *Z* for Rs. 300 is contingent.[8] This, however, is not the common type of contract. A contract to supply a man, in return for a fixed payment, with extracts of newspaper articles or paragraphs relating to a given subject which may appear during a given time is contingent; for the duty arises only if and when such matter is published in one of the journals contemplated by the parties. Here the contingent events do not in any necessary or probable way depend on the promisor's will; but in many cases—as, for example, a sale on approval—the contingency may depend on an act of discretion to be exercised by him.

A, whose property has been attached, agrees to sell it to *B* upon the following terms *inter alia:* (i) that *A* should apply to the Court for its approval to the sale of the property to *B;* (ii) that part of the sale price should be paid to the attaching creditors; (iii) that the balance of the price should be paid in the presence of the Sub-Registrar. *A* duly applied to the Court for its approval, but the application was rejected. Thereupon *A* sold the property to *C*, who had notice of the contract with *B*.

B sued *A* and *C* for specific performance, but it was held that the contract with *B* was a contingent contract, and the contingency having failed, there was no contract which could be enforced.[9]

Contingency dependent on act of party.—The distinction just now mentioned requires some further explanation. Words of promise amount to no promise at all if their operation is expressed to be dependent, in terms or effect, on the mere will and pleasure of the promisor, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable.[10] But the operation of a promise may well be dependent on a voluntary act other than a mere declaration of the promisor's will to be bound. The act may be that of a third person; thus a promise to pay what *A* shall determine is perfectly good. The fact may also be that of the promisor himself, so long as it is not an act of mere arbitrary choice whether he will be bound or not, as in the common case of goods being sold on approval, where the sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial.[11] So, in the case of goods to be manufactured to order, it may be a term of the contract that the work shall be done to the customer's approval, and then the customer's judgment, acting "*bona fide* and not capriciously," is decisive.[12] On the same principle, if a clause in a contract provides that a party's disability to perform his promise shall be a cause for annulling the contract but shall give no remedy in damages, this does not apply to a disability brought about by the promisor's own conduct.[13] A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and

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6 *Pahranchi Lal* v. *Man Singh* (1971) A.A. 444, 447; *Rudradas Chravarti* v. *Kamakshya Narain Singh* (1925) A.P. 259; 3 Pat. 968; *Kripaldas Jivrajmal* v. *Manager Encumbered Estates* (1936) A.S. 26; *Govind Laxman* v. *Harichand Mancharam* (1919) A.B. 154, 50 I.C. 403 disting.

7 *Commissioner of Excess Profits Tax* v. *Ruby General Insurance Co. Ltd.* (1957) S.C.R. 1002, 1011; (1957) 32 I.T.R. 82, 88; *Chandulal Harjivandas* v. *C.I.T.* (1967) A.SC. 816; 63 I.T.R. 627.

8 *Ismail* v. *Daudbhai* (1900) 2 Bom. L.R. 118.

9 *Dalsukh M. Pancholi* v. *The Guarantee Life and Employment Insurance Co. Ltd.*, 1947 A.P.C. 182.

10 *Roberts* v. *Smith* (1859) 4 H. & N. 315; 118 R.R. 462.

11 *Elphick* v. *Barnes* (1880) 5 C.P.D. 321.

12 *Andrews* v. *Belfield* (1857) 2 C.B.N.S. 779; 109 R.R. 885.

13 *New Zealand Co.* v. *Societe des ateliers et chantiers de France* (1919) A.C. 1; *Chunilal Dayabhai & Co.* v. *Ahmedabad Fine Spinning, etc. Co.* (1921) 46 Bom. 806; 67 I.C. 223; *Chotalal* v. *Champsey Umusey & Sons* (1922) 24 Bom. L.R. 877; 75 I.C. 233; *Kandasami Chettiar* v. *Shanmugha Thewar*, 1949 A.M. 302. This principle does not apply where there never was a contract for want of form: *Gordhandas* v. *Natvarlal Chandulal & Co.*, 1952 A.B. 349, 359.

such a condition is good.[14] Payment of a policy of insurance may be conditional on proof of a claim satisfactory to the directors of the insurance company being furnished; this means such proof as they may reasonably require.[15]

An auction of a forest lease is not a contingent contract merely because the acceptance of the highest bid was to receive the confirmation of the Forest Officer. Therefore before the confirmation the highest bidder can withdraw his offer even though there was a term of the auction making the bid not withdrawable, there being no consideration for the latter.[16]

The English authorities were considered, and the principle applied by the High Court of Madras in *Secretary of State for India* v. *Arathoon*.[17]

The plaintiff had entered into a contract to supply Government with a certain quantity of timber. One of the terms of the contract was that the timber should be of unexceptionable quantity and should be liable to be rejected if not approved by the Superintendent of the Gun Carriage Factory, for which it was required. The timber tendered was not approved by the Superintendent, and was accordingly rejected. The plaintiff sued for breach of the contract, contending that the timber which he tendered answered the description in the contract. It was not alleged that the Superintendent failed to exercise a judgment in regard to the suitability of the wood.

The lower Court held that, the Superintendent being substantially a party, his judgment could not be regarded as conclusive, and that it was open to the plaintiff to show that his tender ought to have been accepted, but the Madras High Court reversed this decision, holding that it was not open to the plaintiff to question the reasonableness of the Superintendent's disapproval. Innes, Offg. C.J. said:

"The rule of the Civil Law that a condition the happening of which is at the will of the party making it is null and void as being destructive of the contract (Dig. XLV. Tit. 1, 108) probably relates to (cases) where the promisor is not bound to exercise a discretion, as a promise by one to give 'if I am so minded,' for sales and other contracts on a condition the happening of which was entirely subject to the result of a mental process of discrimination on the part of one party were undoubtedly recognised as valid. (See Dig. XVIII. Tit. 1, *De Contrahenda Emptione;* see also Pothier, Part 1, chap. i, art. iii, s.7.) At all events, it is not a rule of the Indian law of contracts, and it may be doubted if it is a rule of the English law."

If this means that the Common Law will give effect to a merely illusory promise, it is not correct; but that which "is not a rule of the Indian law of contracts" seems to be the Civil Law not as the learned Judge himself thought it was but as some one else had suggested. There does not appear to be any real difference here between English and Roman law.[18] A clause in a deed of sale that the vendee will pay the balance of consideration money as soon as possible but when the vendee "would be in a position to make the payment" means payment within a reasonable time. The contract is not a contingent contract under s. 31. The obligation to pay is absolute and the facility in payment is only a concession.[19]

Conversely the operation of penal clauses in a contract may be made to depend not only on some default of one party, but on the decision of a person appointed by the other party that a default contemplated by the contract has taken place. In *Aghore Nath Bannerjee* v. *Calcutta Tramways Co.*,[20] a conductor on taking service with the defendant company deposited a sum of money with them as security for the performance of his duties, subject to the condition that the deposit should be forfeited if there was any dereliction of duty on his part, as to which the certificate of the company's manager was to be conclusive. In a suit by the conductor to recover the amount of his deposit the Court held that he was bound by the certificate of the

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14 *Morgan* v. *Birnie* (1833) 9 Bing. 672; 35 R.R. 65; *Clarke* v. *Watson* (1865) 18 C.B.N.S. 278; 144 R.R. 491.

15 *Braunstein* v. *Accidental Death Insurance Co.* (1861) 1 B. & S. 782; 124 R.R. 745.

16 *Linga Gowder* v. *State of Madras* (1975) A.M. 28, 32; *Municipal Council Karur* v. *Pasupatti Muthu Raja* (1969) 1 Mad. 124; *Cooke* v. *Oxley* (1790) 3 T.R. 653; *Somasundram Pillai* v. *Provincial Govt. of Madras* (1947) Mad. 366 refd. to.

17 (1879) 5 Mad. 173. Here, as too frequently in India, failure to report the argument has made the judgment obscure.

18 *Muttusami Ayyar J.* in his following judgment, quoted a not very dear illustration, as from Windscheid's Pandekten, which we have been unable to identify in that author's text.

19 *(Mrs.) Sohan Singh* v. *State Bank of India* (1964) A. Punj. 123.

20 (1885) II Cal. 232, cited in the commentary on s. 28. "Exception 1" *ante*.

manager, and that the manager was no more the company than the engineer or architect who is constituted the arbitrator, under a contract for works, to settle disputes as to extras or penalties is identical with the person or body for whom the work is done. The case, however, was argued and decided on s. 28.

An undertaking by a mother to make good the amount claimed by the younger son of a maharaja against the elder brother if the latter refused or failed to pay him that out of the father's estate is a good contract and an enforceable agreement, even if it was a contingent contract within s. 31 Contract Act.[21]

In some kinds of contracts, especially for the sale or letting of immovable property, clauses are commonly inserted expressly giving one or both of the parties an option to rescind the contract in specified events. In such cases, and in other cases where there is a complete and active obligation from the first, though subject to be defeated by matter subsequent, it does not seem that the contract can properly be called contingent.[22] *A* purchased *B*'s land, and leased the same to him for a period of six years, there being a forfeiture clause on failure to pay rent on the due dates. It was also agreed that if *B* paid rent regularly, *A* would reconvey the land to *B* at the end of the six years. *B* failed to pay the rent regularly, and *A*, while waiving the right of re-entry, gave notice cancelling the agreement to reconvey. In a suit by *B* for reconveyance, it was held that waiver of the right of re-entry, did not affect the contract of reconveyance, and that *B*, not having performed the condition precedent to his right to reconveyance, was not entitled to specific performance.[23]

In an agreement of sale the purchaser agreed to pay and did pay £600 as deposit and there was a term that the agreement was conditional on the purchaser obtaining a first mortgage loan deposit of £4000/- from an insurance company or other lending institution on or before settlement. The purchaser did not get the loan and the vendor rescinded the contract and sued for a declaration to that effect which the trial Court granted, holding that the purchaser was not entitled to avoid the contract on the nonfulfilment of the special condition and the vendor had lawfully rescinded the contract on the non-fulfilment of the term of payment of balance of purchase price and that the condition was not a condition precedent but condition subsequent or resolutive. The condition was on appeal held not to be dependent on the whim or will of the purchaser but required him to take all reasonable steps to obtain a loan of specified description a fact which was not proved and dismissed the appeal.[24]

Execution of a Formal Agreement.—In a contract between the Union of India and a contractor the execution of a formal agreement with the Union was an essential condition precedent. In the absence of this formality the contract was not complete.[25]

Discharge—Contingent contracts.—If two parties stipulate that the contract shall be void upon the happening of an event over which neither party shall have any control then the contract is void on the happening of that event. But where the contract is that the contract shall be void on the happening of an event which one or either of them can bring about then the blameworthy party cannot take advantage of that stipulation because to do so would be to permit him to take advantage of his own wrong.[26] This principle was accepted in Australia but

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21 *Commissioner of Wealth Tax.* v. *Vijayaba Dowager Maharani of Bhavnagar* (1979) A.SC. 982, 984; (1979) 3 SCR 545. *Kesoram Industries & Cotton Mills Ltd.* v. *Commissioner of Wealth Tax,* 59, I.T.R. 767 (1966) A.S.C. 1370 reld. on. *Bombay Deying & Mfg. Co. Ltd.* v. *Commissioner Wealth Tax* 93 I.T.R. 603; (1975) A.SC. 756. & *Standard Mills Co. Ltd.* v. *Commissioner of Wealth Tax* 63 I.T.R. 470; (1967) A.S. 595. disting.

22 See *Antonio* v. *Inez Faizon* (1949) 53 C.W.N. 336. 1949 A.P.C. 118.

23 *Shanmugam Pillai* v. *Annalakshmi* (1949) F.C.R. 537, 1950 A.F.C. 38, affirming *Annalakshmi Ammal* v. *Shanmugam Pillai* (1946) Mad. 470, 224 I.C. 308, 1946 A.M. 47; *Finch* v. *Underwood* (1876) 2 Ch. D. 310.

24 *Zeime* v. *Gregory* (1963) V.R. 214; *Kennedy* v. *Vercoe* (1960) 105 C.L.R. 521, 526 refd. to.

25 *Union of India* v. *Uttam Singh Duggal & Co.* (1972) A.D. 110.

26 *New Zealand Shipping Co.* v. *Societe des Ateliers* (1919) A.C. 1, 9.

with this modification that in both cases the contract is voidable and not void in one case and voidable in the other, because the construction cannot differ according to events.[27] Some Indian courts held that a clause in a contract giving one of the parties the option to cancel the contract for any reason whether adequate and valid or not confers an absolute and arbitrary power on one of the parties to a contract and is therefore void and unenforceable.[28] Therefore a clause in a contract of supply of goods to the Railway Administration conferring on the Railway Administration the right to cancel the contract "at any stage during the tenure of the contract without calling upon the outstandings on the unexpired portion of the contract" was held to be a clause under which it was open to one of the parties, without assigning any reason valid or otherwise, to say that it was not enforceable. It conferred an absolute and arbitrary power on one of the parties to cancel the contract.[29]

On appeal against the Madras High Court decision the Supreme Court[30] upheld the order passed but held that the clause authorising cancellation applied only where a formal order had not been placed for supply of the goods contracted for at which stage no legal contract can be said to have been made and so the cancellation made in the *Railway case* could not be said to have been covered by the clause. The Madras & Bombay cases were reviewed by the Supreme Court in a subsequent judgment and distinguished and the correctness of the Madras case also doubted. And the Supreme Court held that where the language of a clause in a contract is clear it must be interpreted according to its language. In that case[31] no clause in a insurance policy authorising both parties to cancel the policy at will was upheld. It is submitted that the two Supreme Court judgments show that such clauses are valid and enforceable except where, as in the Madras Railway case, the contract is an executed contract in that a formal order of supply had already been made.

Option to determine.—But in the case of a continuing contract, e.g. partnership or service, there may be a provision making it determinable at the option of one of the parties.[29] The same applies to fire insurance policies where both parties had the option to determine.[32]

A condition in a contract in which liability has been incurred, giving a party discretion to cancel the contract at any time without assigning any reason is void and cannot be enforced when the contract is a concluded contract.[33] But such a clause is not otherwise void.[34]

Condition Subsequent.—When the terms of a contract or a grant are reduced to writing no condition inconsistent with the express terms can be implied therein. But this principle has no application to a condition subsequent on the happening of which the contract will become inoperative.[35]

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible such contracts become void.

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27 *Suttor* v. *Gundowa Proprietary Ltd.* (1950) 81 C.L.R. 418, 441-2.
28 *Thathiah* v. *Union of India,* 1957 A.M. 82; *Chunnilal Daya* v. *Ahmedabad Fine Spinning & Weaving Co.*, 46 Bom. 806; 1922 A.B. 44; *Chotelal* v. *Champsey Umersey & Co.* (1923) A.B. 75 refd. to:
29 *M. Thathiah* v. *Union of India,* 1957 A.M. 82: (1957) Mad. 315.
30 *Union of India* v. *Maddala Thathiah* (1964) 3 SCR 61.
31 *Central Bank of India* v. *Hartford Fire Insurance Co. Ltd.* (1965) A.S.C. 1288, 1290.
32 *Central Bank of India* v. *Hartford Fire Insurance* (1965) A.S.C. 1288, 1290.
33 *M.R. Desai Bros.* v. *Coorg & Mysore Coffee Co. Ltd.* (1975) Knt. 877, 888-9; *Central Bank of India* v. *Hartford Fire Insurance Co. Ltd.* (1965) A.SC. 1288 reld. on.
34 *Central Bank of India* v. *Hartford Fire Insurance* (1965) A.SC. 1288, 1290.
35 *V.C.K. Bus Service Ltd.* v. *Regional Transport Authority,* 1957 S.C.R. 663, 674, 675; 1957 A.S.C. 489.

Illustrations

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse had been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

There are some cases which may be dealt with either under this section or s. 56, for it may be equally true to say that performance of a material part of the contract has become impossible[36] and that the contract was made on the contingency of an event which has become impossible; or it may be hard at first sight, at any rate, to say which section is the more applicable. See notes on s. 56. below, and *Krell* v. *Henry,*[37] where a contract to hire the use of a room in London to view the intended coronation procession of June, 1902, was held, in effect, to be conditional on the procession taking place. When parties enter into an agreement on the clear understanding that some other person shall be a party to it, there is no contract, if the other person does not join in the agreement.[38] In cases, where as a matter of construction the contract itself contains expressly or impliedly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract and would be outside the purview of s. 56. Although in English law they are all treated as cases of frustration under Indian law they would fall under s. 32 which deals with contingent contracts or similar other provisions in the Act.[39]

Whether a contract is of the kind specified in this section may be a question of fact or construction. In one case where this section was relied upon, the Privy Council held, on the construction of the document, that it operated as an unconditional undertaking on the defendant's part to procure a loan and out of the loan to repay the money due to the plaintiff.[40] See *infra* s. 56.

There is a clear distinction between a case where there is a present obligation under a contract and the performance is postponed to a later date and a case where there is no present obligation at all and the obligation arises by reason of some condition being complied with or some contingency occurring.[41] An agreement to sell off the 1,000 shares of a Bank held by the plaintiff at Rs. 50 a share within 12 months of the conversion of the Bank into a finance corporation or in default to buy them himself at that rate falls within the second category as the obligation arises upon the contingency taking place and there was no contract on the day the agreement was entered into but at the end of 12 months. The Bombay Securities Contracts Control Act, 1925 (s.6), is not therefore applicable.[42]

A clause in an insurance policy provided that the insurer will indemnify against loss or damage to a motor-car whilst in transit by road, rail, etc. A car was sent after the Partition of India by rail from Quetta to be carried to Jabalpur but could not be sent from Karachi because of want of an export permit.

This was held not to be covered by the indemnity clause because the car was not in transit when lost and there was no loss which meant loss in bulk by "destruction or disappearance".[43]

The difference between s. 32 and S.56. See *infra* under s. 56.

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36 *Kochuvareed* v. *Mariappa,* 1954 A.T.C. 10
37 (1903) 2 K.B. 740.
38 *Jainarain* v. *Surajmull* (1949) F.C.R. 379, 51 Bom. L.R. 979, 1949, A.F.C. 211 (where however it was held that no such understanding had been established, and therefore specific performance was decreed).
39 *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 323.
40 *Vissanji Sons & Co.* v. *Shapurji* (1912) 39 I.A. 152; 36 Bom. 387.
41 *Jethalal* v. *R.N. Kapur* (1956) A.B. 74.
42 *Ibid.*
43 *V.P. Desa* v. *Union of India* (1958) A.M.P. 297.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay *B* a sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

Sections 32 and 33 cannot be made plainer by any commentary. Section 34 is in accordance with very old English authority. A man who has contracted to sell and convey a piece of land to *A* on a certain date breaks his contract by conveying it to *Z* before that date, though he might possibly get the land back in the meantime.[44] English cases on conditional gifts in wills ought not to be cited in this connection, the rules applicable to the construction of wills being in some respects peculiar. The illustration to the section, in which it must be assumed that *A*'s agreement is made for some distinct consideration, as otherwise it would be merely a proposal, may therefore be taken as declaring the Common Law. The application of the present section, or any section in this group, must obviously depend on the special facts and the construction of the contract.[45]

When contracts become void which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

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44 Choke J., Y.B. 21 Ed. IV 55, pl. 26.

45 *Jaunpur Sugar Factory, In re,* 89 I.C. 438; 1925 A.A. 658; 23 All. L.J. 608.

A clause in a contract for sale of land providing "subject to the approval of the title of the vendor by the purchaser's lawyer" is a term of a contract, which, if assented to by the vendor, must be fulfilled to make the contract enforceable. It does not make the contract a conditional contract.[46] But such approval cannot unreasonably be withheld. In such an event the vendor can enforce the contract. And such approval has to be obtained in a reasonable time.[47]

Agreements contingent on impossible events void.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.[48]

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

The two last foregoing sections explain themselves. Before leaving this chapter we may note that somewhat similar provisions as to transfers of property made subject to conditions occur in the Transfer of Property Act, 1882; see especially ss. 25-34. A conditional transfer of property, though it may be, and often is, made in pursuance of a contract, is not, of course, itself a contract. It was therefore necessary to lay down distinct and independent, though more or less analogous, rules for such transactions.[49] Is it possible to say what would be impossible in this age of advance in Science?

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46 *Venkanarayana Sastry* v. *Chinna Yella Reddy* (1959) A.AP. 256. See *supra*.

47 *Ibid.*

48 This does not seem a very happy illustration in the light of modern geometry; not to say that geometrical relations have nothing to do with time.

49 *Qu.* whether e.g. *Asvath* v. *Chimabai* (1925) 27 Bom. L.R. 1246; 91 I.C. 330; 1926 A.B. 107 (question whether conveyance was conditional sale or mortgage) has anything to do with the Contract Act.

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

Obligation of parties to contracts.

37. The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promises before performance unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

Performance and discharge.—A contract, being an agreement enforceable by law (s. 2, above) creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge, but there are several others. Accordingly, the usual method of approved text-writers is to make the discharge of contract a main head of the subject, and treat of performance and other ways of discharge, such as agreement of the parties, breach of the contract, and operation of law, under distinct chapters or subdivisions, as may be seen in the works of the late Mr. Leake and of Sir W. Anson. This Act, for some reason which does not appear, has made "The Performance of Contracts" the principal title, with the somewhat curious result of including under it group of sections (62-67) on "Contracts which need not be performed." Whatever may be the merits of this innovation, elegance is not one of them. It is sufficient for practical purposes, however, if the law is intelligently stated in some kind of coherent order. The sections (51-58) on the Performance of Reciprocal Promises really belong to the head of Interpretation, which is not separately dealt with by the Act.

This section has some resemblance to a clause of the original draft (cl. 30). which, however, seems rather intended to define what performance is sufficient than to lay down any duty of performance in general. As to performance by an agent, see s. 40, below. The rule of the Common Law which is here affirmed in the second paragraph was stated in England in 1869 by Willes J., a judge of very great learning and authority:

"Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation;[1] and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary."[2]

Such personal considerations as are here mentioned extend, as shown by illustration (b) to the present section, to contracts involving special personal confidence or the exercise of special skill (*cp.* s. 40, below). They do not extend to mere exercise of ordinary discretion. The executors of a man who has ordered goods deliverable by instalments under a continuing contract may be bound to accept the remaining instalments, for the duty or discretion of seeing that the goods supplied are according to contract does not require any personal qualification.[3]

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1 The use of "relationship" as equivalent to "relation" in this sense has been common for several years, but is improper. Willes J. would certainly not have approved it.

2 *Farrow* v. *Wilton*, L.R. 4 C.P. 744, at p. 746. Followed in *Jagannath* v. *Pitambar Mohopatra*, 1954 A. Or. 241.

3 *Wentworth* v. *Cock* (1839) 10 A. & E. 42; 50 R.R. 316.

And generally the Court will not invent exceptions to the general rule which are not expressed or apparent from the nature of the contract.

A lessee cannot plead that he is a mere benamidar.—It is not open to a party to a lease showing him to be the lessee to plead that he was only a benami lessee the real lessee being his father. The parties and privies to the contract are bound by it unless excused by the Contract Act or any other law.[4]

C.I.F. Contract.—A C.I.F. contract is performed by delivery of shipping documents but it is complete mistake to think that the contract has nothing to do with delivery of goods[5] or the delivery of the goods is not material or not contemplated.[6] To state it in the words of Bankes L.J., a C.I.F. contract is a contract for the sale of goods to be performed by the delivery of documents relating to the goods.[7] In the language of Warrington L.J. such contracts are contracts for the sale and purchase of goods but they have to be performed in a particular manner, in particular that the delivery of the goods may be effected first by placing them on board the ship and secondly by transferring to the purchaser the shipping documents.[8]

Discharge by performance.—(i) Conditional on complete performance by one party.—Where one party's promise is made conditional on complete and entire performance by the other, the party in default cannot recover anything if he incompletely performs his side of the contract. The general rule is that no claim can be made in respect of the partial performance of an entire contract.[9]

If the parties have provided that certain work shall be done for a lump sum no judge can assert that it was their intention that a reasonable sum should be paid for each part of the work as it was performed.[10] Nor can a person recover for work done in a *quantum meruit* unless there is evidence of a fresh contract to pay for the work already done. Where the circumstances are such as to give to the defendant no option whether he will take the benefit or not, there is no inference of a fresh contract in the absence of other facts.[11]

(ii) De minimis and unjust enrichment.—A trivial or slight omission in the completion of the contract does not prevent the enforcement of the contract;[12] for, *de minimis non curat lex.*[13] The contract is not on that account discharged.[14] It would also result in unjust enrichment without the necessity of paying for it.[15]

(iii) Defective work and misconduct.—Where the obligation to pay remuneration based on profits was dependent upon the performance of stipulated service in the agreement, namely, that the defendant should devote at least 160 hours in every four weeks during the year to the management of the defendant's business and the promises of the parties were mutual and concurrent and the plaintiff did not perform the contract according to its terms he is not entitl-

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4 *Ranvijaya Shahi* v. *Bala Prasad Motani* (1978) A.P.91, 93.
5 *Joseph Pyke & Co.* v. *Kedarnath* (1956) A. Cal. 328; *Johnson* v. *Taylor Bros. & Co.*, 1920 A.C. 144; Biddel Bros. v. *E. Clemens Horst Co.* (1911) 1 K.B. 214; see *Herman & Mohatta* v. *Pran Vallabh Majumdar* (1960) A. Cal. 524; *Narayanaswami Chetty* v. *Soundara Rajan & Co.* (1958) A.M. 43.
6 *Joseph Pyke & Son* v. *Kedarnath,* 1959 A. Cal. 328; *Kwei Tek Chao* v. *British Traders and Shippers Ltd.* (1954) 2 Q.B. 459; *Arnhold Karberg & Co.* v. *Blythe Green Jourdain* (1916) 1 K.B. 495, 510 (Bankes L.J.), 514.
7 *Arnhold Karberg* v. *Blythe Green Jourdain & Co.* (1916) 1 K.B. 495, 510.
8 *Arnhold Karberg & Co.* v. *Blythe, Green Jourdain & Co.* (1916) 1 K.B. 495, 514.
9 *Cutter* v. *Powell* (1956) 6 T.R. 320; Anson: *Law of Contract* (24th Edn.) p. 456.
10 Cheshire & Fifoot: *Law of Contract* (9th Edn.) p. 523; G.L. Williams: *The Law Reform (Frustrated Contracts) Act,* p. 3; *Brittain* v. *Rossiter* (1879 11 Q.B.D. 123 (such an implication is impossible so long as the express contract to pay the full amount remains in existence).
11 *Sumpter* v. *Hedges* (1898) 1 Q.B. 673,676; *The Madras* (1898) P. 90, 94; *Forman & Co. Pty. Ltd.* v. *The Ship "Littlesdale"*, 1900, A.C. 190, 202; *Philips* v. *Ellinson Bros. (Pty.) Ltd.* (1941) 65 C.L.R. 221.
12 *Lowther* v. *Heaver* (1889) 41 Ch.D. 248; *Wilkinson* v. *Clements* (1872) 8 Ch. App. 96, 106; quoted in *Philips* v. *Ellinson Brothers Pty. Ltd.* (1941) 65 C.L.R. 221. 235.
13 *Arcos Ltd.* v. *E.A. Ronaasen & Son* (1933) A.C. 470, 479, 480, deviation microscopic.
14 *Hoenig* v. *Isaacs* (1952) 2 All E.R. 176 (a case of interior decorator).
15 Anson: *Law of Contract* (24th Edn.) p. 456.

ed to recover. The plaintiff's plea of variation of the contract of working fifteen hours a week or a new contract to that effect could not be a defence as it was without consideration.[16] But where defective work is done under special contract or goods supplied but not in conformity with the contract a deduction is allowed from wages or from price because the defendant accepted and retained the benefit of that which was actually done or supplied.[17] In a general employment involving continuous services specific acts of misconduct do not go to the entire consideration. Before the remuneration in an agency agreement can be forfeited, an interdependence must be found to exist between the act of misconduct and the performance of the work or the fulfilment of the condition upon which the right to remuneration arises.[18] But where the claim of forfeiture relates to the entire remuneration for an inseparable service the acts of misconduct of a servant would go to the entire consideration.[19] Where salary, though annual, is payable monthly, any salary for the period subsequent to the period during which misconduct is established is claimable by the employee because the contract was found to be divisible and the right to the salary became vested at the end of each month.[20]

(iv) Bills, payment by.—The presumption is that a bill or a note given in respect of a debt operates as payment subject to a condition subsequent or qualification by way of defeasance. The principle recognises a discharge or payment subject to a condition subsequent, i.e. if the bill or note is dishonoured it shall no longer be considered payment and the original debt shall revive.[21]

Succession to benefit of contract.—Neither the present section nor anything else in the Act lays down any rule as to the manner in which or the extent to which persons other than the original promisee may become entitled to enforce a promise.

Generally the representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate. It is no real exception to this rule that in some cases the nature of the contract is in itself, or may be made by the intention of the parties, such that the obligation is determined by the death of the promisee. The most obvious example is the contract to marry in the Common Law. Another more seeming than real exception is where performance by the other party is conditional on some performance by the deceased which was not completed in his lifetime and is so of such a personal character that performance by his representatives cannot be equivalent. An architect's executor, for example, cannot insist on completing an unfinished design, even if he is a skilled architect himself; and accordingly he cannot fulfill the conditions on which payment, or further payment, as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts for ordinary building work, for they have only to procure workmen of ordinary competence, and similarly in other cases. It is to be remembered that all rules of this kind are in aid of the presumed intention of the parties, and if the parties have expressed a special intention it must prevail.

Payments actually earned and due to a man before his death, though for services of a confidential or personal kind, are a portion of his estate as much as any other debts, and accordingly his representatives succeed to his right of action for them, and may recover them. This is indeed, as a general proposition, elementary, though doubts may be raised on particular facts as to what were exactly the rights acquired by an original contracting party in his lifetime.[22] The same rule applies to rights of action for conventional damages or penalties.[23]

16 *Philips* v. *Ellinson Brothers Pty. Ltd.* (1941) 65 C.L.R. 221, 234.
17 *Philips* v. *Ellinson Brothers (Pty.) Ltd.* (1941) 65 C.L.R. 221, 235; *Sumpter* v. *Hedges* (1898) 1 Q.B. 673 (quoted).
18 *P & O. Steam Navigation Co.* v. *Johnson & Co.* (1938) 60 C.L.R. 189, 253-4.
19 *Curio Guarantee Corporation Ltd.* v. *McCallum* (1956) V.R. 755.
20 *Healey* v. *Societe Annonyme Francaise Rubastic* (1917) 1 K.B. 946.
21 *McKenzie* v. *Rees* (1941) 65 C.L.R. 1, 14-15.
22 *Stubbs.* v. *Holywell R. Co.* (1867) L.R. 2 Ex. 311. The argument for the defendant was that the contract was really entire, and the payment by instalments only a matter of convenience, and that the full performance of the contract had become impossible by the original party's death. But such an argument could be maintained only by showing that in his lifetime he could not have sued for any instalment until he had done the whole of the work, which would reduce the contract to an absurdity. His death put an end to the contract, but did not destroy rights of action which he had already acquired.
23 *Beckham* v. *Drake* (1849) 2 H.L.C. 579; 81 R.R. 301.

But a cause of action for damages for injuries of a merely personal nature, though arising out of a breach of contract, cannot be sued upon by or against executors.[24] A contract to pay a certain sum of money to a near relative during his life, the consideration being natural love and affection and the document being registered, is enforceable against the heirs of the deceased promisor, by virtue of s. 25(1) read with s. 37, unless a contrary intention appears.[25]

The English law on this subject has now been substantially altered by the Law Reform (Miscellaneous Provisions) Act, 1934, which provides that on the death of any person, all causes of action (with four exceptions, all relating to tortious or wrongful acts and not here material) subsisting against or vested in him are to survive against, or for the benefit of, his estate. Where damage has been suffered by reason of any act or omission which would have given rise to a cause of action against a person, if he had not died before or at the same time as the damage was suffered, a cause of action is deemed for the purposes of the Act to have been subsisting against him before his death in respect of that act or omission. But no claim for exemplary damages will survive and in the cases of breach of promise of marriage damages recoverable are limited to such damage, if any, to the estate as flows from the breach.[26]

"Although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees (in bankruptcy), I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass."[27]

The rights of an insolvent debtor's assignees to sue on his contracts depend, of course, on statute; but in the absence of more specific provisions they are governed by the same principles as an executor's.

A covenant in a deed of sale giving an option of pre-emption without any limit of time to the vendor and his heirs from the purchaser and his heirs is void as offending the rule against perpetuities.[28] But according to the latest edition of Mulla's Transfer of Property Act a covenant for pre-emption being a personal covenant is binding on the immediate parties and on their personal representatives; it creates an obligation arising out of contract and is enforceable under section 40 of the Transfer of Property Act against a purchaser for value with notice or against a gratituous transferee but the benefit of it is restricted to the covenantee and cannot be transferred by him.[29]

Obligation of parties to a Contract.—Where a document is proposed to be signed by several parties and only some of them execute it and others do not. The question of the document being binding on the others who have executed depends on intention of parties. The intention that the document will not bind the executing parties has to be established by the executing parties by showing that they would not have executed the document if the other party had not joined in the agreement or that they did not intend to be bound unless the others who were proposed to be parties joined in the execution.[30]

Where an agreement was signed by *A* for self and on behalf of his minor sons and the name of *A*'s mother appeared in the document but she had not signed it and her interest was a

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24 See the Indian Succession Act, 1925, s. 306.

25 *Vijaya Ramraj* v. *Vijaya Ananda,* 1952 A.A. 564.

26 24 & 25 Geo. 5, c. 41, s. 1. For breach of promise of marriage cases under the earlier law see *Chamberlain* v. *Williamson* (1814) 2 M. & S. 408; 15 R.R. 295; *Finlay* v. *Chirney* (1888) 20 Q.B.D. 494; *Quirk* v. *Thomas* (1915) 1 K.B. 798.

27 Opinion of Maule J. given to the House of Lords in *Beckham* v. *Drake* (1849) 2 H.L.C. at p. 622; 81 R.R. 329.

28 *Dinkarrao* v. *Narayan* (1923) 47 Bom. 191; 82 I.C. 628; *Maharaj Bahadur Singh* v. *Balchand* (1920) 48 I.A. 376; 61 I.C. 702; *Kolatpu Ayyar* v. *Ranga Vadhyar* (1912) 38 Mad. 114; *Nabin Chandra Sarma* v. *Rajani Chandra* (1920) 25 C.W.N. 901; 63 I.C. 196; *Gopi Ram* v. *Jeot Ram* (1923) 45 All. 478; 82 I.C. 646; 1923 A.A. 514; *Ratanlal* v. *Ramanujdas* (1945) Nag. 174, 216 I.C. 266, 1944 A.N. 187. For cases under the Transfer of Property Act, 1882, see Mulla's *Transfer of Property Act,* 5th edn., pp. 118-121. See also and dist. the cases cited under s. 29 above, where the Court would not extend this objection.

29 Mulla's *Transfer of Property Act* (5th Ed.), pp. 118-121.

30 *Sethu Paryathy Ammal* v. *Bajji K. Srinivasan Chettiar & others* (1972) A.M. 222, 227; *Sivasami Chetti* v. *Sevugan (Sevugan) Chetti,* 25 Mad. 389; *U.K. Nethiri Menon* v. *Mullapulli Gopalan Nair,* 39 Mad. 597; *Witkinson* v. *Malin* (1832) 2 Tyr. 544 applied; *In re. Whiteley. Bishop of London* v. *Whiteley,* (1910); 1 Ch. 600 *Teramath* v. *Lakshmi,* 6 Mad. 270 disting.

charge for maintenance payable by '*A*' it was held that the parties could not have intended to be bound only if '*A*'s mother had joined in the execution of the document.[31]

Assignment of contracts.—Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles were thus stated by the Court of Appeal in England:

"Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor.... On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice.... There is, however, another class of contracts where there are mutual obligations still to be enforced, and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person.... To suits on these contracts, therefore, the original contractee must be a party whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable."

Prohibition against assignment of Contract.—Prohibition against assignment of a contract or a part thereof or any benefit or interest therein or thereunder without the written permission of the Council in a contract of road works would cover the assignment of a sum of money, due to the contractor i.e. a debt to a financier and he cannot recover it from the Council. When the subject matter of a contract is a chose in action which was not to be assigned without a written consent of a contractee a debt due from the latter cannot be assigned as it is both a chose in action or a benefit or interest under the contract and accordingly cannot be validly assigned without the consent of the Council.[32]

Not that the burden of a contract can ever really be assigned, but sometimes it may be discharged by a delegated performance (in which case it does not matter to the promisee what are the exact relations of agency or otherwise between the promisor and his delegate), and sometimes not.[33]

The Supreme Court has laid down the law thus:

An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee and then it is a novation resulting in substitution of liabilities.[34] On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment, e.g. as in the case of goods covered by personal licences.[34] In the case of goods covered by import licences the buyer cannot assign his right to a non-holder of a licence as the import licences are personal.[34] There is a distinction in law between assignment of rights under a contract by a party who has performed his obligation thereunder and assignment of a claim for compensation which one party has against another for breach of contract. The latter is a mere claim for damages which cannot be assigned in law, the former is a benefit under a contract which is capable of assignment.[35] But such assignee cannot sue on the contract except when he claims, through a party to the contract by operation of law, e.g. when goods are transferred to him as purchaser.[36] An arbitration clause is not a personal covenant in the sense that it cannot be assigned.[37]

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31 *Seethu Parvathy Ammal* v. *Srinivasan Chettiar* (1973) A.M. 222, 227.
32 *Helston Securities Ltd.* v. *Herts. County Council* (1978) 3 All E.R. 262, 265.
33 *Tolhurst* v. *Associated Cement Manufacturers* (1902) 2 K.B. 660, 668, 669, per Collins, M.R.; (1903) A.C. 414, at p. 417; *Hindustan Steel Corporation Ltd.* v. *Bharat Spun Pipe Co.* (1975) A. Cal. 8, 11.
34 *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1962) A.S.C. 1810, 1817, (1963) 3 S.C.R. 183; *Hindustan Steel Corporation Ltd.* v. *Bharat Spun Pipe Co.* (1975) A. Cal. 8, 11.
35 *Ibid,* 202; 1818 (A.I.R.).
36 *Ibrahim* v. *Union of India* (1966) A. Guj. 6.
37 *Shayler* v. *Woolf* (1946) Ch. 320; (1946) 2 All E.R. 54; *Cottage Club Estates* v. *Woodside Estates Co. (Amersham) Ltd.* (1928) 2 K.B. 463 dist.; *Khardah & Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R.

The assignability of a contract depends on its nature. Contracts in the nature of personal contracts cannot be assigned. The rights under a contract can be assigned but not the obligations. An arbitration clause does not affect either the rights or the assignability of a contract if it is otherwise assignable. Where the contract is for the supply of some materials, there is nothing personal in it.[38]

The terms of a contract can be expressed or implied from what has been expressed. It is legitimate to take the surrounding circumstances into account; therefore the absence of a clause forbidding transfer is not conclusive.[39]

The Contract Act has no section dealing generally with assignability of contracts. A contract which, under section 40, is such that the promisor must perform it in person has been held not to be assignable. "When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which could not be assigned without the promisor's consent, so as to entitle the assignee to sue him on it".[40] Thus where *R* agreed with *M*, the proprietor of an indigo concern, to sow indigo, taking the seed from *M*'s concern, on four *bighas* of land out of his holding selected by *M* or his *Amlah*, and, when the indigo was fit for weeding and reaping, to weed and reap it according to the instructions of the *Amlah* of the concern, and if any portion of the said land was in the judgment of the *Amlah* found bad, in lieu thereof to get some other land in his holding selected and measured by the *Amlah*, it was held that the contract was entered into with reference to the personal position, circumstances, and qualifications of *M* and his *Amlah*, and *M* could not assign the contract without the consent of *R*.[41] Similarly, where *A*, a salt manufacturer, agreed with *B* to manufacture for him for a period of seven years such quantity of salt as *B*, required in consideration of *B* paying him at a fixed rate, four months' credit after each delivery being allowed to *B*, and of his paying Government taxes and dues, and executing all but petty repairs in *A*'s factory, it was held that the contract was based upon personal considerations, and that it was not therefore competent to *B* to assign the contract without *A*'s consent.[42] After referring to the terms of the contract the Court said: "There is therefore not only credit given to *(B)* in the matter of payment, but other liabilities are thrown upon him, the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in regard to the quantity of salt to be demanded".[43] "You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract".[44] But where *A* agreed to sell certain gunny bags to *B* which were to be delivered in monthly instalments for a period of six months, and the contract contained certain buyer's options as to quality and packing, it was held that the clause as to buyer's option did not preclude *B* from assigning the contract.[45] "There is nothing," it was said, "on the face of the contract to suggest that any credit was given by the defendant company to the original purchaser or that any circumstance of an especial or particular character existed which led to the making of the contract between the parties thereto".[46] See Specific Relief Act, s. 14 (1)(b) (Act 47 of 1963) which corresponds to s. 21(b) of the Act of 1877.

We next proceed to consider whether a contract for the future delivery of goods can be assigned under the Indian law; that is, if *A* agrees to sell, say, rapeseed, cotton or gunny bags to *B*, deliverable at a future day, whether either party can assign the contract without the con-

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183, 202; 1962 A.SC. 1810, 1818; *Hindustan Steel Corporation Ltd.* v. *Bharat Spun Pipe Co.* (1975) A. Cal. 8, 11.

38 *Hindustan Steel Corporation Ltd.* v. *Bharat Spun Pipe Co.* (1975) A. Cal. 8, 11; *Khardah Co. Ltd.* v. *Raymon & Co. (P) Ltd.* (1962) A.SC. 1810 refd. to.

39 *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183, 207; (1962) A.SC. 1810, 1820.

40 *Toomey* v. *Rama Sahi* (1890) 17 Cal. 115, at p. 121.

41 *Ibid.*

42 *Namasivaya Gurukkal* v. *Kadir Ammal* (1893) 17 Mad. 168.

43 *Ibid*, p. 174. The decision also proceeded on the ground that the contract was executory, and its assignment as such was invalid without *A*'s consent (*ib.* p. 175).

44 *Humble* v. *Hunter* (1848) 12 Q.B. 310, per Lord Denman C.J. at p. 317; *Arkansas Smelting Co.* v. *Belden Co.*, 127 U.S. 379, 389.

45 *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, affirmed on appeal, 34 Cal. 289.

46 *Ibid*, p. 707.

sent of the other, while the contract is still executory, so as to enable the assignee to maintain an action in his own right and in his own name. In *Tod* v. *Lakhmidas,*[47] the High Court of Bombay held that neither the seller nor the buyer of goods, where the goods are to be delivered at a future day, can assign the contract, before the date fixed for delivery, to a third person without the consent of the other so as to entitle the assignee to sue in his own name; but that there was no objection to suit brought by the assignor and assignee as co-plaintiffs, for when the suit is by them both, there is no question as to which of them is to recover.[48] The decision expressly proceeded upon the principle of the English law that where a contract is still executory the burden thereof cannot be assigned. The Court was not called upon to decide whether the interest of the seller or buyer in the contracts was assignable as an actionable claim within the meaning of the Transfer of Property Act; for that Act, though passed in the year 1882, was not extended to the Bombay Presidency until 1st January, 1893, and the case was heard and decided about eleven months before that date. It is now applicable to the whole of India. An actionable claim is defined in s. 3 of that Act as a claim to any debt (except secured debts), or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, whether such debt or beneficial interest be existent, accruing, conditional or contingent. An actionable claim can always be assigned, but the assignment, to be complete and effectual, must be effected by an instrument in writing; and upon the execution of such instrument all the rights and remedies of the assignor vest in the assignee, who may thereupon sue in his own name without making the assignor a party to the suit.[49] As regards the interests of a *buyer* of goods in a contract for forward delivery, it has been held by the High Court of Calcutta, in *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.,*[50] and by the High Court of Bombay, in *Hunsraj Morarji* v. *Nathoo Gangaram,*[51] that such interest is an actionable claim within the meaning of the Transfer of Property Act, and may be assigned as such so as to enable the assignee to sue in his own name. In the former case, Sale J. said:

"The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit* the beneficial right or interest of the party under the contract and the right to sue to recover the benefits created thereby. This rule, is, however, subject to two qualifications: first, that the benefit sought to be assigned is not coupled to any liability or obligation that the assignor is bound to fulfil, and, next, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it. Neither of these exceptions, I think, applies to the present case. There is nothing on the face of the contract to suggest that any credit was given by the defendant company to the original purchaser, or that any circumstance of an especial or personal character existed which led to the making of the contract between the parties thereto, nor, looking at the terms of the contract, does it appear to impose any liability or obligation of a personal character on the assignor which would prevent the operation of the rule of assignability. The contract is for the sale on the usual terms of a certain quantity of gunny bags to Cassim Karim, and subject to the exercise of certain options the purchaser has an absolute right to call for delivery of the goods on payment of the price. I am inclined to think that the right to claim the benefit of the contract, or in other words, the right on certain conditions to call for delivery of the goods mentioned in the contract, constitutes a 'beneficial interest in movable property, conditional or contingent', within the meaning of the definition of an actionable claim in section 3 of the Transfer of Property Act, and as such is assignable."

And in the Bombay case, where also the assignment was by the buyer, Jenkins C.J. said:

"What was transferred was, in my opinion, property, and under section 6 of the Transfer of Property Act property of any kind may be transferred except as therein provided. None of the specified exceptions would have included what Shariffbhoy (buyer) purported to transfer and I further hold that the subject of the transfer was an actionable claim, and so Chapter VIII of the Transfer of Property Act.[52] applies. That this view of the Transfer of Property Act does not involve any material change in the law as previously understood in Bombay is apparent from what was said by Westropp C.J. in *Dayabhai Dipchand* v. *Dullabhram Dayaram.*"[53]

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47 (1892) 16 Bom. 441.
48 *Ibid: Jiwan* v. *Haji Oosman* (1903) 5 Bom.L.R. 373.
49 Transfer of Property Act, 1882, s. 130.
50 (1906) 33 Cal. 702, affirmed on appeal in 34 Cal. 289.
51 (1907) 9 Bom.L.R. 838.
52 That is the Chapter on Transfers of Actionable Claims.
53 (1871) 8 B.H.C. 133.

In the last-mentioned case, *A* agreed to sell certain shares to *B*, deliverable at a future day. *A*, that is the *seller*, assigned the contract to *C* (it does not appear exactly when or how), and *C* sued *B* for damages for refusing to take delivery. The District Judge, without examining the circumstances, held that such a contract was not assignable, but the case was remitted to him to determine upon all the facts. Westropp C.J. said:

"The District Judge should ... have held that in equity it (the contract) was assignable for a valuable consideration (Spence, Eq. Juris. 852),[54] subject, no doubt (generally speaking), to the equities (if any) which may have existed between the defendant and the original vendor."

It has yet to be decided whether the right of a *seller* to call for payment of the price of goods on delivery is an actionable claim and as such assignable. The *dicta* in *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* are wide enough to include the seller's interest. The Madras High Court has held that the seller of goods can assign his rights, and the assignee is entitled to sue for damages in case the buyer wrongfully refuses to accept delivery.[55] But a claim for damages for breach of contract, after breach, is not an actionable claim "within the meaning of s.3 of the Transfer of Property Act, but a mere right to sue" within the meaning of s. 6 cl. (e), of that Act, and it cannot therefore be assigned.[56]

An option to repurchase property sold is *prima facie* assignable, but the contract may be so worded as to show that it was to be personal to the grantee and not assignable.[57]

Where *A* assigned a mortgage to *B*, agreeing to indemnify him against any loss on the mortgage, and *B* assigned his rights to *C*, *C* is entitled to sue on the contract of indemnity.[58]

Any other law.—The most important statutory discharge of contracts, outside the present Act, is that which follows on insolvency. See the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. See also ss. 62 to 67. The performance may be partially dispensed with under this Act,[59] or any other law.[60]

In a binding contract there was a term that if extra or extended items of work were ordered by the Engineer-in-charge for which no rates were fixed in the schedule the contractor shall give a notice in writing as to the rates he will charge and if the Engineer did not agree he could by a notice in writing cancel the order and if the contractor had incurred any expenditure or carried out any work before the determination of rates he shall be entitled to such rate or rates as are fixed by the Engineer, but he is not entitled to be paid at the rates quoted by him in his notice. The mere fact that the Engineer in charge did not exercise his power to cancel the order would not mean a concluded contract on contractor's terms.[61]

Effect of refusal to accept offer of performance.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

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54 The passage cited from Spence obviously relates to the transfer of rights and not to the delegation of duties. The statement itself is elementary. All that the Bombay case decides, in point of law, is that the District Judge was wrong in laying down as an unqualified proposition that the contract was not assignable. *A* could not, of course, delegate his duty under the contract to *C* without *B*'s consent. But he could perform the contract by *C*'s agency and authorise *C* to receive payment; or, when *B*'s undertaking to pay for the shares had become a debt, he could assign the debt to *C*. It remains true, as Farran J. most correctly said about twenty years later in the same Court. *Tod* v. *Lakhmidas*, 16 Bom. 441, 449, that "a purchaser is entitled to call upon the person with whom he contracted to fulfill his contract, and the latter cannot get rid of his liability by transferring it to a third person, but must himself perform the contract personally or vicariously."

55 *Rangiah* v. *Parthasarathy*, 1947 A.M. 258.

56 *Abu Mahomed* v. *Chunder* (1909) 36 Cal. 345; *Varahaswami* v. *Ramachandra* (1915) 38 Mad. 138, 140; 18 I.C. 520.

57 *Vishweshwar Narsabhatta* v. *Durgappa* (1940) Bom. 674; 42 Bom. L.R. 653; 191 I.C. 139; 1940 A.B. 339.

58 *Dharshi Monji* v. *Chandulal*, 1950 A. Kutch 84.

59 *Bhayyaji* v. *Damodar* (1946) Nag. 334, 1946 A.N. 336.

60 *Bapurao Lalji* v. *Anant Kashinath* (1946) Nag. 407, 227 I.C. 466, 1946 A.N. 210.

61 *Bombay Housing Board* v. *Karbhase Naik & Co.* (1975) A.SC. 763, 765; (1975) 3 SCR 407.

Every such offer must fulfil the following conditions:—

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to *B* at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B*'s warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Tender.—The subject-matter of the present section is to be found under the head of Tender in English books.[62]

The first sub-section is chiefly, though not exclusively, appropriate to an offer of payment; the second and third concern offers of other kinds of performance, such as delivery of goods.

The principles were laid down in England in 1843 in *Startup* v. *Macdonald*:[63]

"The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purported to be." As to what are proper time and place, see ss. 46-49, below.

Offer must not be of part only.—With regard to the validity of an offer of performance, it must be not only unconditional, but entire: that is, it must be an offer of the whole payment or performance that is due.[64] Words to this effect were in the corresponding clause in the original draft of the Act and it is not easy to see why they are not as prominent in the section as finally settled. The substance of the rule is, however, in force in India. It is needless to consider whether this is because the Act does not expressly negative the English rule as already adopted, or because of the words "the whole of what he is bound by his promise to do" in sub-s. (2), or because an offer to pay or perform only in part is not really "an offer of performance" of an entire promise at all. Whatever the reason may be, it has been held by the High Court of Calcutta that a creditor is not bound to accept a sum smaller than he is entitled to and therefore the tender of such a sum does not stop interest running on it.[65]

Discharge by final order of payment.—An order for final payment on the completion of work in connection with a contract for tube wells of the balance due is an irrevocable order which puts an end to the contract, i.e. discharge by performance. It is not necessary to wait for

62 It will be observed that the word "tender" does not appear in the section; and it has been held in Calcutta that condition (2) does not necessarily require the production of money in the case of a debt, as under English law; *Ismail Bhai Rahim* v. *Adam Osman* (1938) 2 Cal. 337; 181 I.C. 539; 1939 A. Cal. 131; though the production of the money is of course the most effective way of proving that the debtor is able and willing there and then to pay his debt. This must be borne in mind when applying "English Authorities" to cases under s. 38. See also *The Bank of India Ltd.* v. *Jamsetji Chinoy* (1950) 77 I.A. 76, P.C.; *Sohanlal Pachisia* v. *Bilasray*, 1954 A. Cal. 179.

63 (1843) 5 Man. & G. 593, 610, 64 R.R. 810, 824, judgment of Rolfe B.

64 *Dixon* v. *Clark* (1847) 5 C.B. 365; 75 R.R. 747; *Read's Trustee* v. *Smith* (1951) ch. 439.

65 *Watson & Co.* v. *Dhonendra Chunder Mookerjee* (1877) 3 Cal. 6, 16; *Chunder Caunt Mookerjee* v. *Jodoonath Khan* (1878) 3 Cal. 468.

a completion certificate.[66] In that case, Narasimham C.J. held that though ordinarily a contract continues to subsist till a completion certificate is obtained, unreasonable delay in issuing the certificate brings about the discharge of the contract.[67] The performance of a contract is complete where there is a legal tender on the part of the promisee.[68] This, it is submitted, is not in accord with authority. A tender of money does not discharge a debt although it may be good defence in an action on the debt.[69]

In *Haji Abdul Rahman* v. *Haji Noor Mahomed,*[70] in the High Court of Bombay, the defendant had tendered a sum which was only a small fraction of the whole sum claimed and found due, and one question in the case was whether interest was due, after the date of this offer, on the whole sum or only on the residue. Telang J. thought that the rule in *Dixon* v. *Clark,*[71] that a tender of part of an entire debt is bad, applied only to cases when the party making the tender admitted more to be due than was tendered, and that it had no application where the debtor tendered the amount as in full payment of the debt. The Court, however, decided against the defendant on the ground that the tender was ineffectual, as it had not been followed by a payment into Court in the suit, as required by an established rule of practice. This opinion of Telang J. appears, with great respect, to be founded on a misconception both of the principle involved and of the English authorities. A creditor is not bound to accept less than is actually due and payable, and therefore by refusing to accept only a portion of the principle he cannot lose his right to interest on that portion where interest is otherwise payable. A so-called tender of less than the debtor admits to be due is not a tender at all, but an offer of payment on account, which the creditor may accept or not, and risks nothing, in point of law, by not accepting, though it is often, in point of fact, unwise not to take what one can get. Tender is, one may almost say, essentially the offer of a sum which the debtor asserts to be the whole sum due, but which is less than the creditor claims; for if the parties are agreed on the amount due, a formal offer is needless and useless. This being so the creditor refuses money at his peril in case his further claim turns out unfounded; but if he accepts, the debtor is still only offering what is due, and the creditor is not bound to make any admission in return. He may take the debtor's offered payment without prejudice to his claim, such as it may be, to a further balance. The debtor is entitled to a receipt for what he pays, but not to a release. It remains to be seen whether there was a discharge or only a payment on account. Hence a tender will be vitiated by the addition of any terms which amount to requiring the creditor to accept the sum offered in full satisfaction, or to admit in any other way that no more is due. It seems almost superfluous to add that an offer to pay an unascertained sum cannot be a tender.[72]

Prevention by one party.—The Indian law is identical with the English law that prevention by one party is constructionally tantamount to a fulfilment of the promise by the (other) party prevented in the case of conditional contract or a contract of reciprocal promises.[73] Where in the case of an agreement of reconveyance a party before the expiry of the period stipulated for recovery once repudiates the contract for reconveyance the other party can sue for specific performance and it will be useless to make a formal tender of the purchase price.[74]

It may here be observed that there is an old Bombay Regulation (V of 1827) which allows a debtor (including a mortgagor) to tender even a part of the debt. If the part is tendered as such and not as in full payment of the debt, further interest on the amount so tendered ceases under sec. 14 of the Regulation; *Nadershaw* v. *Shirinbai.*[75]

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66 *Pyari Mohan* v. *Durga Shankar,* 1958 A. Or. 125, 130.
67 *Ibid.*
68 *Ibid,* 130.
69 Anson: *Law of Contract* (24th Ed) 460-461.
70 (1891) 16 Bom. 141, 147-149.
71 5 C.B. 365; 16 L.J.C.P. 237.
72 See *Lal Batcha Sahib* v. *Arcot Narainaswami Mudaliyar* (1910) 34 Mad. 320.
73 *Nagayya* v. *Bapamma,* 1958 A.AP. 504.
74 *International Contractors Ltd.* v. *Prasanta Kumar Sur* (1961) 3 S.C.R. 579; 1962 A.SC. 77; *Chalikani* v. *Zamindar of Tuni,* 50 I.A. 41; 1923 A.PC. 26; *Hunter* v. *Daniel* (1845) 4 Hare 420; 67 E.R. 712.
75 (1923) 25 Bom.L.R. 839; 87 I.C. 129; 1924 A.B. 264.

Where the contract provided that in case of neglect of the vendor to complete the transaction the purchaser was to deposit the sale price in Court and the money was not so deposited in Court but was deposited after the decree, it was held that it would be purposeless making the deposit if the vendor had made it clear that he was not going through the sale.[76]

Offer must be unconditional.—"The person making a tender has a right to exclude presumptions against himself by saying: 'I pay this as the whole that is due': but if he requires the other party to accept it as all that is due, that is imposing a condition; and, when the offer is so made, the creditor may refuse to consider it as a tender".[77]

A mere specifying of the account on which a payment is offered, though accompanied by such words as "in settlement" or the like, does not amount to a condition in this sense; for it is not more than saying that the debtor offers all that he believes to be due.[78] More than this, a debtor may tender, expressly under protest, a greater sum than he admits to be due, and thus reserve the right of taking further proceedings to test the justice of the claim. Such a protest does not impose any condition. "The creditor has only to say, 'I take the money; protest as much as you please', and neither party makes any admission".[79] A tender of a debt before the due date is not a valid tender, and will not prevent interest from running on the loan.[80] A cheque sent in payment of both moneys immediately due as well as of moneys not payable for some time, is not a good tender.[81]

There are hardly any[82] recent English cases on tender of money debts, and the habits of modern business appear to have greatly diminished the importance of the subject.[83]

Able and willing.—Sub-s. (2) provides that the tender must be made under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.[84] But when the creditor is dead, and no probate has been obtained by the executors of the deceased, an offer by letter to pay the debt to the executors, on a proper release being executed, was held in Bombay to be a valid tender, provided the debtor was able to pay the debt, and had money available for that purpose, no actual production of money was necessary in such a case, there being no person entitled in law to receive the payment. In the case cited the executors, before taking out probate, had called upon a mortgagor to whom the deceased had lent money on mortgage to pay the amount due on the mortgage for principal and interest. The money for repayment was available before the notice expired, but probate was not obtained until after that date. The Court held that actual tender

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76 *Devendra Dasappa* v. *Smt. Sonibai Tuljansa* (1971) A. Mys. 217, 223.

77 *Bowen* v. *Owen* (1847) 11 Q.B. 130, 136; 75 R.R. 306, 310, per Erle J.; *Sati Prosad* v. *Monmotha Nath* (1913) 18 C.W.N. 84; *Bank of Mysore* v. *B.D. Naidu,* 1954 A. Mys. 168.

78 *Ibid.*

79 *Scott* v. *Uxbridge and Rickmansworth R. Co.* (1866) L.R. 1 C.P. 596, at p. 599, per Willes J.

80 *Eshahuq Molla* v. *Abdul Bari Haldar* (1904) 31 Cal. 183.

81 *Hira Lal* v. *Khizar Hayal,* 1936 A. Lah. 168; 161 I.C. 251.

82 *In Rourke* v. *Robinson* (1911) 1 Ch. 480, the only question was whether a mortgagee was bound, on being paid off, to hand over a reconveyance as well as the title-deeds, and the Court thought it needless to decide, but if necessary would have decided, that a tender of the full sum due, coupled with demand of something which the creditor is bound by law to perform on being paid, is not conditional. The view that it was a good tender was confirmed in *Graham* v. *Seal* (1919) 88 L.J.Ch. 31, C.A. See also *Pandurang* v. *Dadabhoy* (1902) 26 Bom. 643.

83 As to tender preventing an act of bankruptcy, see *Ex parte Danks* (1852) 2 D.M. & G. 936; 95 R.R. 376.

84 In a previous edition of this book it was stated that a tender of money in payment must be made with an actual production of the money, *Veerayya* v. *Sivayya* (1914) 27 Mad. L.J. 482; 26 I.C. 121, being cited as authority for the statement. In *Ismail Bhai Rahim* v. *Adam Osman* (1938) 2 Cal. 337; 181 I.C. 539; 1939 A. Cal. 131, this statement was doubted, and the learned judge (Panckridge J.) expressed the opinion that in the Madras case the contract may have contained an express obligation to tender. This may be so, though the abbreviated report makes it difficult to speak with confidence. On further consideration however it is thought that the statement in the last edition may have been too wide; though, as already pointed out (*supra,* "Tender", note 54) the tendering of the actual money is of course the best proof of ability to pay. Where a contract is to be performed by the execution and delivery of a document, a mere offer by post to execute the document without having the document ready to be delivered is not a valid tender: *Sabapathy* v. *Vanmahalinga* (1915) 38 Mad. 959, 970; 23 I.C. 581.

was not necessary, since there was no legally constituted representative to whom it could be made; and that interest on the mortgage debt should in the circumstances stop on the expiration of the notice, since the executors might, if they had been diligent, have obtained probate before that date.[85] In *Ismail Bhai Rahim* v. *Adam Osman*[86] a different view was taken and the opinion expressed that a debtor must either tender to a legally constituted representative or take the risk of tendering to a person not entitled to receive the debt and of a subsequent suit by the executor or administrator or wait until someone obtains probate or letters of administration and incur liability to pay additional interest in the meanwhile. It is submitted that this view is the more correct; but a debtor may perhaps be able to escape from the very real embarrassment of such a situation by taking advantage of ss. 9-11 of the Administrator-General's Act, 1913 (III of 1913).

A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual.[87] The following is the form of the plea of tender: "As to the whole (*or* as to Rs...., part of the money claimed) the defendant made tender before suit of Rs....., and has paid the sum into Court." See Code of Civil Procedure, 1908, O. 24, rr. 1-3, and Schedule I, Appendix A, "Written Statements," Form No.4.

Where a contract for the purchase and sale of Government paper provides for the delivery of the paper to the defendant, it is not necessary that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an actual tender of it. If the plaintiff was ready and willing to perform his part of the contract and did his best to inform the defendant by going to his place of business that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness.[88] Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares, and the issue as to readiness and willingness is in such a case immaterial.[89] Where the plaintiff agreed to manufacture chairs for a railway company, and after parts had been delivered the company gave orders to the plaintiff not to make and send any more, it was held that the plaintiff was entitled to recover without actually making and tendering the remainder of the goods.[90] As to repudiation of a contract by one party before the time for performance, see s. 39, *infra*. See also notes to s. 51. "Readiness and willingness."

Tender of instalments.—A lender is entitled to decline, in the absence of any agreement as to repayment of the loan, to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time.[91] But when payment of money or delivery of goods in instalments is provided for by the contract, a tender of instalments is a good tender. In a case which arose in Calcutta

a contract made between the plaintiff and the defendant stipulated for delivery to the defendant of 7,500 bags of Madras coast castor seed, which were to be shipped per "steamers", and then stated that shipment of 2,500 bags was to be made in December. Of these, 1,690 bags arrived on 12th December, and the plaintiff offered delivery thereof to the defendant, who refused to take them on the ground that he was not bound to take less than the whole of the 2,500 bags at one time. The bags were thereupon resold by the plaintiff. The remaining 810 bags, being the balance of the December shipment, arrived on 19th December, but were refused by the defendant on the same ground as before, and those also were accordingly resold by the plaintiff. The plaintiff sued the defendant for damages for breach of the contract in not accepting the bags.

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85 *Pandurang* v. *Dadabhoy* (1902) 26 Bom. 643, at pp. 647-648.

86 See note 75, *supra*.

87 *Haji Abdul Rahman* v. *Haji Noor Mahomed* (1891) 16 Bom. 141, at pp. 149-150; *Sabapathy* v. *Vanmahalinga* (1915) 38 Mad. 959, at p. 970; *Rakhal Chandra* v. *Baikuntha Nath* (1928) 117 I.C. 687; 32 C.W.N. 1082, 1928 A. Cal. 874.

88 *Juggernath Sew Bux* v. *Ram Dayal* (1883) 9 Cal. 791.

89 *Dayabhai Dipchand* v.*Maniklal Vrijbhukan* (1871) 8 B.H.C.A.C.123. See also *Dayabhai Dipchand* v. *Dullabhram Dayaram* (1871) 8 B.H.C.A.C. 133.

90 *Cort* v. *Ambergate Railway Company* (1851) 17 Q.B. 127. The measure of damages in such a case would ordinarily be the difference between the cost of production and delivery and the contract price.

91 *Behari Lal* v. *Ram Ghulam* (1902) 24 All. 461.

The Court held without difficulty that there was a legal and proper tender of the December shipment by the plaintiff according to the terms of the contract.[92]

Reasonable opportunity.—A tender of goods must be so made that the person to whom the goods are offered has a reasonable time to ascertain that the goods offered are goods of the quality contracted for. A tender made at such a late hour of the appointed day that the buyer has no time to inspect them is not good.[93] In a Bombay case,[94]

the defendant agreed to purchase from the plaintiff 100 bales "fully good fair Kishli cotton", to be delivered from 15th March to 1st April, 1881. On 30th March the plaintiffs sent the defendant a letter enclosing a sampling order, which was received by the defendant's agent at 11.30 a.m. that day. The defendant got samples taken of the cotton, and a dispute having arisen as to the quality and classification of the cotton, the plaintiffs wrote to the defendant on 31st March asking him to attend with his surveyor at 1 p.m. on that day to survey the cotton as, otherwise an *ex parte* survey would be held. It being a mail day, the defendant's surveyor could not attend at the appointed hour, and the plaintiffs had an *ex parte* survey held by their own surveyors, and they pronounced the cotton to be of the description contracted for. Shortly afterwards the defendant asked for a survey by a letter which reached the plaintiffs at 2.19 p.m. on that day. The plaintiffs did not comply with the application, and called upon the defendant to take delivery of the goods.

In a suit by the plaintiffs for damages for breach of the contract it was contended for the defendant that no reasonable opportunity was afforded to the defendant to examine the goods, as there was no joint survey, and that the time allowed by the plaintiffs for the examination of the cotton was not sufficient. It was held that the defendant had reasonable opportunity within the meaning of this section. Latham J. said:

"The rule in the 38th section of the Contract Act agrees with the rule of English law laid down in Benjamin on *Sales* (2nd ed. pp. 573 and 576);[95] but there is little authority as to what is a reasonable opportunity of inspection.[96]... In the present case the sampling order was delivered to the defendant by 11-30 a.m. on the 30th March, and he had till 1 p.m. on the 31st March before any refusal by the plaintiffs to allow a further examination is alleged. Now Vizbhookandas Atmaram seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st; and it seems to me that a period of over twenty-four hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

"Then we are to go further and to say that the purchaser is entitled to continue inspecting and examining until the expiration of the period for delivery? I find no authority for this, and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold, or in the present case to pass every pound of cotton through an expert's hands? There must be some limit, and I think that a reasonable opportunity is the limit alike for vendor and purchaser, and that such a reasonable opportunity had been had by 1 p.m. on the 31st March."

Reasonable opportunity of inspection is all that the Act requires: it is the receiving party's business to verify, not the delivering party's to supply further proof that the goods are according to contract. The goods need not be in the delivering party's actual possession; control is enough.[97]

Late arrival of train.—The unusually late running of the train which delayed the arrival of a tenderer is not a justifiable ground for accepting the tender after the time fixed by the tender notice.[98]

Tender of money.—A creditor is not bound to accept a cheque; but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no

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92 *Simson* v. *Gora Chand Doss* (1883) 9 Cal. 473; *Brandt* v. *Lawrence* (1876) 1 Q.B.D. 344, which the Court cited and followed, was a similar case.

93 *Startup* v. *Macdonald* (1843) 6 Man. & G. 593; 64 R.R. 810.

94 *Ruttonsey* v. *Jamnadas* (1882) 6 Bom. 692.

95 740, *sqq.*, 8th ed.

96 *Isherwood* v. *Whitmore* (1843) 11 M. & W. 347; 63 R.R. 624, seems to be the only case in point. "A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained": per Parke B.

97 *Arunachalam Chettiar* v. *Krishna Aiyar* (1925) 49 Mad.L.J. 530; 90 I.C. 481; 1925 A.M. 1168.

98 *Rajkumar Patra* v. *Union of India* (1981) A. Or. 143.

immediate objection at all, he cannot afterwards object to the nature of the tender. Downright refusal by the creditor to accept payment at all precludes any subsequent objection to the form of the tender.[99]

The sufficiency of a tender of money depends on the circumstances of each case. But if a party to whom tender of money is made is prepared to accept it or would have been prepared to accept it, the tender is good even if it is not strictly according to law because any objection to the form of the tender can be waived. It is not open to a party later to object to the form of the tender.[1] Normally there would be no objection to a tender made in the form of a bank draft.[2]

The landlord of a house, through his agent, sent in rent-bills to his lessee. The lessee gave the agent a cheque in favour of her attorney for the amount demanded and obtained a receipt from him. The landlord's agent then took the cheque to the lessee's attorney, who cashed it and handed the amount to the agent, and requested him to get the rent-bills receipted and returned to him. The landlord's solicitor, to whom the money was taken, refused to accept it, and the money was then returned to the lessee's attorney. In a suit by the landlord for the rent, it was held that under the circumstances the tender amounted to payment, and the suit was dismissed with costs.[3]

Legal tender.—The money tendered must be current coin of the country. An insured cover which purports to contain currency notes amounting to the full sum due is not legal tender.[4] As to tender of coinage, see the Indian Coinage Act, 1906 (III of 1906), ss. 11 to 15A; and as to tender of currency notes, see the Reserve Bank of India Act, 1934 (II of 1934) ss. 22, 26.

Where a loan to a mortgagor was made of Rs. 450 in the Poona currency which was equivalent to Rs. 435.2.0. of the British Indian currency the mortgagee could not claim Rs. 450 in the British Indian currency, and the mortgagor was entitled to redeem on payment of Rs. 435.2.0. in the British Indian currency.[5]

Payment in foreign currency.—When a debt is to be paid in foreign currency as in the case of price of goods imported or damages for breach of a contract or payments of salaries and pensions to officers of the Secretary of State for India, the question arises as to what is the exchange rate for conversion in Indian money.

The rule of English law is, that,—

"For the purpose of litigation in England, a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable."[6] See cmd. 7192 of August 1947, for Compensation & Pensions.

Thus where English law is the proper law of the contract, a debt expressed in pounds may be discharged in whatever are pounds in English currency at the date fixed for payment[7] and a debt expressed in a foreign currency, e.g. marks may be discharged by the same nominal

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99 *Venkatrama Ayyar* v. *Gopalakrishna Pillai* (1928) 52 Mad. 322; 116 I.C. 844; 1929 A.M. 230; *Hira Lal* v. *Khizar Hayat,* 1936 A.L. 168; 161 I.C. 251; *Harnath Rai* v. *Hirdyanarain* (1947) 25 Pat. 451, 231 I.C. 243, 1947 A.P. 208; *Krishnaswamy* v. *Mohanlal* (1949) Mad. 657, 1949 A.M. 535; *Keshav Mills Co.* v. *Income Tax Commissioner,* 1950 A.B. 166; *Narain Das* v. *Rikhab Chand,* 1952 A. Raj. 72.

1 *(Joseph) Varghese* v. *Annamma* (1971) 1 Ker. 494, 510.

2 *International Contractors Ltd.* v. *Prasanta Kumar* (1962) A.SC. 77 reld. on (No tender is necessary if the seller repudiates the contract.).

3 *Bolye Chund Singh* v. *Moulard* (1878) 4 Cal. 572. Cp. *Jones* v. *Arthur* (1840) 59 R.R. 833; 8 Dowl. Pr. Ca. 442.

4 *Salik Ram* v. *Jai Gopal Singh,* 1955 A. All. 350.

5 *Trimbak* v. *Sakharam* (1891) 16 Bom. 599.

6 *Re United Railways etc. Ltd.* (1961) A.C. 1007; (1960) 2 All E.R. 333, 342 (H.L.).

7 *Ottoman Bank* v. *Chakarian* (1938) A.C. 260; *Sforza* v. *Ottoman Bank of Nicosia* (1938) A.C. 282; *Bonython* v. *Commonwealth of Australia* (1951) A.C. 201; *Treseder Griffin* v. *Co-operative Insurance Ltd.* (1956) 2 Q.B. 127; *In re United Railways of Havana & Regla Warehouses Ltd.* (1961) A.C. 1007; (1960) 2 All E.R. 332 (H.L.); (1960) 2 W.L.R. 969.

amount of marks.[8] The rule is the same in all foreign systems of law.[9] Where payment in foreign currency can only be made after permission is obtained under the Exchange Control Act, 1947, then the debt does not become payable till then and the exchange rate for payment would be the date of obtaining of permission.[10] But where property was sold in Ceylon by an agent and due to currency exchange restrictions the money could not be brought into India, the agent was not liable to pay the price in India in rupees.[11] Hence under English law, a liquidated debt, wherever payable and subject to whatever law, must be converted into sterling at the rate of exchange of the day when it was payable.[12]

If the parties have by agreement fixed the rate of exchange, that will be applied by the court.[13]

Same is the position in respect of sale. Where price is due in a foreign currency, the damages recoverable in an English action are to be calculated at the rate of exchange prevailing at the time when the price was due, and not at the date of judgment.[14]

In some cases, the meaning of pound and the question of "money of account" was dealt with.[15] The Privy Council in *Khoury* v. *Khayat* held that the rate of exchange to be applied was at the date of maturity of a bill or note and not the date of actual payment.[16] In that case[16] Lord Wright said at p. 409:

> "there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted *the first rule,* not only in regard to obligations to pay a certain sum at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort. The general principles on which that rule has been based are explained by the Court of Appeal in *Di-Ferdinando* v. *Simon, Smits & Co.,*[17] a case of an ordinary breach of contract. The rule, however, was established many years before then. It was again enunciated by the House of Lords in *S.S. Celia* v. *S.S. Volturno*[18] where the claim was for damages in tort consequent on a collision."

Thus, the date on which payment *becomes due* is the crucial date. If the payment becomes due periodically and is of a recurring nature, the devaluation effected *up-to-date* must be taken into account every time, because the payment becomes due *only then.*

If the obligation was to pay an amount *in rupees,* and, because of devaluation of the rupee, the creditor claimed a higher amount, it would be necessary to consider the principle of "nominalism". The principle has been explained by Denning L.J. thus:[19]

> "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time."[19]

Date of rate of conversion of foreign currency into pound sterling.—Where payment of a sum of money is required to be calculated at a rate expressed in U.S. dollars but was payable in British pounds sterling equivalent and there is a default in payment then in the absence of any agreement to the contrary that any payment after the default and before any judgment or award enforcing payment is to be converted at the rate of exchange prevailing on the date of payment and not at the rate prevailing on the date of default or the date of judgment or award.[20]

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8 *Re Chesterman's Trusts* (1923) 2 Ch. 466; Cf. *Addison* v. *Brown* (1954) 1 W.L.R. 779, 785; (1954) All E.R. 213.
9 Dicey: *Conflict of Laws* (7th Ed.), pp. 881 *et seq.*
10 *Cummings* v. *London Bullion Co. Ltd.* (1952) 1 K.B. 327; (1952) 1 All E.R. 383.
11 *Kumarappan* v. *Suppiah* (1965) Mad. 265; (1965) A.M. 314.
12 *Cummings* v. *London Bullion Co. Ltd.* (1952) 1 K.B. 327; (1952) 1 All E.R. 383; Cheshire: Private International Law (1957) p. 257; *In re United Railways of Havana & Regla Warehouses Ltd.* (1961) A.C. 1007; (1960) 2 All E.R. 332; (1960) 2 W.L.R. 969.
13 *Boissevain* v. *Weil* (1950) A.C. 326; (1950) 1 All E.R. 728.
14 *Peyrae* v. *Wilkinson* (1924) 2 K.B. 166: *Madeleine Vionnet et Cie* v. *Wills* (1940) K.B. 72.
15 See also *Khoury* v. *Khayat* (1943) A.C. 507; (1943) 2 All E.R. 406.
16 (1943) A.C. 507; (1943) 2 All E.R. 406, 409 (P.C.).
17 (1920) 3 K.B. 409.
18 (1921) 2 A.C. 544.
19 *Treseder Griffin* v. *Co-operative Insurance Ltd.* (1956) 2 Q.B. 127, 144 (C.A.); (1956) 2 All E.R. 33, 36 discussed in (1957) L.Q.R. 181. See also Dicey, *Conflict of Laws* (1958), p. 883.
20 *George Veflings Rederi A/S* v. *President of India the Bellami* (1978) 3 All E.R. 838, 840

Consolidated stock of Commonwealth of Australia issued in 1932 against surrender of Queensland Government debentures issued in 1895 for varying sums in Pounds Sterling stipulating payment in Brisbane, Sydney, Melbourne or London at the option of the holder was held not to be payable in Pounds Sterling of English currency but in the currency of Queensland, i.e. Australian Pounds.[21]

Where sellers were in breach of contract in failing to ship the goods on or before the due date, the effect of accepting the goods is that the term as to the payment of price remains in full force and if in the meanwhile, that is between the date of the contract and the date the full price fell to be paid, the currency rates change, the buyers are obliged to pay an enhanced price. But the buyer can recover the difference between the original price and the enhanced price as damages which are not too remote.[22] The Supreme Court of Pakistan has held that when both parties to a contract where in Pakistan a contract, whereby a Bank opened a letter of credit in London for its customer in pounds, sterling, envisages payment in Pakistan currency and not in sterling and at the rate of exchange on the date when the foreign bill was accepted and the mere circumstance that payment was deferred by agreement, or under mercantile custom will not alter the rate of exchange.[23]

Where the currency of the contract between the parties was a foreign currency the English Courts have power to give judgments in that currency.[24] It is submitted that the Law in India would be the same.

An English Company agreed to purchase yarn from a Swiss Company in non EEC area. The payment was to be made in Swiss francs and the law governing the contract was Swiss Law. In an action by the Swiss Company for recovery of the price in Swiss Francs the Court of Appeal held that the judgment should be for payment in Swiss Francs and not in pound sterling because the contract contemplated payment in Swiss Francs and pound sterling was not a stable currency.[25]

On appeal going to the House of Lords this judgment was affirmed and it was held that the plaintiff was entitled to claim and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the proper law of contract was the law of that country and the money of account and payment was that of the same country.[26]

A Swiss Company supplied goods to an English Company and one of the consignments was not taken delivery of. The Swiss company treated the non-acceptance as repudiation of the contract, and brought an action against the English Company claiming damages in Sterling. The proper law of the contract was Swiss. The money of account and payment was in Swiss Francs. The judgment was given in terms of the claim but the Swiss company applied for amendment of the statement of claim, claiming damages in Swiss Francs. It was held that the plaintiff was entitled to obtain judgment in foreign currency of obligation if the proper law of the contract was the law of the foreign country and the money of the account and payment was also of the foreign currency. The plaintiff's claim was for a debt and arose under a con-

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21 *Bonython* v. *Commonwealth of Australia* (1951) A.C. 201, 221, (P.C.); *Goldsbrough Mort & Co. Ltd.* v. *Hall* (1948-49) 78 C.L.R. 1; *R.* v. *International Trustee* (1937) A.C. 500, 531. See also *Mount Albert Borough Council* v. *Australasian T. & G. Assurance Co. Ltd.* (1938) A.C. 224; (1937) 4 All E.R. 206, 214.

22 *Aruna Mills Ltd.* v. *Dhanrajmal Gobindram* (1968) 2 W.L.R. 101, 109.

23 *Central Bank of India Ltd.* v. *Mohd. Islam Khan,* P.L.D. (1962) 1 S.C. 251, 256-7 (Pak.); Dicey: Conflict of Laws (The Nominalistic Principle) (6th Ed)., r. 160 quoted; *S.S. Lelia* v. *S.S. Volturno* (1921) A.C. 544; *Pyrmount Ltd.* v. *Schott* (1939) A.C. 145 (P.C.); *Societe des Hotels le Touquet-Paris Plage* v. *Cummings* (1922) 1 K.B. 451 (C.A.); (case dealing with old German Currency); *Re Schnapper, Westminster Bank Ltd.* v. *Schnapper* (1936) 1 All E.R. 322; *Murrache* v. *Ashton* (1943) A.C. 311 (P.C.); and *Graumann* v. *Treittel* (1940) 2 All. E.R. 188 refd to.

24 *Schorsch Meier Gmbh* v. *Hennin* (1975) 1 All ER 237.

25 *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 1 All E.R. 1076; *Schorsch Meier Gmbh* v. *Hennin* (1975) 1 All E.R. 152 followed (a case of a Country within EEC.); *Young* v. *Bristol Aeroplane Co.* (1944) 2 All E.R. 293 appld. *Jean Kraut A.G.* v. *Albany Fabrics Ltd* (1977) 2 All E.R. 116; Re: *United Railways of the Havana and Regla Warehouses* (1960) 2 All E.R. 332 disting.

26 *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 3 All E.R. 801; (1976) 3 WLR. 477; *Deutsche Bank* v. *Humphrey* (1926) 272 U.S. 517 refd to.

tract whose proper law was Swiss. Accordingly, the plaintiff was entitled to ask for judgment to be expressed in Swiss Francs.[27]

Similarly where French Charterers of a Swedish ship working in Paris had to pay damages to the Brazilian Receivers for damage to the cargo due to the failure of machinery of the ship in Brazilian currency purchased with French francs and the Brazilian currency the House of Lord[28] applied the principle of *restitutio in integrum* and awarded damages in French francs as that would truly express the French company's loss.

The principle of awarding damages in foreign currency has been extended to damages in Torts. The House of Lords decided this matter in two cases. In the first case there was a collision between two Greek ships, one owned by the plaintiffs managed from New York and the other by the defendants. The plaintiffs' ship was damaged off Shanghai and repairs had to be done in Shanghai, paid for in Shanghai currency, in Yokohama, paid for in Japanese currency and finally in Los Angeles when permanent repairs were done and paid for in U.S. dollars. The plaintiffs paid for these currencies out of the New York dollar Account. They brought an action in England for damages for negligence against the defendants. By arrangement parties agreed that the liability of the defendant was 85% and the plaintiffs applied for a separate trial of the question that where the plaintiffs had suffered loss or damage in a currency other than sterling the Court should give judgment for a sum expressed in that foreign currency. Brandon J. answered the question in the affirmative and held that the plaintiffs were entitled to be awarded damages in the currency in which the expenditure was incurred. The matter ultimately went to the House of Lords.[29] It held that the principle of *restitutio in integrum* applied and the plaintiffs were entitled to damages in their own currency by virtue of being the currency which they generally operated or with which had the closest connection and that was U.S. dollars.

The plaintiff who brings an action to enforce a foreign money obligation under a contract is entitled to claim judgment in foreign currency if the proper law of the contract was the law of the foreign country and the money of accounts and payment was that of foreign country.[30]

Payment in default-Exchange Rate.—The charge of carriage on a ship was to be calculated in U.S. dollars but was payable in sterling and if there was a default in payment then in the absence of any contract if paid after the default but before any award or judgment, then it was to be calculated as on the date of payment and not on the date of the default or the award or judgment.[31]

Gold Clause.—Gold clause is a protective clause and its validity, meaning and effect are determined by the proper law of the contract. Where English law is the proper law of contract,

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27 *Jean Kraut AG.* v. *Albany Fabrics Ltd* (1977) 2 All. E.R. 116, 123-4 (Q.B.D) *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 3 All E.R. 801 (H.L.) applied; (1975) 1 All ER 1076 affd by H.L.; *Di Fernando* v. *Simon, Smits & Co. Ltd.* (1920) 3 K.B. 409; *Owners of Steamship Celia* v. *Owners of Steamship Volturno* (1921) All E.R. Rep. 110 distinguished; *Oceanska Plovidba* v. *Castle Investment Co* (1973) 3 All ER 498 applied; *Schorsch Meier* v. *Hennin* (1975) 1 All ER 152; Re *United Railways of the Havana & Regla Warehouse Ltd* (1960) 2 All ER 332 folld.

28 *Services Europe Atlantique Sud (Seas)* v. *Stockholms Rederiaktieholag SVEA-The Folias* (1979) 1 All E.R. 421,431,433; *Jugoslavenska Oceanska Plovida* v. *Castle Investment Co. Inc.* (1973) 3 All E.R. 498 appld.; *Jean Krant A G* v. *Albany Fabrics Ltd.* (1977) 2 All E.R. 116; (1977) Q.B. 182; *Federal Commerce & Navigation Co. Ltd.* v. *Tradax Export S.A.* (1977) 2 All E.R. 41; (1977) Q.B. 324 approved; *Di Ferdinando* v. *Simon Smits & Co. Ltd.* (1920) 3 K.B. 409; (1920) All E.R. Rep. 347 (a case of Contract; sterling is constant as far as English Courts are concerned). *The Canadian Transport* (1932) 432 C.L.R. 409.

29 *The Despina R-Owners of m.v. Eleftherotria* v. *Owners of m.v. Despina* (1979) 1 All E.R. 421, 431; *The Volturno (Owners of Steamship Celia* v. *Owners of Steamship Volturno* (1921) 2 AC 544, 546-7; (1921) All E.R. Rep. 110, 118 disting (a case of contract); *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 3 All E.R. 801; (1976) A.C. 443; (1975) 3 W.L.R. 758 appld.; *The Volturno (owners of Steamship Celia* v. *Owners of Steamship Volturno* (1921) 2 A.C. 544, 566-7; (1921) All E.R. Rep. 110, 118 disting. (English Currency awarded; case of Tort & Contract); (1977) 3 All E.R. 874 C.A. affirmed

30 *Jean Kraut AG.* v. *Albany Fabrics Ltd.* (1977) 2 All E.R. 116.

31 *Gerge Vefling Rederi* v. *President of India* (1978) 3 All E.R. 838, 840 *Miliangos* v. *George Frank (Textiles) Ltd* (1975) 3 All E.R. 801 applied *Syndic in Bankruptcy of Salim Nasarallah* v. *Khayat* (1943) 2 All. E.R. 406 doubted.

the clause referring to gold is presumed to be a gold value clause. It does not impose an obligation to pay in gold or gold coins but it is used to ascertain the amount of the debt so that the debtor has to pay in legal tender of the currency the amount necessary to purchase gold or gold coins to the nominal amount of the debt.[32] In England also after the devaluation of the Pound, the debt has to be paid in depreciated value.[33]

Gold coin in the U.S.A.—Dollar bonds repayable by the British Government in New York in gold coin of the United States or at a fixed rate of 4.86½ dollars to a pound have to be paid, if paid in New York, according to the law of the U.S.A. at the time of payment. And by that law, making the payment in gold being illegal, the payment will be dollar for dollar at the nominal amount of the bonds and not in gold coins or equivalents thereof.[34] There is no such general rule that losses resulting from revaluation of currencies are always too remote in law to be recoverable in the case of a breach of contract.[35]

Offer to one of several joint promisees.—A tender of rent by a lessee to one of several joint lessors[36] and of a mortgage debt by a mortgagor to one of several mortgagees[37] would be a valid tender under this section.

Validity of discharge by one of several joint promisees.—In *Barber Maran* v. *Ramana,*[38] It was held by the High Court of Madras that this section does not make it incumbent on the debtor to satisfy all the joint promisees before obtaining a complete discharge, and therefore a release of a mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. This decision was based upon the English case of *Wallace* v. *Kelsall,*[39] decided long before the Contract Act, and upon the last paragraph of s. 38, which provides that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them." The correctness of this decision was doubted later by the same Court,[40] and also by the High Courts of Bombay[41] and Calcutta.[42] One reason for this was the decision of Farwell J. in *Powell* v. *Brodhurst,*[43] which has considerably shaken the authority of *Wallace* v. *Kelsall.* Later still,[44] however, a Full Bench of the Madras High Court (White C.J. dissenting), approved of the decision in *Barber Maran* v. *Ramana,* and held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees.[45] It was observed that there was no distinction as regards the question of discharge between claims under a mortgage bond and those under a negotiable instrument. Referring to the last paragraph of s. 38, Sankaran Nair J. said:

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32 *Fiest* v. *Societe Intercommunale Belge d'Electricite* (1934) A.C. 161 (1933) All E.R. Rep. 238. Chitty on *Contracts* (24th Ed.), paras 1309-10.

33 Chitty on *Contracts* (24th Ed.,), paras 1309-10.

34 *R.* v. *International Trustees, etc.* (1937) A.C. 500; (1937) 2 All E.R. 164 (H.L.).

35 *Aruna Mills Ltd.* v. *Dhanrajmal Gobindram* (1968) 2 W.L.R. 101, 111.

36 *Krishnarav* v. *Manaji* (1874) 11 B.H.C. 106, where it was held that payment of rent by a lessee to one of several joint lessors discharges the debt as to all. But payment to a partner in fraud of his co-partners is not a valid discharge: *Chinnaramanuja Ayyangar* v. *Padmanabha Pillaiyan* (1896) 19 Mad. 471.

37 See *Barber Maran* v. *Ramana Goundan* (1897) 20 Mad. 461, where it was held, relying upon this section principally, that payment of the amount due on a mortgage by a mortgagor to one of several mortgagees discharges the mortgage debt as to all.

38 (1897) 20 Mad. 461. See *Shrinivasdas* v. *Meherbai* (1917) 44 I.A. 36; 41 Bom. 300; 39 I.C. 627, where the question was one of title to immovable property.

39 (1840) 7 M. & W. 264; 56 R.R. 707.

40 *Ahinsa Bibi* v. *Abdul Kader* (1901) 25 Mad. 26, at pp. 38-39; *Ramaswamy* v. *Munniyandi* (1910) 20 Mad. L.J. 709; *Sheik Ibrahim* v. *Rama Aiyar* (1911) 35 Mad. 685, 687.

41 *Sitaram* v. *Shridhar* (1903) 27 Bom. 292, 294.

42 *Jagat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305, at pp. 320-321; *Hossainara* v. *Rahimannessa* (1910) 38 Cal. 342, at pp. 349-350.

43 (1901) 2 Ch. 160.

44 *Annapurnamma* v. *Akkaya* (1913) 36 Mad. 544; nothing short of actual payment will do; see *Ramasami* v. *Chandra Kotayya* (1924) 48 Mad. 693; 85 I.C. 297; 36 Mad. 544 was followed in *Ammalammal* v. *Gnanammal,* 1954 A.M. 473, and applied to a case where payment had been made to a promisee after the death of the other promisee.

45 See Negotiable Instruments Act, 1881, ss. 78 and 82.

"It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge."[46]

As to *Wallace* v. *Kelsall,* Sadasiva Ayyar J. said that it was decided in 1840 and was good law when the Indian Contract Act was passed in 1872, that Act following the principles of the English decision. On the other hand, White C.J. in delivering his dissenting judgment said:

"It (s. 38) provides in effect that all the joint promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and not restricted to an offer which has not been accepted, but apparently the Legislature was not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which had been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication the acceptance of payment by one of several promisors operated as a discharge of the claims of the others. On the other hand, as it seems to me now, s. 45 which deals with the devolution of rights where a person has made a promise to two or more persons 'jointly' throws very little, if any, light on the question which we have to decide.... If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law and to see whether the rule of law as laid down in *Wallace* v. *Kelsall* applies or whether the rule or rather the presumption of equity on which *Steeds* v. *Steeds*[47] was decided is to prevail. I think the equitable presumption applies and I do not think this presumption is negatived by the provisions of the Contract Act."[48] The rule laid down in *Wallace* v. *Kelsall* seems to have been accepted in England, See Chitty: On Contracts (24th ed) para 1292.

The opinion of White C.J. was adopted by a Full Bench in the Punjab;[49] and also the Calcutta High Court, now followed by the Patna High Court after a contrary decision,[50] has taken the same view.[51] The High Court of Allahabad[52] has taken the same view, as have the High Courts of Nagpur and Mysore.[53] The Bombay High Court has again taken this view. See S. 45 Contract Act. *Govindlal Bhikhulal* v. *F. Thakurdas Bhallabhadas* (1974) A.B. 164, 168.

We agree with the dissenting opinion of White C.J. so far as concerns the present section. Tender of a money debt does not discharge the debt (a point surely not irrelevant); the material section of the Contract Act, as regards the right to give a discharge in the name of joint debtors, is not s. 38 but s. 45. It must not be overlooked that in English law the rule that payment to one of joint creditors is a good discharge is still the general rule.[54]

In any case a payment to one of several joint creditors does not operate as a payment to them all where the payment is fraudulently made to him and not for the benefit of them all.[55]

The principle of the decision in *Barber Maran* v. *Ramana*[56] applies only where there are two or more joint promisees. It does not apply to the case of co-heirs who are not joint promisees, but the heirs of a single promisee, and a release therefore of the debtor by one of the heirs of the deceased creditor on payment to him of the amount due on the bond is not a valid discharge to the debtor.[57] Nor does that principle apply when a debt, though due to a joint

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46 36 Mad. 544, at p. 549.
47 (1899) 22 Q.B.D. 537.
48 36 Mad. 544, at pp. 545-546.
49 *Mathra Das* v. *Nizam Din* (1917) Punj. Rec. No. 68, p. 252; 41 I.C. 921.
50 *Parbhu Ram* v. *Jhalo Kuer* (1917) 2 Pat. L.J. 520; 42 I.C. 408; *Syed Abbas Ali* v. *Misri Lall* (1920) 5 Pat. L.J. 376. 56 I.C. 403. See also *Banamali Satpathe* v. *Talna Rambar Patra* (1920) 5 Pat. L.J. 151; 55 I.C. 841.
51 *Sheikh Hakim* v. *Adwaita Chandra Das Dalal* (1918) 22 C.W.N. 1021; 49 I.C. 63.
52 *Shyam Lal* v. *Jagannath, 1957 A.A. 527; (1937) All L.J. 395; 168 I.C. 198, Joti Bhushan* v. *B.N. Sarkar* (1945) All. 165, 1945 A.A. 311.
53 *Mahadeo Singh Hirasingh* v. *Balmukand Jayanarain* (1947) Nag. 553, 1948 A.N. 279; *Venkatasetty* v. *Rangasetty,* 1952 A. Mys. 68.
54 *Powell* v. *Brodhurst* (1901) 2 Ch. at p. 164; the qeustion that matters, as there pointed out, is whether the debt is really joint.
55 *Sherik Ibrahim* v. *Rama Aiyar* (1911) 35 Mad. 685; *Joti Bhusan* v. *B.N. Sarkar* (1945) All. 165, 1945 A.A. 311.
56 (1897) 20 Mad. 461.
57 *Bapanna* v. *Jaggiah,* 1939 A.M. 818; (1939) 2 Mad. L.J. 214, where the authorities are reviewed;

Hindu family, stands in the name of one member. In such a case he is the person *prima facie* entitled to realise it, and a payment made to him is a valid discharge of the debt; if the payment is made to any other member of the family it does not operate as a discharge unless there be circumstances justifying the payment.[58] Where a bond is passed to the manager of a joint Hindu family, payment made to a junior member of the family during the lifetime of the manager does not discharge the promisor from his liability under the bond.[59]

Payment of rent to one of the two co-lessors does not discharge the liability of the tenant to the other co-lessor.[60]

Validity of discharge by one of several joint decree-holders.—One of several joint decree-holders cannot receive payment or give a valid discharge for the whole debt, so as to bind his co-decree-holders; and this so, even if the joint decree-holders are partners, unless the partner receiving payment has been constituted their agent for the purpose by his fellow partners.[61]

Indian Law and English Law.—Difference.—The difference between Indian Law and English law was pointed out by Chandurkar J. thus: In English law release by one of the creditors releases the debtor qua all the creditors and in Indian law the position is that the joint creditors are presumed to be tenants in common and therefore release by one of such creditors does not give a release on behalf of all the creditors.[62]

Effect of refusal of party to perform promise wholly.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence[63] in its continuance.

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

S. 39 applies to ending a contract and not where a breach of contract is pleaded.[64]

Refusal to perform contract.—It is not easy to see why this section is placed here. The subject-matter would seem really to belong to the category of contracts, not which must, but which need not, be performed, dealt within ss. 62-67, below. Further, it is closely connected with the consequences of breach of contract laid down in Chap. VI. However, a commentator must take the Act as he finds it.

Ahinsa Bibi v. *Abdul Kader* (1901) 25 Mad. 26; *Sitaram* v. *Shridhar* (1903) 27 Bom. 292; *Ramaswamy* v. *Muniyandi* (1910) 20 Mad. L.J. 709, at pp. 715-716; *Ankalamma* v. *Bellam Chenchayya* (1918) 34 Mad. L.J. 315; 45 I.C. 419.

58 *Ramaswami Chetti* v. *Manikka Mudali* (1899) 9 Mad. L.J. 155; *Addikkalam Chetti* v. *Marimuthu* (1899) 22 Mad. 326.

59 *Ankalumma* v. *Chenchayya* (1918) 41 Mad. 637, 1918 A.M. 29; *Dan* v. *Sensmal,* 1951 A.Ajm. II.

60 *Ananda Prakash Dey* v. *Lokendranath Maulik* (1972) A. Or. 269.

61 *Periasami* v. *Krishna Ayyan* (1901) 25 Mad. 431; *Mohomed Silar Sahib* v. *Nabi Khan,* 1917 A.M. 998; 35 I.C. 157; *Muthusamy* v. *Narasimha* (1934) 57 Mad. 696; 1934 A.M. 330; 148 I.C. 860.

62 *Govindlal Bhikanlal* v. *F. Thakardas Bhallabhadas* (1974) A.B. 164.

63 See *Boulton Bros. & Co.* v. *New Victoria Mills Co.* (1928) 119. I.C. 837, 844; 26 All. L.J. 1119; 1929 A.A. 87 (but there was nothing amounting to a refusal).

64 *State of Bihar* v. *P.K. Jain* (1981) A.P. 280, 284.

As correctly laid down in the High Court of Calcutta when the Act was still recent, "this section only means to enact what was the law in England and the law here before an Act was passed, viz., that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind it".[65] English authorities are collected in the notes to *Cutter* v. *Powell* in Smith's Leading Cases.[66]

Anticipatory breach.—It was settled in Scotland in 1848 and has been the law in Scotland and England that:

If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract whether or not the time for performance has come; or he may, if he chooses, disregard or refuse to accept it and then the contract remains in full effect,[67] quoted with approval in *Motilal Srinivasa Sarda* v. *Netha Co-op. Spg. Mills Ltd.*[68] Anticipatory breach was not devised as a whip to be used for the chastisement of deliberate law breakers, but from which the shiftless, the dilatory or the unfortunate are to be spared. Anticipatory breach means simply that a party is in breach from the moment his actual breach becomes inevitable.[69] Wynn-Perry J. has said that "there is neither any good reason for a distinction nor does there exist any distinction which is required to constitute an anticipatory breach".[70] It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen.[71] *Hochester* v. *De La Tour*[72] established that a renunciation when acted upon became final. Thus if a man proclaimed by words or conduct an inability to perform, the other party could safely act upon it without having to prove that when the time came for performance the inability was still effective.[73]

The three set of circumstances giving rise to the discharge of a contract are—

(1) renuniciation of a party of his liabilities under it;
(2) impossibility of performance created by his own act; and
(3) total or partial failure of performance.

In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the time of performance of the contract.[74] The third of these is the ordinary case of breach and the first two state the two modes of anticipatory breach.[75]

Effect of Acceptance of the Breach.—When one party assumes to renounce the contract that is by anticipation refuses to perform it, he thereby, as far as he is concerned declares his

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65 Per Garth C.J. in *Sooltan Chund* v. *Schiller* (1878) 4 Cal. 252, at p. 255. The present section is often referred to, it is submitted not correctly, in cases where there is no refusal at all, but only the failure in performance of reciprocal promises dealt with by s. 54, below. For example, *Bishunath Kunwar* v. *Sheo Bahadur Singh* (1927) 104 I.C. 587; 1927 A.O. 265. As to what amounts to repudiation, cp. *Obla K. Subbier* v. *Venkatachalapathi Ayyar* (1925) 91 I.C. 580; 1925 A.M. 1290.

66 This note, however, is hardly intelligible without some familarity with the old common law system of pleading.

67 *White & Carter (Councils) Ltd.* v. *McGregor* (1962) A.C. 413, 427; (1961) 3 All E.R. 1178; (1962) 1 W.L.R. 17, 20 (H.L.) per Lord Reid.

68 (1975) A.AP. 169, 175.

69 *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 Q.B. 401, 438.

70 *Thorpe* v. *Fasey* (1949) Ch. 649, 661; (1949) 2 All E.R. 393, 398.

71 *Universal Cargo Carriers Corpn.* v. *Citati* (1957) 2 Q.B. 401; (1957) 2 All E.R. 70, 86; on app. (1957) 3 All E.R. 234 (C.A.).

72 (1853) 2 E & B 678,689; (1843-60) All E.R. Rep. 12.

73 *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 Q.B. 401, 437: See also *Forshind* v. *Bechely Grundall* (1922) S.C. (H.L.) 173.

74 *Heymans* v. *Darwins* (1942) A.C. 356,397; (1942) 1 All E.R. 337, 360, quoting Anson: *Law of Contract* (18th Ed. 1937); *Universal Cargo Carriers Corpn.* v. *Citati* (1957) 2 Q.B. 401, 436; (1957) 2 All E.R. 70 on app. (1957) 3 All E.R. 234; Anson: *On Contract*, p. 438 (22nd Ed.)

75 *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 W.L.R. 713, 730; (1957) 2 Q.B. 401; (1957) 2 All E.R. 70 on app. (1957) 3 All E.R. 234.

intention then and there to rescind the contract.... The other party may adopt such renunication of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for damages sustained by him in consequence of such renunciation".[76] It is however clear that in cases of anticipatory breach, the cause of action is not the future breach but it is the renunciation itself.[77]

The injured party can accept the breach either by bringing an action on the contract or by giving notice to the other party and acting accordingly. Three legal effects follow from the acceptance of the breach.[78]

(1) It releases the innocent party from his obligation to perform .[79] He can bring an action without showing that he could have performed within the stipulated time.[80] But proof by the guilty party that the other party could not have performed by that time may affect damages and in appropriate cases reduce them to a nominal sum.[81]

(2) Acceptance of the breach also releases the guilty party from the obligation to perform. He can henceforth be sued for damages and not for specific performance.

(3) The innocent party can sue for damages.[82] Once the innocent party has accepted the breach, that is final, his right to damages is not defeated by actual or possible supervening events.[83] Subsequent events may affect the amount of damages[84] but not the right to damages.

If the anticipatory breach is accepted as a discharge of the contract it is not open to the party in breach subsequently to tender performance within the time originally fixed.[85] The innocent party can claim damages at once even though his right to future performance of the contract is only contingent.[86]

Section 39 applies to executory contracts and not executed contracts. It presupposes that the contract is subsisting and there is something to be performed under it. The option to the promisee to keep the contract alive clearly implies that.[87]

Promise in its Entirety.—The words used by Garth C.J. "where a party to a contract refuses altogether to perform .... his part of it," clear up a slight verbal ambiguity in the Act, where the words "his promise in its entirety' mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety"; but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for.[88]

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76 *Johnstone* v. *Milling* (1886) 16 Q.B.D. 460, 467.
77 *The Mihalis Angelos* (1971) 1 Q.B. 164; (1970) 3 All E.R. 125; *Moschi* v. *Lep Air Services Ltd.* (1973) A.C. 331, 356; (1972) 2 All E.R. 393.
78 Treitel: Outlines of the Law of Contract (2nd Ed.) p. 305.
79 *Michael* v. *Hart & Co.* (1902) 1 K.B. 482.
80 *British & Beningtons Ltd.* v. *N.W. Cachar Tea Co. Ltd.* (1968) A.C. 48.
81 *The Mihalis Angelos* (1971) 1 Q.B. 164.
82 *Hochester* v. *De La Tour* (1853) E & B 678.
83 *Danube & Blacksea Ry.* v. *Xenos* (1863) 13 C.B.N.S. 825; See also *Synge* v. *Synge* (1894) 1 Q.B. 466.
84 *The Mihalis Angelos* (1971) 1 Q.B. 164.
85 Chitty: On Contracts (24th Ed.) Para 1483.
86 *Ibid.; Xenos* v. *Danube & Blacksea Ry.* (1863) 16 C.B.N.S. 825.
87 *Kedarnath Lal* v. *Sheo Narain Rai* (1957) A.P. 408.
88 In *Hoenig* v. *Isaacs* (1952) 2 All E.R. 176, the plaintiff sued defendant for the balance of £750 for decorating and furnishing defendant's flat. The defendant claimed that because of defects the work was not according to contract, and the contract being an "entire" contract, the plaintiff could recover nothing. The Court of Appeal held for the plaintiff, as there had been substantial compliance, but made a deduction for the defects. They referred to *Cutter* v. *Powell* (1795) 6 T.R. 320, the case of the ship's mate who agreed to serve from port to port for a lump sum, but died on the voyage. His legal representatives could recover nothing. The Court of Appeal said it would have been otherwise had he merely failed on some occasion in his duty whereby some damage had been caused.

In a case where a Finance Corporation had lent a large sum of money to the respondent and demanded from the borrower the carrying out of his part of the contract to insure the property mortgaged to the Finance Corporation and to pay the instalments due together with interest accrued which the respondent did not do but the respondent demanded a further loan which the Finance Corporation in its discretion refused to give under the circumstances, it could not be said that the Corporation had refused to perform his promise in its entirety and therefore in the premises the respondent could not rescind the contract.[89]

"A repudiation," said Lord Atkin in *Spettabile Consorzio Veneziano* v. *Northumberland Shipbuilding Co.* "has been defined in different terms—by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; Bowen L.J., as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."[90]

The clearest leading case is perhaps *Withers* v. *Reynolds*.[91]

The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October. 1829. to Midsummer. 1830. in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January. 1830. the straw having been regularly sent in, and the plaintiff being in arrear with his payments, "the defendant called upon him for the amount, and he there-upon tendered to the defendant £11 11s. being the price of all the straw delivered except the last load, saying that he should always keep one load in hand," The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery.

The Court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke J. (as he was then, afterwards better known as Baron Parke), said,

"the substance of the agreement was that the straw should be paid for on delivery.... When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him." It is to be observed that, as Patterson J. added, "if the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw."

Later English authorities have in fact established that mere failure to make one of a series of payments will not generally, in the absence of a prospective refusal, discharge the other party from proceeding with the contract.[92]

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, to "evince an intention not to be bound by the contract".[93] In other words, a party renunciating must "evince an intention" not to go on with the contract which may be by words or by conduct, provided it is clearly made. The test whether intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.[94] It seems, however, with great submission,

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89 *West Bengal Financial Corporation* v. *Glurco Series (Pvt.) Ltd.* (1973) A. Cal. 268, 275.

90 (1919) 121 L.T. 628, at pp. 634-5; *Shaffer* v. *Finlay* (1953) 1 W.L.R. 106, 117; *Master* v. *Garret & Taylor Ltd.*, 1931 A.R. 126; 131 I.C. 220.

91 (1831) 2 B. & Ad. 889; 36 R.R. 782.

92 *Freeth* v. *Bhurr* (1874) L.R. 9 C.P. 208; Finch, Sel. Ca. 714; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884) 9 App.Ca. 434. "These cases were determined after the passing of the Indian Contract Act, but the views of the learned judges are useful guides in determining what amounts to a 'refusal' in cases of this class": per Maclean C.J. in *Rash Behary Shaha* v. *Nrittya Gopal Nundy* (1906) 33 Cal. 477, at p. 481.

93 L.R. 9 C.P. 213, 214; and see Pollock on *Contract,* 13th ed., pp. 213 *sqq: Dumenil* v. *Ruddin* (1953) 1 W.L.R. 815; (1953) 2 All E.R. 294.

94 Anson's *Law of Contract* (18th Ed. 1937 (24th Ed.) 508; *Heymans* v. *Darwins* (1942) A.C. 356, 397; (1942) 1 All E.R. 337, 350; *Universal Cargo Carriers Corp.* v. *Citati* (1957) 2 Q.B. 401, 436; (1957) 2 W.L.R. 713, 730; (1957) 2 All E.R. 70; on app. (1957) 3 All E.R. 234; Smith's *Leading Cases* (13th Ed. 1929), Vol. 2, p. 40 refd. to; *Forslind* v. *Bechely-Crundall* (1922) S.C. (H.L.) 173; *Hochster* v. *De La Tour* (1853) 2 E. & B. 678, 688 (per Campbell C.J.).

that the intention which is material is not that with which the contract is broken, but that with which it was made. Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach. Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases.[95]

The plaintiffs, [96] a French manufacturing Company, appointed the defendants sole concessionaries of their products in U.K. The plaintiffs were to despatch goods with reasonable promptness against orders of the British Concessionaire who were to pay the bills drawn on them. The agreement between the parties was terminable by reasonable notice on either side. The defendants were consistently late in meeting the bills of exchange drawn on them. The plaintiffs without notice arranged with another British firm to be their sole concessionaires and wrote to the defendants saying that as the latter had wrongfully repudiated the contract by failing to pay the bills on time, they accepted the repudiation and demanded payment for the unpaid bills. They brought an action on that allegation and also prayed for a declaration of the defendants ceasing to be their sole concessionaires in the U.K. The defendants claimed to be continuing to be the sole concessionaires, and the trial Court gave judgment for the plaintiffs for the unpaid bills and for the defendants continuing to be the sole concessionaires. The Court of Appeal held that there was no repudiation by the defendants but there was by the plaintiffs as a 12 months notice as reasonable notice was necessary to terminate the agreement. The plaintiffs were released from their positive undertaking to continue to supply the defendants with the goods but could not be relieved of their negative undertaking not to supply their goods to any one else.

The plaintiffs were the suppliers of litter bins to local authorities and by getting advertisements to be placed on the bins they made their profits. The defendant a garage keeper had a contract of advertisement with the plaintiffs. When that contract ended the defendant's business Manager without any specific authority entered into a contract for a further period of three years. The defendant coming to know of this renewal at once, i.e., the same day wrote to the plaintiffs countermanding the order of renewal. This the plaintiffs refused to accept and carried out their part by preparing plates for attachment to bins and exhibited them. The defendants refused to pay for it within the period specified in the contract and the plaintiffs sued for the full period 156 weeks. This was treated as a case of anticipatory breach and the plaintiffs held entitled[97] to recover the contract price having completed their part of the contract and there was no duty on them to vary the contract so as to deprive themselves of its benefit.

The defendant promised to marry the plaintiff on the death of his (defendant's) father. While the father was still alive he announced his intention of not fulfilling the contract and the plaintiff brought a suit for damages. It was held by the Court of Exchequer[98] that the promisee could treat the repudiation of the other party as wrongful putting an end to the contract and may at once bring an action for damages for the breach of contract subject to abatement in respect of any circumstance which may have afforded the means of mitigating his loss.

In *Sooltan Chund* v. *Schiller*[99]

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95 It is submitted, both intentions are material, first that with which the contract was made, for unless there is a breach of vital term, there can be repudiation under this section, secondly that with which the contract is broken, for unless the defendant is refusing to perform the said vital term, there can be no repudiation. Before the plaintiff can repudiate, both these circumstances must concur: (i) a term held fundamental; (ii) refusal to perform that term by the defendant. Proof of (i) will depend upon the intention of the parties at the making of the contract, and proof of (ii) on the intention of the party in default at the time of the breach.

96 *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* (1971) 2 All E.R. 216.

97 *White & Carter (Councils) Ltd.* v. *Mc Gregor* (1962) A.C. 413; (1961) 3 All E.R. 1178.

98 *Frost* v. *Knight* (1872) 7 Ex. 111, 113; *Hochster* v. *De La Tour* (1853) E & B 678; (1843-60) All E.R. Rep. 12; *Danube and Black Sea Ry.* v. *Xenos,* 13 C.B.N.S. 825; *Lovelock* v. *Franklyn* (1846) 8 Q.B.371; *Short* v. *Stone* (1846) 8 Q.B. 358 followed.

99 (1878) 4 Cal. 252; *Burn & Co.* v. *Thakur Saheb Sree Lukhdirjee* (1923) 28 C.W.N. 104; 83 I.C. 260, a case on rather similar lines; *Simson* v. *Virayya* (1886) 9 Mad. 359; *Volkart Bros.* v. *Rutna Velu Chetti* (1894) 18 Mad. 63; *Sundar Singh* v. *Krishna Mills Co.* (1914) Punj. Rec. No. 63, p. 214; 23 I.C. 91.

the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery. Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum of Rs. 1,000 was paid on account by the plaintiffs, which left a large balance due to the defendants in respect of linseed already delivered. This balance was not paid, and the defendants thereupon wrote to the plaintiffs cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered expressing their willingness to pay on adjustment of a sum which they claimed for excess refraction and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed and sued the defendants for damages for non-delivery of the remaining linseed.

Upon these facts it was held, following *Freeth* v. *Burr,*[1] that there was no refusal on the part of the plaintiffs to pay for the linseed delivered to them, as they were willing to pay the sum due as soon as their cross-claims were adjusted. As to illustration (b) to the section it was said:

"That illustration is perhaps not a happy one, because it may lead, as I think it has led in this instance, to misapprehension. But the difference between that case and this is clear enough. The singer by wilfully absenting hereself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their contract. They were willing to pay the sum due as soon as their cross-claims were adjusted; and their default consisted in not paying for the linseed on delivery."[2]

It may be further observed, with regard to the illustrations, that it would be rash to extend them. In England it has been held that a singer engaged to perform in concerts as well as in operas who has agreed, amongst other things, to be in London six days before the beginning of his engagement, for the purpose of rehearsals, does not, merely by failing to be in London at the time so named, entitle the manager to put an end to the contract.[3] Wrongful dismissal of an employee has, on the other hand, been held to determine not only the contract of service, but a term restraining the employee from carrying on the same business after is termination.[4] In reading the illustrations to the Act, so far as they bear on questions of construction, it must be assumed that there are not any terms beyond those stated; the agreements met with in practice will almost always contain special terms, which must be considered.

The principles set forth above were applied by the High Court of Calcutta

in a case where the plaintiff had agreed to purchase from the defendant 300 tons of sugar, "the shipment (to) be made during September and October next in lots of about 75 tons in a shipment," the terms as to payment being cash before delivery. Notice of the arrival of the September shipment was given to the plaintiff, and he was called upon to pay before delivery. The plaintiff was unable to pay, and asked for time, but the defendant would not give it, and ultimately wrote to the plaintiff stating that he had cancelled the contract. On the arrival of the October shipment the plaintiff tendered payment for the same, but the defendant refused to accept the money, saying that the contract had been cancelled.

The plaintiff thereupon sued the defendant for damages for refusing to deliver the October shipment. It was held, in accordance with the English authorities, that mere failure on the part of the plaintiff to pay for and take delivery of the September shipment did not amount to "a refusal" to perform the contract within the meaning of this section so as to entitle the defendant to rescind the contract, and that it did not exonerate him from delivering the October shipment.[5]

There is nothing in this section to confine it to anticipatory refusals: it includes refusal to perform any substantial part of the contract which remains to be performed.[6] But a merely

1 L.R. 9 C.P. 208.
2 Per Garth C.J., 4 Cal. at p. 256.
3 *Bettini* v. *Gye* (1876) 1 Q.B.D. 183; Finch. Sel. Ca. 742.
4 *General Billposting Co.* v. *Atkinson* (1909) A.C. 118.
5 *Rash Behary Shaha* v. *Nrittya Gopal Nundy* (1906) 33 Cal. 477. See *Maple Flock Co.* v. *Universal Furniture* (1934) 1 K.B. 148, a case on S. 31 of the Sale of Goods Act. 1893, which is identical with s. 38 in the Indian Act. In this case it was held that the main tests to be considered for the purpose of deciding whether breaches of an instalment contract can be treated as having terminated the contract are the quantitative ratio which the breach bears to the contract as a whole and the degree of probability that such a breach will be repeated. This case was followed in *Moolchand Kesarimull* v. *Associated Agencies* (1941) 2 M.L.J. 281; 1942 A.M. 139.
6 *Phul Chand-Fateh Chand* v. *Jugal Kishore-Gulab Singh* (1927) A.L. 501; 106 I.C. 10; 1927 A.L. 693. The contract which may be put an end to under s. 39 is "voidable"; *Muralidhar Chatterjee* v. *International Film Co.,* 1943 A.P.C. 34; (1943) 70 I.A. 35.

conditional refusal withdrawn before the time for performance cannot be treated by the other party as final.[7] It has been held that the section applies only when the contract is still executory, and the time for performance has not yet arrived.[8] This in effect restricts the section to cases of anticipatory breach, or cases of continuing contracts under which obligations remain to be performed, such as instalment contracts.

Where two transactions are separate, repudiation of one cannot affect the other.[9]

A buyer who has refused to receive goods on the ground that they were not tendered within the agreed time cannot afterwards change his ground and raise the objection that in fact the goods were not according to contract;[10] for the election to rescind, once made, is conclusive.[11]

It may be worth while to add that an unsuccessful attempt to perform a contract which does not disable the promisor from still performing it effectually within the time limited, or a reasonable time, and does not cause any damage to the promisee, cannot be treated as a refusal. Such an attempt does not of itself affect the legal rights of the parties at all.[12]

Where, according to the custom of the caste to which the plaintiff and defendant belonged, marriages ordinarily took place when the bride was between twelve and fifteen years of age, and the plaintiff, who was betrothed to the defendant's daughter, required the defendant to fix a date for his marriage within a certain period, after which the marriage could not take place for eighteen months, owing to the intervention of the *Sinnasth* year, and the girl would then have passed her fifteenth year, it was held that the declaration by the girl that she was unwilling to be married for three or four years, and by the father that he could not compel her to change her mind, was practically a repudiation of the contract of marriage, and entitled the plaintiff to damages for the breach.[13]

Where the sale of a piece of agricultural land was for Rs. 17,000/- and the purchaser had only paid Rs. 12,000/- but was in possession, the vendor can sue for possession or in the alternative for the balance of the purchase price with interest, the suit cannot be said to be not maintainable on the ground of sections 39 and 55 Contract Act as the purchaser had refused to perform his part of the contract.[14]

In a case where the plaintiff was to supply cotton by instalments of fifty bales each and after the first two instalments the defendant mill repudiated the contract on the ground of the quality but the plaintiff refused to accept the repudiation but did not perform his part of the contract in that he neither supplied the instalments nor proved his readiness and willingness to supply the contracted bales of cotton, the Andhra Pradesh High Court held[15] that the plaintiff could not in the circumstances sue for damages.

One of the conditions in a building contract was that if the contractor (where time was the essence of the contract for works) rendered himself liable to pay compensation for delay in execution of the work amounting to the whole of the security deposit or if he abandoned the

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7 *Ibid,*

8 *Kumuraswami* v. *Karuppuswami,* 1953 A.M. 380; *Sultan Ahmad* v. *Maksad* (1943) 22 Pat. 306, 211 I.C. 35, 1944 A.P. 3.

9 *Madholal* v. *Official Assignee of Bombay* (1949) F.C.R. 441, 51 Bom. L.R. 906, 1950 A.F.C. 21; *Johnson* v. *J.* (1802) 3 B. & P. 162.

10 *Nannier* v. *Rayalu Iyer* (1925) 49 Mad, 781; 93 I.C. 673. But as to a case where the vendor was not ready and willing to perform at all, see *British and Beningtons* v. *N.W. Cachar Tea Co.* (1923) A.C. 48, per Lord Sumner, at p. 70.

11 See *Narasimha Mudali* v. *Narayanaswami Chetty* (1925) 49 Mad. L.J. 720; 92 I.C. 333 (facts rather confused); ep. *Jawahar Singh* v. *Secy. of State* (1926) 94 I.C. 635; 1926 A.L. 292.

12 See *Borrowman* v. *Free* (1878) 4 Q.B.D. 500.

13 *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1897) 21 Bom. 23, 35; *Khimji Khuverji Shah* v. *Lalji Karamsi* (1941) Bom. 211, 43 Bom. L.R. 35, 196 I.C. 208, 1941 A.B. 129. For the form of decree in such cases see 21 Bom. 23, 37, following *Umed Kika* v. *Nagindas* (1870) 7 B.H.C. 122.

14 *Ranchhoddas Chhaganmal* v. *Devaji Supdu Dorik* (1977) A.SC. 1517, 1519.

15 *Motilal Srinivasa Sarda* v. *Netha Cooperative Spg. Mills Ltd.* (1975) A.AP. 169; *Bamier & Bros* v. *Ramudu* (1933) A.M. 176, 178; *State of Kerala* v. *C.C. Refineries Ltd.* (1968) A.SC. 1361; 1364 reld. on; *Rayulu Aiyar* v. *Kappu Aiyar & Sons* (1925) A.M. 274; *Nannier* v. *Rayulu Iyer & Sons* (1926) A.M. 778 refd. to; *Pollock & Mulla:* Contract Act (9th Ed.) p. 347 quoted with approval.

contract on account of illness or death or any other cause the Executive Engineer could rescind the contract and in that case the security deposit stood forfeited. The work did not progress satisfactorily and the Executive Engineer gave notice to show cause why penalty should not be imposed. The contractor stopped the work and the Executive Engineer rescinded the contract and confiscated the security. The contractor brought a suit claiming refund of the security deposit and damages. His suit failed and the Supreme Court held[16] that the security deposit had been rightly confiscated.

A contractor had to supply the Army Charpoys in certain quantities by instalments. He failed to supply the requisite number and even after that breach an instalment of charpoys was received by the Army Authorities. They could not therefore cancel the work orders and put an end to the contract.[17]

Second alternative—Contract subsisting.—The second alternative that the contract remains in full effect is illustrated by *Avery* v. *Bowden*.[18] If the second alternative is chosen the contract subsists at the risk of both parties and the anticipatory renunciation is ineffective.[19]

There is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived.[20] Thus where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he will not be able to perform when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith.[21]

Renunciation in the Course of Performance.—The law is similar where a party renounces a contract in the course of his performance, e.g., where the subject-matter is the sale of goods to be delivered by instalments. Thus where the purchaser after accepting some, refuses to take any more of the goods concerned, the vendor may sue him for damages at once without manufacturing and tendering the remainder.[22]

"Disabled himself from performing."—Disability due to the party's own fault must be distinguished from inability to perform a contract. See Specific Relief Act, 1963, s. 12(2), as to the effect of inability of a party to perform the whole of his part of a contract. See also s. 16 of the same Act, which enacts, amongst other things, that specific performance of a contract cannot be enforced in favour of a person who has become "incapable" of performing any essential term of a contract that on his part remains to be performed.

It is very old law that if a promisor disables himself from performanee, even before the time for performance has arrived, it is equivalent to a breach.[23] In a later English case[24] the defendant promised the plaintiff, his intended wife, in consideration of the marriage which afterwards took place, to leave a certain house and land to her by will for her life. After the marriage he sold the property to a third person. The Court, having decided on the facts that there was a contract, held that the plaintiff was entitled to treat the defendant's conveyance to a stranger as an immediate breach and to sue for damages.

In a Madras case, under the terms of a mortgage for Rs. 800, the mortgagee advanced Rs. 300 to the mortgagor and agreed to pay the balance to a prior mortgagee of the same property. The mortgagee failed to pay the balance according to the agreement, and the prior mortgagee sued the mortgagor and recovered the debt by attachment and sale of the mortgagor's movable property. About eight years after the date of the mortgage the mortgagee sued the mortgagor for interest due under the mortgage on Rs. 300 only. It was held[25] that under the

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16 *State of Maharashtra* v. *Digambar Balwant Kulkarni* (1979) A.SC. 199.
17 *Union of India* v. *S. Kesar Singh* (1978) A.J. & K 102, 106.
18 (1855) 5 E. & B. 714; (1856) 6 E.&.B. 953.
19 Per Cotton L.J. in *Johnstone* v. *Milling* (1886) 16 Q.B.D. L.J. 460, 470.
20 *Thorpe* v. *Fasey* (1949) Ch. 649, 661; *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 Q.B. 401, 438.
21 *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 Q.B. 401, 438.
22 *Withers* v. *Reynolds* (1831) 2 B & Ad. 882; *Cort* v. *Ambergate etc. Ry.* (1851) 17 Q.B. 127.
23 See 3 Encyl. Laws of England, 350 (632, 3rd ed.); Pollock on *Contract*, 13th ed., p. 219.
24 *Synge* v. *Synge* (1894) 1 Q.B. 466 C.A.
25 *Subba Rau* v. *Devu Shetti* (1894) 18 Mad. 126.

circumstances the mortgagor was entitled to rescind the mortgage under this section "on the ground that the mortgagee by acting in contravention of his agreement incapacitated himself from performing it in its entirety",[26] and that he was not entitled to treat the original mortgage as still in force so as to enable him to sue for the interest alone. The Court, however, expressed the opinion that in putting an end to the mortgage the mortgagor was bound to give up the benefit he had received under the mortgage and to pay back Rs. 300 with interest up to the date of cancellation.[27] Without disputing the correctness or the substantial justice of the decision, one may be allowed to think that the application of the present section was somewhat forced. It was made by only one member of the Court.

The view that a mortgagor who has not received the full amount of the consideration for the mortgage is entitled to rescind the mortgage under this section was referred to with apparent approval by the High Court of Madras.[28] But in a later case[29] it has been dissented from by that Court as well as by the High Courts of Allahabad[30] and Patna,[31] on the grounds that the present section applies to contracts only, that a mortgage when registered is not a contract but a transfer of property,[32] and that a mortgage, notwithstanding a partial failure of consideration, may be enforced to the extent of money actually advanced by the mortgagee to the mortgagor.[33]

"Promisee may put an end to the contract."—The Common Law rights of a promisee on refusal by the promisor to perform his promise were thus stated by Scotland C.J. in a Madras case [34] of 1863, and the statement remains applicable under the Act:—

"If a vendor contract to deliver goods within a reasonable time, payment to be made on delivery, and before the lapse of that time, before the contract becomes absolute, he says to the purchaser, 'I will not deliver the goods', the latter is not thereby immediately bound to treat the contract as broken, and bring his action. The contract is not necessarily broken by the notice. That notice is, as respects the right to enforce the contract, a perfect nullity, a mere expression of intention to break the contract, capable of being retracted until the expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action unless, of course, the purchaser thereupon exercises his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained. The law on this subject will be found in *Leigh* v. *Paterson*[35] and *Philipotts* v. *Evans*,[36] the authority of which cases was upheld in *Hochster* v. *De la Tour*."[37]

The last-mentioned case is now generally treated as the leading one on "anticipatory breach of contract".[38] The rule shortly indicated by this phrase is that on the promisor's repudiation of the contract, even before the time for performance has arrived, the promisee may at his option treat the repudiation as an immediate breach, putting an end to the contract for the future and giving the promisee a right of action for damages. It must be remembered

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26 Per Muttusami Ayyar J. at p. 127.
27 See s. 65, *post*.
28 *Rajai Tirumal* v. *Pandla Muthial* (1912) 35 Mad. 114, at p. 117.
29 *Kandasami Pillai* v. *Ramasami Monnadi* (1919) 42 Mad. 203; 51 I.C. 507.
30 *Rashik Lal* v. *Ram Narain* (1912) 34 All. 273.
31 *Makhan Lal* v. *Hanuman Bux* (1917) 2 Pat. L.J. 168; 38 I.C. 877.
32 See Transfer of Property Act, 1882, s. 58.
33 In the Punjab it has been held that an agreement to mortgage is indivisible, and failure of a part of the consideration leads to failure of the whole mortgage: *Gokulchand* v. *Rahaman* (1907) Punj. Rec. No. 59. But See *contra: Motichand* v. *Sagan* (1905) 29 Bom. 46; *Bhagabati* v. *Narayan* (1907) 31 Bom. 552; *Rajani Kanta Das* v. *Gour Kishore* (1908) 35 Cal. 1051; *Tatia* v. *Babaji* (1898) 22 Bom. 176; at p. 183.
34 *Mansuk Das* v. *Rangayya Chetti*, 1 M.H.C. 162. See also the observations of Mulla J. in *Steel Brothers & Co.* v. *Dayal Khatao & Co.* (1923) 47 Bom. 924; 87 I.C. 67, a case of a contract on c.i.f. terms.
35 (1818) 8 Taunt. 540; 20 R.R. 552.
36 (1839) 5 M. & W. 475; 52 R.R. 802. It is difficult to understand how the learned Chief Justice supposed this case to anticipate the doctrine of *Hochster* v. *De la Tour*, to which the judgment of Parke B, is distinctly adverse, but this is of only historical interest.
37 (1853) 2 E.& B. 678; 95 R.R. 747; and see *Ripley* v. *McClure* (1849) 4 Ex. 345, 359; 80 R.R. 593, 604. The rule in *Hochster* v. *De la Tour* is now generally received in America, and has been approved and applied by the Supreme Court of the United States: *Roehm* v. *Horst* (1900) 178 U.S. 1.
38 This expression is considered unfortunate by Lord Wrenbury, *Bradley* v. *H. Newsom, &c.* (1919) A.C. 16, 53; the breach is in the present repudiation. *Cp.* per Lord Haldane at p. 33.

that the option is entirely with the promisee.[39]

A few months before the Contract Act came into force the effects of "anticipatory breach" were thus summed up in the Exchequer Chamber in England.[40]—

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."[41]

When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting.[42] Similarly if he freely and with full knowledge elects not to accept the repudiation, he cannot go back on this election, and sue before the date of performance has arrived.[43]

Rescission and Repudiation (H.L.).—A purchaser of land for development agreed to buy land for a sum of money and he was to pay £150,000/- to a third party. A compulsory purchase of a part of the land had already commenced. The price of the land fell. The purchaser rescinded the contract and he claimed that the contract was discharged. The vendor did not accept the rescission and brought an action for declaration that the purchaser could not rescind. The purchaser in his defence and counter claim claimed that the rescission was valid. The vendors brought another action for declaration that the position taken by the purchaser amounted to repudiation which they accepted and claimed damages and included in their claim damages for the third party.[44] The trial Judge and the Court of Appeal held that the purchasers were not entitled to rescind and had repudiated the contract and awarded damages. The House of Lords on appeal held that unjustified rescission did not always amount to repudiation and when deciding the question the Court had to consider the conduct of the party as a whole. The purchasers were (albeit) wrongly relying on the contract itself which provided for the power of rescission in case of compulsory purchase of the land. In the circumstances they were not abandoning the contract or refusing further performance if the Court decided against them. The erroneous or unsuccessful attempt at rescission did not amount to repudiation.[45] Furthermore, their pleading did not amount to repudiation.

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39 The High Court of Ontario has held in *Roy* v. *Kloepfer* (1951) 3 D.L.R. 122, that a purchaser of land may issue a writ for specific performance before the date for performance has arisen, in the case of an anticipatory breach by the vendor, and is entitled to judgment.

40 *Frost* v. *Knight* (1872) L.R. Ex. 111 The judgment delivered by Cockburn C.J. is practically, though not formally, the judgment of the Court; see *ibid*, at p. 118. The actual points decided were that the rule applies to contingent promises, and that the contract to marry is not expected from it on any such grounds of its special character as were suggested in the Court below. See also *Synge* v. *Synge* (1894) 1 Q.B. 466 C.A., where it was not necessary to rely on the principle to its full extent.

41 See also *Edridge* v. *R.D. Sethna* (1933) 60 I.A. 368; 36 Bom. L.R. 127; 146 I.C. 730; 1933 A.P.C. 233; *Ratanlal* v. *Brijimohan*, (1931) A.B. 386. 33 Bom.L.R. 703; 133 I.C. 861; and notes to illustration (h) to s. 73, *infra*. *Dhanraj Mills* v. *Narsingh Prasad* (1949) 27 Pat. 723, 1949 A.P. 270.

42 *Jhandoo Mal-Jagan Nath* v. *Phul Chand-Fateh Chand* (1924) 5 Lah. 497; 85 I.C. 118; 1925 A.L.217 (the only difficulty was on the construction of the correspondence). *Panoutsos* v. *Raymond Hadley Corporation of New York* (1917) 2 K.B. 473; (1916-17) All E.R. Rep. 448; *Cohen & Co.* v. *Ockerby & Co. Ltd.* (1917) 24 C.L.R. 288, 298; *Peter Turnbull & Co. (Pty.) Ltd.* v. *Mundus Trading Co. Pty. Ltd.* (1954) 90 C.L.R. 235.

43 *Haroon Tar Mohammed* v. *Bengal Distilleries Co. Ltd.* (1948) 2 Cal. 11, 46.

44 *Woodar Investment Development Ltd.* v. *Wimpey Construction U.K. Ltd.* (1980) 1 All E.R. 571, 574 *et set*. Lord Coleridge's dictum in *French* v. *Burr* (1876) 8 C.P. at p. 213; *James Shaffer Ltd.* v. *Findlay Durham & Brodic* (1953) 1 W.L.R. 106 appld.; *Sweet & Maxwell* v. *Universal news Services Ltd.* (1964) 3 All ER 30; *Federal Commerce & Navigation Ltd.* v. *Morena Alpha Inc.* (1979) 1 All ER 307. disting.

45 *Woodar Investment Development Ltd.* v. *Wimpey Construction Ltd.* (1980) 1 All ER 571, 576, 583; - *Jackson* v. *Horizon Holidays* (1975) 1 All ER 91 Explained and dictum of Lord Denning MR in

It was also observed that the law relating to the recovery of damages for the benefit of third parties was in an unsatisfactory state and required review by the House of Lords.

Anticipatory breach.—As soon as one party to a contract communicates to the other his refusal to carry out the contract the doctrine of anticipatory breach becomes applicable. The other party is put to election. He may treat the contract as ended and recover damages for loss of benefit of the contract. Alternatively he may treat the contract as continuing on foot, in which case it will remain in force for the benefit of both parties unless and until the second party elects to treat the contract at an end first, the repudiating party may withdraw his refusal and require the second party to perform his part of the contract subject to giving reasonable notice of his change of intention.[46] Or he may take advantage of any supervening circumstances of such a character as to discharge the contract.[47]

A seller agreed in November to sell oats as 7s. 4d. per bushel f.o.b. Sydney to be loaded on a ship nominated by the buyer during January and February 1951. The buyer was to give 14 days' notice of ships and shipping date given. The buyer nominated a ship *the Afric* but at no time was the firm nomination of the ship or the firm shipping date given. The buyer agreed to sell to a third party at 8/60 f.o.b. Sydney. The seller then informed the buyer his inability to deliver at Sydney and offered to supply at Melbourne. The seller could not arrange at Melbourne and informed the buyer accordingly. *The Afric* arrived in Sydney in March. The buyer then bought oats at 10s, 4d. per bushel after giving the seller an opportunity to supply at the agreed price of 7/6.

The High Court on appeal held in favour of the buyer and awarded damages.[48] The decision turned on the question whether the completion of the contract proceeded from the wrongful act and conduct of the buyer, the appellant in not nominating a February ship and giving due notice of its shipping date or of the seller the respondent by continuing to refuse to load oats at Sydney. By March the buyer was ready and willing to perform his part of the contract but the refusal of the seller continued. The buyer was therefore entitled to say that by the seller's default he had lost the benefit of the contract and was entitled to recover damages.[49]

The legal consequences of refusal by a party to perform his obligation occurs in various ways all compendiously described as 'repudiation'. But repudiation by one party does not itself determine or rescind the contract, the injured party having the right to elect to stand on the contract and enforce it or accept the repudiation and regard himself freed from the contract and claim damages for it.[50] Though a party may exercise his right to treat the contract as at end as regards obligations *de futuro* it remains alive for the purpose of vindicating rights already acquired under it on either side.[51] Upon a repudiation by one party, the other has the right to elect to keep the contract alive.[52] The expression used by Asquith L.J. in *Howard* v. *Pickford Tool Co.*

"An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind,"

was in a case of contract of service where the servant was continuing to serve and the employer was continuing to employ him.[53]

Jackson's case disapproved. *Tweddle* v. *Atkinson* (1861-73) All E.R. Rep. 369; (1861) 1 B & S. 393; *Beswick* v. *Beswick* (1967) 2 All E.R. 1197 (H.L.); (1968) A.C. 58; and dictum of Lush L.J. in *Lloyd's* v. *Harper* (1880) 16 Ch. D. at. p. 321 refd. to.

46 *Panoutsos* v. *Raymond Hadley Corp. of N.Y.* (1917) 2 K.B. 473; *Cohen & Co.* v. *Ockerby & Co. Ltd.* (1917) 24 C.L.R. 288, 298; *Peter Turnbull & Co. Ltd.* v. *Mundus Trading Ltd.* (1954) 90 C.L.R. 235, 250.

47 *Avery* v. *Bowden* (1856) 6 E. & B. 953; 119 E.R. 1119; *Peter Turnbull Co. Ltd.* v. *Mundus Trading Co. Ltd.* (1954) 90 C.L.R. 235, 250.

48 *Peter Turnbull & Co. Ltd.* v. *Mundus Trading Co.* (1954) 90 C.L.R. 235.

49 *Peter Turnbull & Co. Ltd.* v. *Mundus Trading Co.* (1954) 90 C.L.R. 235, 254.

50 *Heyman* v. *Darwins Ltd.*, 1942 A.C. 356, 397; (1942) 1 All E.R. 337, 360; *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1926) A.C. 497; (1926) All E.R. Rep. 51, 58. (Difference between frustration & rescission or repudiation pointed out).

51 *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1926) A.C. 497, 509, 510; (1926) All E.R. Rep. 51, 59; *White* v. *Ross* (1960) N.Z.L.R. 247.

52 *Universal Cargo Carriers Corp.* v. *Citati* (1957) 2 W.L.R. 713, 727; (1957) 2 Q.B. 401.

53 *Howard* v. *Pickford Tool Co.* (1951) 1 K.B. 417, 421.

An agreement for display of advertisement of a garage owner was entered into for 3 years. On the same day the garage owner cancelled the contract on the ground of mistake of his representative but the advertising contractor refused to accept the cancellation and five months after the date of the contract began the display in accordance with it.

The House of Lords held that the advertising contractor was entitled to carry out the contract and claim the full contract price and was not obliged to accept the repudiation and sue for damages.[54] Anticipatory breach of the charter party by the charterer would be established only if the owners show that on the date of the breach the charterer was not willing and able to perform his part of the contract. This the owners can show by establishing either renunciation by the charterer or impossibility created by him.[55] In the case of sole concessionaire failure to meet bills of exchange is not repudiation, to constitute which the repudiation must be by a breach going to the root of the contract. *Decro-Wall International* v *Practitioners in Marketing Ltd.*, (1971) 2 All E.R. 216.

A contract for supply of sleepers by instalments can be taken as repudiated if breach in one instalment took place in such circumstances as to lead to the inference that similar breaches would be committed in future instalments also and the contract might be rescinded.[56]

The owners of a vessel by their conduct evinced an intention not to be bound by the terms of the charterparties for they were threatening without justification to commit a fundamental breach of their obligation under the charterparties and were taking steps to implement that threat by instructions which they gave to their masters. Their conduct amounted to anticipatory breach of the terms of the charterparties and they could not excuse it by saying that they had acted on legal advice or by relying on lien given by the charterparties. It was open to the charterers to accept the repudiation, as they did, and to treat themselves as discharged from any further performance.[57]

No revival after rescission.—Where on account of breach of the obligation by the vendor to make out a good title, which the purchaser rightly considered repudiation, the purchaser in the clearest terms rescinds the contract of purchase, the parties cannot revive the contract unless it is by something, which amounts to a new agreement, because an effective rescission brings a contract to an end and entitles the purchaser to the return of his deposit.[58]

Erroneous expression not repudiation.—The expression of an erroneous but *bona fide* view on the construction of an agreement does not amount to a repudiation and therefore where an agreement for a lease contained a clause that the lease "shall be non-assignable" for the period of the lease and the lessee refused to accept an absolute prohibition against such letting or parting with possession in the lease it does not amount to repudiation of the agreement.[59] If one of the parties to a contract under a mistaken impression treats a contract to have been terminated after the lapse of time given in the contract and negotiates for better or new terms, the contract is not terminated by this unilateral act if the negotiations fail; he is still entitled to enforce the contract as it stood before the negotiations.[60]

Electing to accept repudiation

On January 17, 1964, *G* repudiated a contract of sale to *F*. On January 24, 1964, *F* issued a writ against *G* for declaration that the contract was subsisting and damages for breach of contract. *F*'s solicitors wrote on the same day that *G* could not rescind the contract. The writ was not mentioned therein and it was not served.

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54 *White & Carter (Councils) Ltd.* v. *McGregor* (1962) A.C. 413; (1962) 1 W.L.R. 17 (H.L.).

55 *Universal Cargo Corpn.* v. *Citati* (1957) 2 Ch. 401; (1957) 2 All E.R. 70; (1957) 2 W.L.R. 713.

56 *Tata Iron & Steel Co. Ltd.* v. *Ramam Lal Kandoi* (1971) 2 Cal. 493, 524; *Chhedilal Hariniwas* v. *Britover Ltd.*, 52 Cal. W.N.45; *Maple Flock Co. Ltd.* v. *Universal Furniture Products Ltd.* (1934) 1 K.B. 148.refd to.

57 *Federal Commerce and Navigation Ltd.* v. *Morena Alpha Inc.* (1978) 3 All ER 1066, 1081, 1082; - *James Shaffer Ltd.* v. *Findlay Durham & Brodie* (1953) 1 WLR 106; and *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* (1964) 3 All ER 30 disting.

58 *In re Stone & Saville's contract* (1962) 1 W.L.R. 461, 466; on appeal (1963) 1 W.L.R. 163 (C.A.); *In re Atkinson & Horsell's contract* (1912) 2 Ch. 1 (C.A.) dist.

59 *Sweet and Maxwell Ltd.* v. *Universal News Services Ltd.* (1964) 3 W.L.R. 356.

60 *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254, 260; *Jainarain* v. *Suraj Mull Sagar Mull,* 1949 F.C.R. 379; 1949 A.FC. 211.

By issuing a writ, a party elects to treat a contract as terminated—that he is rescinding it.[61] But a writ claiming a contract to be valid and subsisting must mean that the party is refusing to treat it as terminated.[62] But if the writ is capable of meaning that the party elected to treat the refusal to perform as a repudiation of it, could the issue of writ without service of it constitute election was not decided by the House of Lords in *Garnac Grain Co.* v. *Faure & Fairclough Ltd.*[63]

If the law lays down a particular form in which repudiation must take place, it is not open to the promisee to put an end to the contract in any other way. In *Thakurain Raj Rani* v. *Thakur Dwarka Nath, G,* in January 1904, executed an agreement in favour of *S* to make *S* monthly payments of Rs. 50 during *S*'s life, from the time *S* should execute a will in his favour, and obtain the consent of the Court of Wards, *S* being a disqualified proprietor. *S* did execute such a will, and obtained sanction in July, 1904. From then until *S*'s death in 1922, *G* made none of the agreed monthly payments. *S* did not revoke the will in *G*'s favour, although on several occasions he submitted fresh wills to the Court of Wards in favour of his wife, but these were never sanctioned. *S*'s widow sued for a declaration that *G* had no rights under *S*'s will, but the Court held for *G*. One plea raised by *S*'s widow was that *S* had repudiated the contract under s. 39 by making fresh proposals for new will to the Revenue authorities, but the Court held that *S*'s obvious course to terminate the contract was to revoke his will, and that he could do this by only using the special procedure laid down in the Indian Succession Act.[64]

By a compromise decree, *B* agreed to take *A*'s son in adoption and *A* to leave *B* in undisturbed possession and enjoyment of certain properties. *A* not only refused to give his son in adoption, he made the adoption impossible by performing the marriage of the boy.

B was held entitled to enforce her right to the property, as she should be deemed to have performed her part of the agreement. Besides *A* could not take advantage of his own wrong.[65] An agreement to execute a conveyance of immoveable property without an agreement to register cannot be fully performed until the vendor has done all that was required to have the document duly registered as the latter is necessarily implied in the contract.[66] Insisting on the performance of a condition which was not one of the terms of the contract and was unilaterally imposed by a party amounts to inability of that party to perform his part of the contract or repudiation of the contract. The other party can, under s. 39, put an end to the contract.[67] Where a party has wrongfully refused to perform his part of the contract and the other party rightly put an end to the contract under s. 39, that other party is liable under s. 64 to restore to the wrong doer any benefit received under the contract.[68]

Motive for rescission irrelevant.—If a contract to fell timber in a forest is validly cancelled the motive for it is irrelevant and does not furnish a cause of action for claiming damages, even if the lessor does it to advance the interest of a company in which he has a financial interest.[69]

Arbitration clause.—When a contract is terminated by acceptance of the repudiation, an agreement to refer all disputes to arbitration does not become void.[70]

Ordinarily speaking, a widely drawn arbitration clause would embrace a dispute as to whether a party is discharged from future performance by frustration whether time for perfor-

61 See *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 361, 379.
62 *Garnac Grain Co. Ltd.* v. *Faure & Fairclough* (1967) 3 W.L.R. 143, 151. See *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 361, 379.
63 (1967) 3 W.L.R. 143, 151.
64 (1946) 21 Luck. 314, 347; 1946 A.O. 193; 223 I.C. 206. The Supreme Court affirmed this decision in (1953) S.C.R. 913, but the plea of s. 39 does not seem to have been raised there.
65 *Nagayya* v. *Bapamma* (1958) A.AP. 504.
66 *Hutchi Gowder* v. *Bheema Gowder,* 1960 A.M. 33.
67 *Kutumba Rama Sastry* v. *Dakshina Murthy* (1960) A.AP. 178.
68 *Union of India* v. *Bungo Steel Furniture Ltd.,* 1963 A. Cal. 71; *Murarilal Chatterjee* v. *International Film Co.,* 70 I.A. 35, 48; (1943) A.PC. 34 folld.
69 *Rattayya* v. *Venkatayya* (1959) A.AP. 551.
70 *Karan Narain* v. *Messrs. Volkart Bros.* (1946) Lah. 692, 227 I.C. 546, 1946 A.L. 116; *Radhakishen* v. *General Construction Co.,* (1947) A.S. 57, 230 I.C. 20. Following *Heyman* v. *Darwins* (1942) A.C. 356, H.L.

mance has already arrived or not.[71] The Supreme Court in *Jawahar Lal Burman* v. *Union of India*[72] quoted with approval the following passage from the speech of Lord Macmillan in *Heyman* v. *Darwin Ltd.*[73]: The arbitration clause

"is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde;* but the arbitration clause does not impose on one of the parties an obligation in favour of the other."

If a dispute is that a contract with an arbitration clause was never entered into or that it is *ab initio* void the arbitration clause is inoperative but if the dispute is as to whether there is a breach or discharge of the contract, the arbitration clause will operate. In the former case, the court and not the arbitrator has to decide the issue.[74]

In cases of frustration of contract, the performance of contract comes to an end but the contract remains in existence for the purpose of resolution of disputes including the question whether the contract was discharged under the doctrine of frustration or by breach.[75]

When an agreement is invalid, every part of it including the arbitration clause contained there must also be invalid. When the whole perishes, its parts also must perish. *"Ex nihilo nil fit"*.[76] Arbitration clause goes with the repudiation.[77] Similarly if one party to the alleged contract contends that it is void *ab initio,* the arbitration clause cannot operate, for on this view the clause itself is also void.[78] In such cases the Court and not the arbitrators have to decide the question of invalidity.[79] It is theoretically possible for a contract to come to an end and not the arbitration agreement. It is also theoretically possible that the arbitration agreement may be void and yet the contract may be valid. In that sense, there is a distinction between the arbitration agreement and the contract of which it forms a part.[80]

If a party contends that he never entered into the contract he thereby denies that he ever joined in the submission; the issue cannot go to arbitration under the contract.[81] But when the parties are agreed on having entered into the contract and the differences have arisen as to breach or its discharge such differences are regarded being 'in respect of' or 'with regard to' or 'under' the contract.[81] But Sarkar J. in *Kishorilal's case* said: Parties to a contract may, to all

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71 *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) 1 All E.R. 337, 343; *Johannesburg Municipal Council* v. *Stewart* (1909) S.C. (H.L.) 53 explained; *Jureidini* v. *National British & Irish Millers Insurance Co. Ltd.*, 1915 A.C. 499, (1914-15) All E.R. Rep. 328 (A case of repudiation) dist.; *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* (1926) A.C. 497 (a case of frustration) (Held not binding on H.L.).

72 (1962) 3 S.C.R. 769, 780; (1962) A.SC. 378.

73 (1942) A.C. 356; (1942) 1 All E.R. 337, 347.

74 *Jawaharlal Burman* v. *Union of India* (1962) 3 S.C.R. 769, 781; (1962) A.SC. 378; *Waverley Jute Mills Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 209; (1963) A.SC. 90; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) All E.R. 337; *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810, 1814; *Shiva Jute Baling Ltd.* v. *Hindley & Co. Ltd.* (1960) 1 S.C.R. 569; *Union of India* v. *Kishorilal* (1960) 1 S.C.R. 493; (1959) A.SC. 1362; *East India Tradiing Co.* v. *Badat & Co.* (1959) Bom. 1004; (1959) A.B. 414; *The Tradesman* (1962) 1 W.L.R. 62; *Contra Hirji Mulji* v. *Cheong Yue S.S. Co.* (1926) A.C. 491, 497; (1926) All E.R. Rep. 51 P.C. For cases of novation, see *infra* s. 62.

75 *Union of India* v. *Kishori Lal* (1960) 1 S.C.R. 496, 514; (1959) A.SC. 1362, 1371; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 528; *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1962) A.SC. 1810, 1814; (1963) 3 S.C.R. 183; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) 1 All E.R. 337; *Contra Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* (1926) A.C. 497; (1926) All E.R. Rep. 51.

76 *Khardah Co. Ltd.* v. *Raymon Co. Ltd.* (1963) 3 S.C.R. 183, 188; (1962) A.SC. 1810.

77 *Jureidini* v. *National British & Irish Millers Insurance Co. Ltd.*, (1915) A.C. 499; (1914-15) All E.R. Rep. 328, 331; *Khardah Co.* v. *Raymon & Co. (India) Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810; *Heyman* v. *Darwins Ltd.*, 1942 A.C. 356; *Union of India* v. *Kishorilal Gupta* (1960) 1 S.C.R. 493; (1959) A.SC. 1362; *Tolaram* v. *Birla Jute Mfg. Co.* (1948) 2 Cal. 17.

78 *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810, 1913-4; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; Halsbury's *Law of England* (3rd Ed.), Vol. 2, p. 24; *Union of India* v. *Kishori Lal Gupta & Bros.* (1960) 1 S.C.R. 493; 1959 A.SC. 1362; *Shiva Jute Baling Ltd.* v. *Hindley & Co. Ltd.* (1960) 1 S.C.R. 569; (1959) A.SC. 1357.

79 *Waverly Jute Mills* v. *Raymon & Co.* (1963) 3 S.C.R. 209; (1963) A.SC. 90; *Khardah Co.* v. *Raymon & Co.* (1963) 3 S.C.R. 183; 1962 S.C. 1810 folld.

80 *Jawahar Lal Burman* v. *Union of India* (1962) 3 S.C.R. 769, 781.

81 *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810, 1814; *Union of*

intents and purposes, agree to end it. In that case, if there be an arbitration clause in the contract it perishes with the contract.[82]

Agreement for Arbitration in a Deed of Trust

In a deed of trust there was a clause of reference to arbitration of "any dispute arising between the three trustees" appointed thereunder. Disputes arising the matter was referred to arbitration to which one of the trustees refused to be a party.

It was held that by accepting a trust, a trustee merely undertakes to carry out the terms of the trust and there is no question of any agreement amongst themselves. And as an agreement requires a proposal and acceptance, it cannot be said that the trustees have entered into a written agreement amongst themselves.[83]

Contract to enter into a contract.—A contract to enter into a contract is not a valid contract and therefore a clause in an arbitration agreement that in the event of a dispute arising the same "can" be referred to arbitration is not a valid agreement to refer to arbitration. An invalid contract does not become valid by describing it as a condition.[84]

Contract of service.—The illustrations to the section are both examples of contracts of service. In *Hochster* v. *De la Tour*[85]

the defendant engaged the plaintiff as his courier on a Continental tour from June 1 for three months certain at £10 a month. Before that day came the defendant changed his mind and wrote to the plaintiff that he did not want him. The plaintiff, without waiting further and before June 1, sued the defendant for breach of contract. For the defendant it was argued that the plaintiff should have waited till June 1 before bringing his action, on the ground that the contract could not be considered to be broken till then.

It was held, however, that the contract had been broken by express renunciation, and the plaintiff was not bound to wait until the day of performance. The principles enunciated in this case and the others underlying the present section were applied by the High Court of Bombay in a case where a stationmaster in the employ of a railway company, alleging that he had resigned the service of the company, claimed his share of the company's provident fund, but the claim was resisted on the ground that he was dismissed from service, and that he was not therefore entitled, under the rules of the fund, to more than the amount of his subscriptions thereto. One of the questions was whether the notice of dismissal, having regard to the date on which it was given, operated as a dismissal of the plaintiff.

The plaintiff had on February 14 gone on three months' leave without pay. On May 5 he tendered his resignation to the defendant company. On May 13 the company wrote to the defendant that he was dismissed from service. It was contended that there was no such dismissal as disentitled the plaintiff to his full share of the fund, first, because he had previously tendered his resignation, and, secondly, because the notice of dismissal was given on May 13, that is, before

he became liable to resume his duties, which was on the 14th. Both these contentions were overruled. As to the first contention it was said that, there being no contract between the parties that the service should terminate on resignation, the resignation did not operate to determine the contract unless it was assented to by the other side. As to the other contention it was said: "His (plaintiffs) letter of the 5th day of May was an intimation of his intention not to perform the services to which he was bound.... The company only took him at his word ....and it seems to me that there was on the 13th an *anticipatory breach* which in the events entitled them to determine the contract by dismissing the plaintiff."[86]

India v. *Kishori Lal Gupta & Bros.* (1960) 1 S.C.R. 493; (1959) A.SC. 1362; *Heyman* v. *Darwins Ltd.*, 1942 A.C. 356; (1942) 1 All E.R. 337; Halsbury's *Laws of England* (3rd Ed.), Vol. 2, p. 24.

82 Per Sarkar J. in *Union of India* v. *Kishori Lal Guptas Bros.* (1960) 1 S.C.R. 493, 519; (1959) A.SC. 1362. (But this was the minority opinion). Contra *Heyman* v. *Darwins Ltd.* (1942) A.C. 356; (1942) 1 All E.R. Rep. 337, 343.

83 *Bijoy Kundu* v. *Tapeti Kundu,* 1965 A. Cal. 628.

84 *Jyoti Brothers* v. *Shree Durga Mining Co.,* 1956 A. Cal. 280. (The word 'can' cannot be construed as a kind of option given to either of the parties to the agreement.) See *Namayya* v. *Union of India* (1958) A.AP. 533.

85 (1853) 2 E. & B. 678; 95 R.R. 747.

86 *Ganesh Ramchandra* v. *G.I.P. Ry. Co.* (1900) 2 Bom. L.R. 790. This appears a strange decision, for if the resignation was inoperative there was no breach at all. There might have been if the plaintiff had

Where a servant or a clerk who is engaged by the month leaves his employer's service wrongfully in the course of the then current month, he is not entitled to any salary for the broken portion of the month in the course of which he left the service.[87] But where the engagement is for one full year, say from 1st April, 1908, to 31st March, 1909, and the salary is fixed at so much (say Rs. 18) per month, and the servant wrongfully leaves his employer's service on 20th March, 1909, he is nevertheless entitled to his salary for the eleven months during which he actually served his employer, less the damages incurred by the employer by the breach, though the salary be payable under the terms of the agreement in a lump sum of Rs. 216 at the end of the year. It was so held by the High Court of Madras, the Court observing that the case was governed by the present section and s. 64, and that ill. (c) to s. 65 was almost conclusive in the plaintiff's favour.[88]

The receiving of a three months' notice of resignation of a Manager Director of his seven years' agreement by the other directors in silence, without anything more, is not acceptance of the anticipatory breach by the Directors and would be no legal effect. Nor would the mere calling of an extraordinary meeting to remove the Managing Director which meeting was never held be anticipatory breach by the company or repudiation of contract by them.[89] The wrongful dismissal of a servant by a master operates instantly giving the servant the instant right to claim damages. But this general rule will not apply where the servant continues to work for the employer, the employment does not terminate.[90] Appointment out of Court of a receiver of a company does not of itself bring about the determination of current service contracts.[91]

Bills and notes, anticipatory breach as to.—A promissory note or bill of exchange which is not overdue and is still current cannot be treated as dishonoured before maturity. The doctrine of anticipatory breach does not apply to contracts completely executed on one side nor to promissory notes and bills of exchange.[92] In the United States the repudiation or renunciation of a bill or note not yet due cannot be treated as an immediate breach of contract entitling the holder to sue upon the note[93] as the doctrine does not apply to unilateral obligations to pay money.[94] The law is the same in Canada.[95]

Distinction between repudiation and frustration.—Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio,* in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract.[96]

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said, "I shall not return to your service, whether you accept my resignation or not."

87 *Ramji* v. *Little* (1873) 10 Bom. H.C. 57; *Dhumee* v. *Sevenoaks* (1886) 13 Cal. 80; *Ralli Bros.* v. *Ambika Prasad* (1913) 35 All. 132; *Amar Singh* v. *Gopal Singh,* 1931 A.L. 133; 132 I.C. 577. But see *Raghoonath Doss* v. *Halle* (1871) 16 W.R. 60. See also *Empress of India Cotton Mills Co.* v. *Naffer Chunder Roy* (1898) 2 C.W.N. 687, and *Aryodaya Spg. & Wvg. Co. Ltd.* v. *Siva Virchand* (1911) 13 Bom. L.R. 19, cases decided with reference to the special terms of the contract.

88 *Chokalinga* v. *Mahomed* (1912) 23 Mad. L.J. 680.

89 *Cranleigh Precision Engineering Ltd.* v. *Bryant* (1966) 1 W.L.R. 1293, 1302-3.

90 *Ibid,* 1304.

91 *Re Mack Trucks (Britain) Ltd.* (1967) 1 All E.R. 977; *Re Foster Clark Ltd.'s Indenture Trusts* (1966) 1 All E.R. 43, 48; Chitty: On Contracts (23rd Ed.), para 502.

92 *McKenzie* v. *Rees* (1941) 65 C.L.R. 1, 15.

93 *Roehm* v. *Horst* (1900) 178 U.S.I. 17; 44 Law, Ed. 953, 960.

94 Har. L.R., vol. 39, 268; American Restatement of the Law, Art. 318, p. 477. See also Anson: *Law of Contract* (1st. Ed.), 1879, p. 271 (speaks of discharge by renunciation of a contract wholly executory). See 24th Ed. p. 508.

95 *Melanson* v. *Dominion of Canada General Insurance Co.* (1934) 2 D.L.R. 459, 464.

96 See per Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (1881) 6 App. Cas. 38; 50 L.J. Ch. 411; 44 L.T. 381; *Hirji Mulji* v. *Cheong Yue S.S. Co.* (1926) All E.R. Rep. 51, 58; see s. 56, *infra.*

Measure of damages.—The measure of damages for "anticipatory breach" is not necessarily the same as it would be for a failure or refusal occurring at the time when performance was due.[97] The injured party is under an obligation to take all reasonable steps to mitigate the loss flowing from the breach; the emphasis is on the word "reasonable." In *Ramgopal* v. *Dhanji Jadhavji Bhatia,*[98] the defendants, the owners of a cotton ginning mill, contracted in October 1919, that for a period of six months they would put their mill at the disposal of the plaintiff, a cotton merchant, for half its working time at fixed rates in order to gin raw cotton which the plaintiff contemplated buying and which he agreed to supply to them for the purpose. In November, before any of the plaintiff's cotton had been taken by the mill, the defendants repudiated the contract. The plaintiff sued the defendants for damages and it was held that the breach being anticipatory, the damages were the estimated loss of profit to the plaintiff by the reason of the contract not being carried out, and that the plaintiff was not bound to buy cotton and have it ginned at other mills under his obligation to mitigate the damages. Lord Sumner in delivering the judgment of the Privy Council observed:

> "Though no doubt the plaintiff was bound to take reasonable steps to mitigate his loss, the present argument requires that, after the appellant's breach, he should have bought the cotton, which both parties knew he had not yet done, and then have tendered it for ginning to other mills in order to cut down his loss for their benefits to a mere difference in ginning rate. The fact, however, is that this was a case of anticipatory breach. The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages as they then stood and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him."

Where the plaintiff has accepted an anticipatory repudiation e.g. has begun an action for damages, it is his duty forthwith to mitigate the damage if a reasonable opportunity arises. If the opportunity is lost, the defendant is entitled to have the damages assessed at the time when the opportunity occurred. If, however, the plaintiff does not accept the anticipatory repudiation, but holds the defendant to his contract, damages are to be assessed at the time fixed for performance, and no duty to mitigate arises until that date.

Insolvency of promisor.—This is not of itself equivalent to a total refusal to perform the contract, though it may be accompanied by conduct which amounts to a notice of the insolvent debtor's or his representative's intention not to pay his debts or perform his contracts. Insolvency does not determine a contract nor does it operate as rescission of a contract. A contract after initiation of insolvency proceedings and before adjudication is not void.[99] But conduct on the part of the insolvent or the official receiver that he does not mean to perform the contract may amount to refusal to perform entitling the other party to rescind.[1] A seller, however, is not bound to go on delivering goods to an insolvent buyer.[2] The proofs and illustrations belong to the special subject of Sale of Goods, now dealt with in a separate volume.

By whom Contracts must be performed

Person by whom promise is to be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it.

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97 *Millet* v. *Van Heek & Co.* (1921) 2 K.B. 369. C.A.; *Manindra Chandra* v. *Aswini Kumar* (1921) 48 Cal. 427, 433; 60 I.C. 337; 1921 A. Cal. 185; *Maung Po Kyaw* v. *Saw Tago,* 1933 A.R. 25; see further on s. 73, below.

98 (1928) 55 I.A. 299; 55 Cal. 1048; 111 I.C. 480; 1928 A.P.C. 200.

99 *Rama Raju* v. *Official Receiver* (1964) A.AP. 299.

1 *Ibid.*

2 *Ex parte Chalmers* (1873) L.R. 8 Ch. 289.

Illustrations

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise either by personally paying the money to *B* or by causing it to be paid to *B* by another; and if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Personal contracts.—Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what is an adequate performance of a personal contract. The hiring of a carriage from Sharpe, a coachmaker trading under his own name alone, but in fact with a partner, was held to be a personal contract, which the hirer was not bound to go on with after Sharpe had retired from business. "He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe, and at all events had a right to his services in the execution of it".[3] This has been considered an extreme application of the principle,[4] which ought to be applied only where the contract really and substantially has relation to the personal conduct of the contracting party.[5] A contract for personal agency or other service entered into with partners is generally determined by the death of a partner, or it may be more accurate to say that it is not held to continue with the surviving partner unless there is something to show a distinct intention to that effect.[6] On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example, a contract to perform at a music-hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party.[7] Every case must really be judged on its own circumstances. Where a contract requires personal performance by a promisor because of his personal qualifications, his death or disablement discharges the contract and frees the other party from liability.[8] Where a person contracts with another to do work or perform service and it can be inferred that the person employed has been selected with reference to individual skill, competency or other personal qualifications, the inability or unwillingness of the party so employed is a sufficient answer to any demand by a stranger to the contract of the performance of it by the other party and entitles the latter to treat the contract at an end.[9] But in a case of a contract of repairing a carriage when necessary or painting it once a year there is sufficient performance where it is done by a sub-contractor or an assignee so long as the original company continues to exist and the assignee continues to fulfil the contract.[10]

The illustrations to the section look obvious enough. But the second is not quite so simple as it looks. Suppose *A* is not a painter, but a sculptor. Must *A* chisel the whole of his statue in the marble with his own hand, or, if the statue is to be in bronze, must he cast it himself? According to all modern usage, he is clearly not bound to do so; he is expected to design and supervise the work, but the manual execution will be done, subject to the master's final touches, by skilled workmen. Benvenuto Cellini cast his own Perseus; Sir Hamo Thornycroft did not cast his own King Alfred. Again, *A* is a painter commissioned to carry out a great mural decoration. Must he actually hold the brush that lays on every square inch of paint? Certainly that was not the understanding of the great European painters of the sixteenth and seventeenth centuries and their patrons; the less important parts of the work were executed by pupils and assistants under the master's direction, and it would have been impossible to get the

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3 *Robson* v. *Drummond* (1831) 2 B. & Ad. 303; 36 R.R. 569, 572.
4 *British Waggon Co.* v. *Lea & Co.* (1880) 1 Q.B.D. 149, 152.
5 *Phillips* v. *Alhambra Palace Co.* (1901) 1 K.B. 59.
6 *Tasker* v. *Shepherd* (1861) 6 H. & N. 575; 123 R.R. 697.
7 *Phillips* v. *Alhambra Palace Co., supra,* note 47. The defendants were undisclosed partners trading under a quasi-corporate name; the plaintiffs were a troupe of performers, but nothing turns on their number. If one of the *plaintiffs* had died the case would have been different, as they had undertaken active and personal performances.
8 *Sri Madana Gopalaswamy* v. *Manikyam* (1957) A.A.P. 643.
9 *Robson* v. *Drummond,* 2 B. & Ad. 303; *British Waggon Co. & Parkgate Waggon Co.* v. *Lea & Co.* (1880) 5 Q.B.D. 149, 153.
10 *The British Waggon Co.* v. *Lea & Co.* (1880) 5 Q.B.D. 149.

work done otherwise. Still the master was bound to perform his promise personally in the sense that he could not delegate the design or general supervision to a junior. In ascertaining what is contemplated by the parties, usage as well as the express terms must be regarded.

Ordinary contracts for delivery of goods, payment for them and the like, may of course be performed by deputy.[11] "There is clearly no personal element in the payment of the price".[12] See notes to s. 37, above.

Where the mills were the lessors and were not a party to the agreement between the State and the lessees, no decree can be passed against the lessors for any liability of the lessees to the State.[13]

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

There is English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor; but it is not clear that the better modern opinion is not the other way.[14] In India there is no occasion to discuss the point, as the words of the Act leave no room for doubt. It need hardly be added that this section applies only when a contract has in fact been performed by a third person.[15] There is some authority for the rule that in English law discharge of a contract is effectual only if authorised or ratified by the debtor. But in India the matter is governed by statute and that rule would not be applicable.[16] *Cp.* the Negotiable Instruments Act, 1881, s. 113.

Assignment and Subrogation—Distinction.—There is a distinction between assignment and subrogation. It is in the case of assignment that section 41 applies.[17] What is necessary for application of section 41 is that performance must be by a stranger and in full and not partial.[18] Section 41 does not apply to executory contracts but to contracts which have been performed.[19] *A* agreed to supply timber to *B* and *B* assigned the contract to *C* who received the timber from *A*. *A* had received part of the price from *B* and received another sum from *C* but not the whole price of timber. In the absence of a contract to the contrary *A*, it was held, could recover the balance from *B*.[20] The payment by an insurer for loss of goods by the Railway is not in discharge of the obligation of the Railways on the risk note. Therefore a consignor of goods can sue the Railway for the loss of goods even though the loss has been satisfied by the insurer. Will it not be a case of unjust enrichment, unles the suit is on behalf of the insurer.[21] Such a suit may be for the benefit of the assignee.[22] A promisor accepting perfor-

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11 *Tod* v. *Lakhmidas* (1892) 16 Bom. 441, 541; but authority is really needless, even if illustration (a) did not cover it; followed *Yaman* v. *Changi* (1925) 49 Bom. 862; 27 Bom. L.R. 1261; 91 I.C. 360; 1926 A.B. 97.

12 *Tolhurst* v. *Associated Portland Cement Manufacturers* (1902) 2 K.B. 660, 672, per Collins M.R.

13 *Nand Kishore Prasad* v. *State of Bihar* (1974) A.SC. 1988, 1991.

14 See Leake, 8th ed., 704; Pollock, 13th ed., 388.

15 *Har Chandi Lal* v. *Sheoraj Singh* (1917) 44 I.A. 60; 39 All. 178; 39 I.C. 343; cf. *Dhanpat Mal* v. *Niamat Rai,* 1933 A.L. 335; *Gaya Muzaffarpur Roadways & Co.* v. *Fort Gloster Industries Ltd.* (1971) A. Cal. 496, 498.

16 *Kapur Chand Godha* v. *Mir Nawabali Himayati Khan* (1963) 2 S.C.R. 168, 179; (1963) A.S.C. 250; *Gaya Muzaffarpur Roadways Co.* v. *Fort Gloster Industries Ltd.* (1971) A. Cal. 494, 499.

17 *Sri Sarada Mills Ltd.* v. *Union of India* (1966) A.M. 381.

18 *Chandrasekhara* v. *Vittala* (1966) A. Mysore 84; *Harchandi Lal.* v. *Sheoraj Singh,* 44 I.A. 60; (1916) A.P.C. 68 folld. (Although the Privy Council did not say in so many words, it meant that contract must be performed in full).

19 *Sri Sarada Mills Ltd.* v. *Union of India* (1966) A.M. 381.

20 *Chandrasekhara* v. *Vittala (1966) A. Mys. 84.*

21 *Sri Sarada Mills Ltd.* v. *Union of India* (1966) A.M. 381. *Harchandi Lal* v. *Sheoraj Singh,* 44 I.A. 60; (1916) A.P.C. 68 reld on; *Chandrasekhara* v. *Nagabhusanam* (1927) A.M. 817 folld. (A case of mesne profits transferred to transferee of the property.)

22 *Sri Sarada Mills Ltd.* v. *Union of India* (1966) A.M. 381; *Chandrasekhara* v. *Nagabhusanam (1927) A.M. 817; Textiles & Yarn (P) Ltd.* v. *Indian National Steamship Co. Ltd.* (1964) A. Cal. (not reld. on)—(a case of short delivery and claim under bill of lading); *Alliance Insurance Co.* v. *Union of India,* 62 C.W.N. 539 refd. to. *Gaya Muzaffarpur Roadways Co.* v. *Fort Gloster Industries Ltd.* (1971) A. Cal. 494, 498.

mance of the promise from a third person cannot afterwards enforce it against the promisor.[23] If a creditor is paid a lesser sum by a third party on the condition that that would be in discharge of the whole debt, the creditor cannot accept the payment and not the condition. Therefore, where a jeweller with a claim of Rs. 27 lakhs accepts Rs. 20 lakhs in full discharge of his claim from the State he cannot subsequently sue the original debtor, a Hyderabad prince, for the balance.[24]

Devolution of joint liabilities.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

This is a deliberate variation of the Common Law rule. In England

"upon the death of one of several joint contractors the legal liability under the contract devolves on the survivors; and the representative of the deceased cannot be sued at law either alone or jointly with the survivors. Consequently the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives".[25]

Limited exceptions have been introduced by Courts of Equity, and in particular a deceased partner's estate is liable, subject to the prior payment of his separate debts, for the unsatisfied debts of the firm.[26] Parties can, of course, make their contracts what they please; but the presumption established for India by the present section appears to be more in accordance with modern mercantile usage.

Any one of joint promisors may be compelled to perform.

43. When two or more persons make a joint promise,[27] the promisee may, in the absence of express agreement to the contrary, compel any (one or more)[28] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

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23 *Kapur Chand Godha* v. *Mir Nawab Himayatali Khan* (1963) 2 S.C.R. 168, 179; (1963) A.S.C. 250; - *Day* v. *McLea* (1899) 32 Q.B.D. 610, 613; *Hirachand Punamchand* v. *Temple* (1911) 2 K.B. 330 dist. *Textile & Yarn (P) Ltd.* v. *Indian National Steamship Co.* (1964) A. Cal. 362 *Union of India* v. *Gangabishan Banshilal* (1973) A. Cal. 141, 144.

24 *Kapurchand Godha* v. *Mir Nawab Himayatali Khan* (1963) 2 S.C.R. 168, 181; (1963) A.S.C. 250, 254; *Hirachand Punamchand* v. *Temple* (1911) 2 K.B. 330 refd. to: *Dey* v. *McLea* (1899) 32 Q.B.D. 610, 613; *Neuchatel Asphalte Co. Ltd.* v. *Barnett* (1957) 1 All E.R. 362 dist.

25 Leake, 8th ed., 313.

26 Partnership Act, 1890, s.9, following the decision of the House of Lords in *Kendall* v. *Hamilton* (1879) 4 App. Ca. 504, before which partnership debts were generally supposed to be joint and several for all purposes.

27 This means what it says. Co-heirs of a mortgagor are not joint promisors, and some of them cannot be sued for the whole debt: *Hazara Singh* v. *Naranjan Singh* (1929) 119 I.C. 419; 1929 A.L. 783.

28 Substituted for the word "one" by the Amending Act, 1891 (XII of 1891). It has been found necessary to lay down that if one of two parties to an alleged joint promise turns out not to have

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) *A, B* and *C* jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(b) *A, B* and *C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate, and 1,250 rupees from *B*.

(c) *A, B* and *C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anthing, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A, B* and *C* are under a joint promise to pay *D* 3,000 rupees. *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

Joint promisors.—The series of sections now before us materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts.[29] As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.[30] The plaintiff a bank, filed a suit on a promissory note against the defendants where liability was joint and several. The High Court depending on some equitable ground directed that the decree must first be realised from one defendant and for the balance if any the execution was to be taken against the other defendant. The Supreme Court held such a decree was bad in law there being no such equitable principle or statutory provision and converted the decree to be a joint and several decree against the defendants.[31] It allows a promisee to sue such one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co-promisors.[32] Hence the minority of one joint promisor does not affect the liability of the other.[33] There is still considerable difference of opinion in the Indian High Courts as to its consequential operation where a judgment has been obtained against some or one of joint promisors, and the decisions must be examined.[34] We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in India, to be held a bar to a subsequent action against the other promisor or promisors.

Sections 43 and 69.—The words "contribution" in section 43 and "reimbursement" in section 69 convey two different ideas and are applicable in two different circumstances.[35] Section 43 applies to liability for contribution arising out of an express contract.[36] Principles of section 43 of the Contract Act apply to the case of contribution by joint tort feasors.[37]

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agreed to it at all, the other who did contract is not released; *Sankole* v. *Badridas* (1925) 89 I.C. 976; 1926 A.N. 196.

29 *Lukmidas Khimji* v. *Purshotam Haridass* (1882) 6 Bom, 700, 701.

30 *Motilal Bechardass* v. *Ghellabhai Hariram* (1892) 17 Bom. 6, 11; *Bishunath Sahay* v. *Nanku Prasad Singh* (1923) 2 Pat. 446; *Raghunath Das* v. *Baleshwar Prasad* (1927) 7 Pat. 353; 105 I.C. 484; 9 P.L.T. 137; 1927 A.P. 426.

31 *Joint Family of Mukundas Raja Bhagwandas & Sons* v. *Bank of Hyderabad* (1971) A.SC. 449, 454; (1971) 2 SCR 136.

32 *Hemendro Coomar Mullick* v. *Rajendrolall Monshee* (1878) 3 Cal. 353, 360; *Muhammad Askari* v. *Radhe Ram Singh* (1900) 22 All. 307, 315; *Dick* v. *Dhunji Jaitha* (1901) 25 Bom. 378, 386; *Balakrishna* v. *Balu,* 1949 A.P. 184; *Jainarain* v. *Surajmull* (1949) F.C.R. 379, 51 Bom.L.R. 979, 1949 A.F.C. 211; *Union of India* v. *East Bengal River Steamer Service Ltd.* (1964) A. Cal. 196, 206 (a case under the Indian Independence (Rights, Liabilities & Properties) Order of 1947.

33 *Jamna Bai* v. *Vasanta Rao* (1916) 43 I.A. 99; 39 Mad. 409; *Sain Das* v. *Ram Chand* (1923) 4 Lah. 334; 85 I.C. 701; 1924 A.L. 146; *Keka* v. *Sirajuddin,* 1951 A.A. 618; *Govinda* v. *Venkatakrishnayya* (1949) 1 Cut. 351, 1950 A. Or. 6.

34 *Nil Ratan Mukhopadhyaya* v. *Cooch Behar Loan Office* (1941) 1 Cal. 171; 194 I.C. 746; 1941 A. Cal. 64.

35 *Shankar Lal* v. *Moti Lal* (1957) A. Raj. 257.

36 *Meyyappa* v. *Murugappa & Sons* (1960) A.M. 117, 119.

37 *Ramayya Naidu* v. *Chilakayya* (1963) A. Or. 142.

Effect of decree against some only of joint promisors.—In *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee*[38] the High Court of Calcutta held, following the rule laid down in *King* v. *Hoare,*[39] that a decree obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against others. This was followed by the High Court of Madras in a similar case in *Gurusami Chetti* v. *Samurti Chinna*[40] Strachey C.J. dissented from these decisions in *Muhammad Askari* v. *Radhe Ram Singh.*[41] In that case the question was whether a judgment obtained against some several mortgagors and remaining unsatisfied against them was a bar to a second suit against other joint mortgagors, and the Court held that it did not constitute any bar and that a second suit was maintainable, the doctrine of *King* v. *Hoare*[42] not being applicable in India, at all events in the *Mufassal,* since the passing of the Indian Contract Act. Strachey C.J. said:

"My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King* v. *Hoare* (1844) 13 M. & W. 494, as on the judgments of the Law Lords in *Kendall* v. *Hamilton* (1879) 4 App. Ca. 504. As explained in those judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co-contractors joined as defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement, and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by s. 43 of the Contract Act, and therefore, the basis of the doctrine being absent, the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex.*"

Coming next to the High Court of Bombay, the doctrine of *King* v. *Hoare* was assumed to be applicable to India by that Court in *Lukmidas Khimji* v. *Purshotam Haridas,*[43] and in *Lakshmishankar* v. *Vishnuram.*[44] In the latter case it was held that the principle of *King* v. *Hoare* did not apply to the facts of the case, as the decree in the first suit against one of the partners, which was set up as a bar to a subsequent suit against all the partners, was made by the Civil Court of Baroda, which had no jurisdiction over some of the partners who resided in British territory. On the other hand, there is a dictum of Farran J. in *Motilal* v. *Ghellabhai*[45] that the present section appears to make all contracts joint and several. The applicability to India of the rule in *King* v. *Hoare* was again considered by the same Court in *Dick* v. *Dhunji Jaitha,*[46] but the point was not decided, as the Court thought it did not arise directly for decision. In a case[47] where the question was whether the plaintiff having sued an agent to judgment was entitled under s. 233 (below) subsequently to maintain a suit against the principal, Macleod J. expressed his dissent both from the reasoning and the decision of Strachey C.J. in *Muhammad Askari's case,* and held that the present section merely took away the right of a joint promisor to have his co-promisor joined with him in the action, and did not enable the promisee to file separate actions against both.

"It could not have been intended."

said the learned Judge,

"to deprive the second co-contractor of his right to plead the previous judgment, or to split up one cause of action into as many causes of action as there were joint contractors."

This view was soon afterwards adopted by Kajiji J.[48]

The reasoning of Strachey C.J. seems to us conclusive; but until it has been adopted generally by the other High Courts, or confirmed by the Supreme Court, the point must be

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38 (1878) 3 Cal. 353.
39 (1844) 13 M. & W. 494; 67 R.R. 694.
40 (1881) 5 Mad. 37.
41 (1900) 22 All. 307. See also *Abdul Aziz* v. *Basdeo Singh* (1912) 34 All. 604, 606; 17 I.C. 89.
42 (1844) 13 M. & W. 494; 67 R.R. 694.
43 (1882) 6 Bom. 700.
44 (1899) 24 Bom. 77.
45 (1892) 17 Bom. 6, 11. See also *Govind* v. *Sakharam* (1904) 28 Bom. 383.
46 (1901) 25 Bom. 378.
47 *Shivlal* v. *Birdichand* (1917) 19 Bom. L.R. 370, 377-380; 40 I.C. 194.
48 *Markandrai* v. *Virendrarai* (1917) 19 Bom.L.R. 837, 843; 42 I.C. 815.

regarded as open. The Madras High Court, in later cases, seems inclined to adopt the opinion expressed in the first paragraph of the commentary of this section.[49] The various judgments on either side will be found collect in *Nil Ratan Mukhopadhyaya* v. *Cooch Behar Loan Office,*[50] but the Court in that case did not find it necessary to decide between them.

Judgment against one joint promisor who admits the claim after institution of the suit does not bar the suit against other joint promisors. In the last-mentioned case the plaintiff sued the defendants, alleging that they were partners, and at the hearing one of the defendants admitted the plaintiff's claim, and judgment was thereupon passed against him for the amount claimed. On behalf of the other defendants it was contended that, the cause of action alleged in the plaint being joint, it merged in the judgment recovered against the first defendant, and that further proceedings in the suit were therefore barred. The Court did not accede to this connection, and it was held that the judgment recovered against the first defendant did not bar further prosecution of the suit against the others. Reference was made in the course of the judgment to s. 153 of the Code of Civil Procedure, 1882 (now 0.15, r. 2, Code of Civil Procedure, 1908). As to *King* v. *Hoare,* it was stated that the rule there laid down did not apply to the facts of the case under consideration.

Where pending an appeal against a decree obtained against joint promisors, one of the promisors dies and the appeal abates *qua* him, the appeal can proceed against the other joint promisors. The abatement does not affect the right of the surviving promisors for contribution against the deceased joint promisor's estate.[51] According to the Punjab High Court, neither section 43 nor section 44 of the Contract Act applies because the respondent on record will not be able to get contribution from the other respondent; the decree of Court having become conclusive.[52] It is submitted that the Nagpur view is more in accord with the language of section 43. Decree against one of the joint promisees to pay in the first instance and then proceed against the others is bad. *Bhagwandas & Sons* v. *State Bank of Hyderabad* (1971) A.SC. 449.

Suit against one of several partners.—The section applies as much to partners as to other co-contractors.[53] In *Lukmidas Khimji* v. *Purshotam Haridas*[54] It was held in a suit brought upon a contract made by a partnership firm that a plaintiff may select as defendants those partners of the firm against who he wishes to proceed. This decision was cited with approval by Farran C.J. in *Motilal Bechardass* v. *Ghellabhai Hariram*[55] and was followed by the High Court of Madras in *Narayana Chetti* v. *Lakshmana Chetti,*[54] where it was held in a similar case that according to the law declared in s. 43 of the Contract Act, especially when taken with s. 29 of then Code of Civil Procedure,[57] it is not incumbent on a person dealing with partners to make them all defendants, and that he is at liberty to sue any one partner as he may choose. It will be noted in this case that the Court expressly applied to partners not only s. 43 of the

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49 *Mool Chand* v. *Alwar Chetty* (1916) 39 Mad. 548, at pp. 551-2; 29 I.C. 303; *Ramanjulu* v. *Aravamudu* (1909) 33 Mad. 317 at pp. 319-21.

50 (1941) 1 Cal. 171; 194 I.C. 746; 1941 A. Cal. 64; and see *In re Vallibhai Adamjee,* 1933 A.B. 407; 35 Bom.L.R. 881; 145 I.C. 619. See also *Phani Bhusan Mukherji* v. *Rajendra Nandan Goswami* (1946) 2 Cal. 605.

51 *Ganeshmull Sabasmull* v. *Sohanlal Punamchand* (1956) A.N. 111.

52 *Kedar Nath* v. *Manak Chand* (1961) A. Punj. 555.

53 *In re Vallibhai Adamji, supra,* n. 91 where the authorities are collected.

54 (1882) 6 Bom. 700.

55 (1892) 17 Bom. 6, 11. In that case Farran C.J. observed that ss. 42, 43, and 45 related to partners as well as to other co-contractors, and that if the Legislature had intended to except partners from the provisions of this section it would have done so in express words. See, however, *Lakshmishankar* v. *Vishnuram* (1899) 24 Bom. 77, where the Court held, without any reference to the earlier case, that the liability of partners was joint, and that no one partner could change it into a joint and several liability without the consent of the other partners.

56 (1897) 21 Mad. 256. See also (1878) 3 Cal. 353, 359, 360, and (1900) 22 All. 307, 315; *Appa Dada Patil* v. *Ramakrishna Vasudeo* (1930) 53 Bom. 652; 121 I.C. 581; 1930 A.B. 5.

57 S. 29 of the Code of Civil Procedure, 1882 (now O. 1, r. 6, in the Code of 1908), runs as follows: "The plaintiff may, at this option, join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange *hundis,* and promissory notes." The judgment seems to assume that the effect of s. 43 was to make all joint contracts joint and several. See *Motilal Bechardass* v. *Ghellabhai Hariram* (1892) 17 Bom. 6, 11; and *Muhammad Askari* v. *Radhe Ram Singh* (1900) 22 All. 307, 316.

Contract Act, but also s. 29 of the Code of Civil Procedure, 1882, which relates not to joint, but to several and to joint and several, liability. The same view of the section has been taken by the High Court of Lahore.[58]

Where a partner of a registered firm entered into a contract of tenancy on behalf of the firm, a suit against that partner for recovery of rent is maintainable in the absence of the other partners who are not necessary parties. The non-payment of rent is an act of the firm within the meaning of s. 25, Partnership Act read with s. 2(a) thereof.[59]

Where one partner, having himself settled a decree against the partnership, sues another partner for contribution, he cannot rely upon s. 43 to defeat a plea by the defendant that the partnership has been dissolved, that a suit for accounts of the dissolved partnership is time barred, and that therefore a suit for one item in that account cannot be a subject of claim.[60]

In this connection may be noted O. 1, r. 10, of the Code of Civil Procedure, which provides that the Court may order, either of its own motion or on the application of a party to a suit, "that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." The effect of s. 43 being, according to the above decisions, to render the liability of joint promisors joint and several and to exclude the right of a joint contractor to be sued along with his co-contractors, the provisions of O.1, r. 6, are applicable to the case, and the promisee is at liberty to sue any one or more of the joint promisors. But this right is distinct from, and does not affect, the right of a defendant to apply to the Court under O.1, r. 10, of the Code to have his co-contractor added as a party. But such an application, it is conceived, can be sustained not on the ground that the joint contractor "ought to have been joined" as defendant, but only under the latter branch of the section, if the Court considers it necessary to do so.[61]

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58 *Muhammad Ismail Khan* v. *Saad-ud-din Khan* (1928) 9 Lah. 217; 104 I.C. 700; 1927 A.L. 819; *Jog Lal* v. *Shib Lal* (1902) Punj. Rec. No. 37; *Thomas Beck* v. *Thomas Siddle* (1892) Punj. Rec. No. 11; *Livingstone* v. *Feroz Din* (1914) Punj. Rec. No. 107, p. 396 (joint tenants); *Liquidator, Union Bank of India* v. *Gobind Singh* (1923) 4 Lah. 239; 77 I.C. 338; 1924 A.L. 148 (partners).

59 *Jatindra Kumar Das* v. *Dhirajlal Vrajlal* (1975) A. Cal. 123, 127; *Lukmidas Khimji* v. *Purshotam Haridas* 6 Bom. 700; *Sahu Rajeshwar Nath* v. *Income Tax Officer* C Ward, Meerut (1969) A.SC. 667 refd. to.

60 *Rajagopala* v. *Palani,* 1954 A.M. 1101.

61 Note the observations of Strachey C.J. in *Muhammad Askari* v. *Radhe Ram Singh* (1900) 22 All. 307, 316 317: "In their note to s. 43, Messrs. Cunningham and Shephard, at pp. 158, 159, of their commentary on the Indian Contract Act, 7th ed., say that, 'if this section is intended to deny to joint debtors the right to be sued jointly in one suit, it involves a departure from English law' and that, 'in view of this section and the 29th section of the Code of Civil Procedure, it is clear that the non-joinder of a co-debtor is no ground of defence to a suit; but it is apprehended that an application made under the 32nd section of the Code to add as a defendant an omitted co-debtor would be dealt with in the same manner as it is in England.' I cannot agree with this view. As the judgments in *Kendall* v. *Hamilton* (1879) L.R. 4 A.C. 504 show, such an application would in England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined: *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.* (1893) 1 Q.B. 422; *Robinson* v. *Geisel* (1894) 2 Q.B. 685."

Note also the observations of Crowe J. in *Dick* v. *Dhunji Jaitha* (1901) 25 Bom. 378, 386, where the learned Judge says: "With regard to the argument based on the provisions of s. 43 of the Contract Act, it seems to me that the section merely takes away the right of a joint debtor to be sued jointly and to plead in abatement a right which was abolished in England by the Judicature Acts. It is still open to a defendant to apply to the Court for joinder of a person who ought to have been included in the action; and, to use the words of Earl Cairns L.C. in *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504, 'the application to have a person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.' S. 32 of the Civil Procedure Code gives the Court absolute discretion, either on application or *suo motu,* to dismiss or add parties."

The opinion expressed by Mr. Justice Crowe corresponds to a considerable extent with that of Messrs. Cunningham and Shephard. We agree with Strachey C.J. in thinking that an application under O. 1, r. 10, to add as defendant an omitted debtor should not be dealt with as in England, but on the principles expressed in the Contract Act and to be reasonably inferred from its language. As to the practice in amendment, see *Muhammad Ismail Khan* v. *Said-ud-din Khan* (1927) 104 I.C. 700; 1927 A.L. 819.

As to cases under the Bengal Tenancy Act, see *Chamatkari* v. *Triguna Nath* (1913) 17 C.W.N. 833; 19 I.C. 989.

Co-heirs.—This section speaks of two or more persons making a joint promise, and it has no application where parties become jointly interested by operation of law in a contract made by a single person. Hence the section does not apply to the case of several heirs of the original debtor, and they all must be joined as parties to the suit.[62] But Orissa[63] and Rajasthan[64] High Courts have held that co-heirs are liable. But see a full bench decision of the Calcutta High Court which was a case of a rent suit against some of the heirs.[65] It is submitted that the former view is correct on the wording of the section. The Calcutta Full Bench cannot be said to be an authority to the contrary under section 43 of Contract Act. As a matter of fact Mukherji J. expressly referred to section 43 and confined his opinion to cases not falling under contract but where there is privity of estate.[66]

Co-tenants.—Each of a number of co-tenants is under s. 43 separately liable to the landlord for the whole rent.[67]

Contribution between joint promisors.—This clause represents the doctrine of English equity as distinct from that of the Common Law Courts. It would be useless to cite English authorities.

Section 43 also gives a promisor, compelled to perform a promise, a right to compel his co-promisors to make contribution. Section 43 read along with O. 1, r. 6 of the C.P.C., shows the exact position of joint liability on a contract under the Civil Procedure Code. Section 43 of the Contract Act read with this rule makes the effect of joint liability arising on a contract the same as where the liability is several. But this is limited to the question of joinder of parties liable on the same contract and is a matter of procedure.[68]

Joint tenants are joint promisors; therefore the liability is only to contribute to the performance of the promise. Hence if one of several persons jointly liable for a debt is sued, and is compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, and not in respect of the costs.[69] For the remedies of a partner who has paid a partnership debt, see Pollock & Mulla, Indian Partnership Act.[70]

When liability to contribute arises.—In a case decided before the enactment of the Contract Act, it was held that the mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors. "Until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him".[71] And the law under the Contract Act would appear to be the same: see illustrations to the section.[72] If one of the persons liable to contribute is not in a position to pay his share, then that amount should be divided between the others only in the proportion of the benefit each has received.[73]

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62 *Shaikh Sahad* v. *Krishna Mohan* (1916) 24 Cal. L.J. 371; 35 I.C. 563; 1917 A. Cal. 829. But see *Chandra Bhan* v. *Misrimal,* (1955) A. Raj. 11; *Soorayya* v. *Kateeza Begum* (1957) A.A.P. 688.

63 *Mawaji Ramji* v. *Premjit* (1967) A. Or. 158.

64 *Chandrabhan* v. *Misrimal,* 5 Raj. 95; (1955) A. Raj. 11. *Devi Dayal* v. *Bhupendar Kumar* (1973) A.D. 290.

65 *Kailash Chandra* v. *Brojendra,* 53 Cal. 197; (1925) A. Cal. 1056 (F.B.).

66 *Kailash Chandra* v. *Brojendra,* 1925 A. Cal. 1056, 1060.

67 *Nirdosh* v. *Jakaria* (1914) 20 Cal. L.J. 492; *Raghunath Das* v. *Baleshwar Prasad Chaudhuri* (1927) 7 Pat. 353; 105 I.C. 484; 1927 A.P. 426; *Kuman Das* v. *Kameshwar Singh,* 1935 A.P. 146; 156 I.C. 352.

68 *Union of India* v. *East Bengal River Steamer Service Ltd.* (1964) A. Cal. 196, 206. See also *Kailash Chandra Mitra* v. *Brojendra K. Chakravarti & Others,* 53 Cal. 197; (1925) A. Cal. 1056, 1060 (F.B.).

69 *Punjab* v. *Petum Singh* (1874) 6 N.W.P. 192; unless the joint promise includes costs: *Kanto Mohan Mullick* v. *Gour Mohan Mullick* (1940) 45 C.W.N. 357; or it may be equitable to order contribution towards the costs: *Nandlal* v. *Ram Kirti,* 1950 A.P. 212.

70 3rd edn., pp. 366-367. See also *Meyappa* v. *Palaniappa,* (1949) A.M. 109.

71 *Ram Pershad Singh* v. *Neerbhoy Singh* (1872) 11 B.L.R. 76. But if the decree has been realized against one of the joint-debtors, in proceedings for contribution a plea by one of the other joint debtors that the money was lent to the plaintiff alone is inadmissible. *Nityanand* v. *Radhacharan,* 1934 A.P. 411; 148 I.C. 434.

72 See *Abraham* v. *Raphial* (1916) 39 Mad. 288, 291; 27 I.C. 337; 1915 A.M. 675.

73 *Kakkothaya* v. *Derinjithaya,* 1951 A.M. 239.

A joint promisor can sue another joint promisor for contribution, even though the claim of the creditor against the latter was time barred.[74]

By a decree in a partition suit the properties were allotted in equal shares to 25 persons, but no arrangement was made to discharge a money liability which was imposed by a previous final decree. This liability was enforced against the allottees of the properties and some had to pay more than their due share. Those allottees then sued for contribution.

The Court held that such a claim was not covered by section 82 and 92 of the Transfer of Property Act nor by section 43 of the Contract Act. But all the allottees were bound to contribute not on the principle of common ownership of property but on the principle which prescribes equality of burden and of benefit and which creates a right of contribution.[75]

Contribution as between judgment debtors.—The question as to whether, as between persons against whom a joint decree has been passed, there is any right of contribution at all depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit for contribution will lie.[76] Thus where a decree for costs against two defendants jointly was executed against one of them, who had set up a false defence in the suit in collusion with the other, and the former sued the latter for contribution, it was held that the suit would not lie.[77] It is no longer necessary to consider[78] whether the rule in *Merryweather* v. *Nixon,*[79] under which there was no contribution between joint tortfeasors, is applicable to India, the rule having been now for all practical purposes abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935,[80] Lord Herschell had already said in *Palmer* v. *Wick, etc., Steam Shipping Co.,*[81] that the rule did not appear to him "to be founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries." A Full Bench of the Allahabad High Court, in holding that *Merryweather* v. *Nixon* does not apply in India, has considered that in exercising its power to proceed in accordance with the rules of justice, equity and good conscience, the Court cannot afford to ignore the extent to which the common law has been abrogated by statute.[82]

A decree-holder (promisee) can recover his decretal debt from one or more or any of the judgment-debtors (joint promisors) and the latter can compel contribution from the other judgment-debtors who have not been compelled to pay. In the absence of a contract to the contrary the liability to contribute is not affected by the release of any judgment-debtor by the decree-holder.[83]

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74 *Ibid,* following *Woolmershausen* v. *Gullick* (1893) 2 Ch. 514; *Kunju Naina* v. *Eapen Chacko,* 1954 A.T.C. 499; *Gopendra Narayan* v. *Golokendra Kumar,* 1955 A. Cal. 62.

75 *Meyappa Chettiar* v. *Murugappa & Sons* (1960) A.M. 117, 119.

76 *Suput Singh* v. *Imrit Tewari* (1880) 5 Cal. 720, citing *Merryweather* v. *Nixon* (1799) 8 T.R. 186; 16 R.R. 810; (the real leading case is, however, *Adamson* v. *Jarvis* (1827) 4 Bing. 66; 29 R.R. 503. See (1894) A.C. 318, at p. 324); *Hari Saran Maitra* v. *Jotindra Mohan Lahiri* (1900) 5 C.W.N. 393; *Mohesh Chandra* v. *Boydya Nath* (1901) 6 C.W.N. 88; *Krishna Ram* v. *Rakmini Sewak Singh* (1887) 9 All. 221; *Sudhangshu Kumar Roy* v. *Banamali Roy,* 1946 A. Cal. 63, 223 I.C. 537.

77 *Vayangara* v. *Pariyangot* (1883) 7 Mad. 89; *Sudhu Singh* v. *Lehna Singh* (1901) Punj. Rec. No. 7; *Gobind Chunder* v. *Srigobind* (1897) 24 Cal. 330. See also as to contribution between judgment debtors *Brojendro Kumar Roy* v. *Rash Behari Roy* (1886) 13 Cal. 300, and *Lakshmana Ayyan* v. *Rangasami Ayyan* (1894) 17 Mad. 78, where it was held upon the facts of the case that one judgment debtor against whom execution had been levied was entitled to contribution against the rest.

78 As in *Siva Panda* v. *Jujusti Panda* (1901) 25 Mad. 509.

79 *Supra,* note 17.

80 25 & 26 Geo. 5, c. 30, s. 6.

81 (1894) A.C. 318, at p. 324; and see *Nihal Singh* v. *The Collector of Bulandshahr* (1916) 38 All. 237, at p. 240; 33 I.C. 165.

82 *Dharni Dhar* v. *Chandra Shekhar,* 1951 A.A. 774, 777. There are also bench decisions from Calcutta and Nagpur that the rule does not apply: *Nani Lal* v. *Tirthalal,* 1953 A. Cal. 513; *Khushalrao* v. *Bapurao,* 1942 A.N. 52.

83 *Shanker Lal* v. *Moti Lal* (1957) A. Raj. 267.

Contribution between mortgagors.—As the rights of one of joint mortgagors, who has redeemed the mortgage, are specifically dealt with in s. 92 of the Transfer of Property Act, s. 43 of the Contract Act has no application.[84]

Debtors' Relief Act.—Where two out of three judgement-debtors were discharged from their debt under a Relief of Indebtedness Act, and the decree was executed against the remaining debtor, the latter was held entitled to contribution from the other two.[85]

Effect or release of one joint promisor.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

We have here another variation of English law.[86] In England the releasing creditor must expressly reserve his rights against the co-debtors if he wishes to preserve them.[87]

This section applies equally to a release given before or after breach. Thus where in a suit[88] for damages against several partners the plaintiff compromised the suit with one of them, and undertook to withdraw the suit as against him, it was held that the release did not discharge the other partners, and the suit might proceed as against them. For the latter it was contended that the section occurred in the portion of the Act relating to the *performance* of contracts, and that it did not therefore apply to liabilities arising out of the *breach* of a contract. The Court held that such a construction of the section was too narrow.

Under section 44, Contract Act, where two or more persons have made a joint promise, a release of one such joint promisor by the promisee does not discharge the other joint promisors nor does it release the joint promisor so released from the responsibility to other joint promisors. Thus abatement of an appeal against him on the death of one joint promisor does not release the other joint promisors.[89]

The principle of this section has also been applied to judgment debts. It has thus been held that a release by a decree-holder of some of the joint judgment-debtors from liability under the decree does not operate as a release of the other judgment-debtors.[90]

Development of joint rights.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

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84 *Kedar Lal* v. *Hari Lal,* 1952 A.SC. 47.

85 *Jankibai* v. *Rama Manaji* (1947) Nag. 881, 1948 A.N. 292.

86 See *Krishna Charan* v. *Sanat Kumar* (1917) 44 Cal. 162, 174; 34 I.C. 609; *Hardas* v. *Ramguljarilal* (1947) Nag. 1 (F.B.).

87 There is no different equitable doctrine. In *Ex parte Good* (1877) 5 Ch.D. 46, the document in question was held not to be a release at all, and the general rule not disputed; see at p. 57.

88 *Kirtee Chunder* v. *Struthers* (1878) 4 Cal. 336.

89 *Devi Lal* v. *Himmat Ram* (1973) A. Raj. 39, 41; *Chhotelal Ratanlal* v. *Rajmal Milapchand* (1951) A.N. 448; *Maung Mu* v. *Maung Kan Gyi* (1924) A.R. 127; *Jwala Prasad* v. *Kopaya Munda* (1920) A.P. 801; 59 I.C. 890 appld.

90 *Mool Chand* v. *Alwar Chetty* (1916) 39 Mad. 548; 29 I.C. 303; *Daulat Ram* v. *Punjab National Bank,* 1933 A.L. 505; 144 I.C. 981; *Narendra Chandra* v. *Pushupati,* 1949 A. Cal. 242; *Arjun Lal* v. *Banbehari,* 1944 A. Cal. 328.

Illustration

A. in consideration of 5,000 rupees lent to him by *B* and *C*., promises *B* and *C*, jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representatives jointly with *C* during *C*'s life, and after the death of *C* with representatives of *B* and *C* jointly.

Section 45, Scope of.—S. 45 deals with devolution of joint rights in the case of joint promisees, but it does not deal with a case where a joint promisee does not want to join as a co-plaintiff but is arrayed as a pro forma defendant against whom no relief is claimed and as a matter of fact the decree enures for his benefit. Therefore where two persons contract with a third person, a suit by one of the joint promisees making the other a co-defendant is maintainable even if the plaintiff does not prove that the other co-promisee has refused to join as a co-plaintiff.[91]

Promise two or more persons jointly.—This section applies to all joint promisees whether they be partners,[92] co-sharers[93] or members of a Joint Hindu family carrying on business in partnership.[94] There is nothing in this enactment to show what happens to a *single* right when the owner of it dies, and several persons become entitled to it.[95] In such a case, it has been held that all of them must join in a suit to enforce the right, and if any of them refuses to join as plaintiff, he must be added as a defendant.[96] Obviously joint promisees cannot divide the debt among themselves and sue severally for the portions.[97]

It has been held that a sole surviving trustee can sue to recover arrears of rent.[98] This is in accordance with s. 44 of the Indian Trusts Act, 1882, and also with English law.[99] That the rule of survivorship should apply to trustees, and that the authority should devolve upon the survivor have always, from the earliest times, been fundamental principles of the law of trusts.

Right to performance of promises during joint lives.—As the right to claim performance of a promise in the case of joint promisees rests with them all during their joint lives, it follows that all the joint promisees should sue upon the promise.[1] Similarly if a suit is instituted against a debtor in his individual capacity, he cannot set off a debt owed jointly to him by the creditor.[2] If a suit is brought by some of the joint promisees only, and the other promisees are

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91 *Jahar Roy* v. *Premji Bhimji Mansata* (1977) A.SC. 2439, 2442; (1978) 1 S.C.R. 770; *Biri Singh* v. *Nawal Singh,* 24 All. 226; *Pyari Mohan Bose* v. *Kedarnath Roy,* 26 Cal. 409 (F.B.); *Monghibai* v. *Cooverji Umersey,* 66 I.A. 210, 219; (1939) A.PC; *Pramada Nath Roy* v. *Ramani Kanta Roy* 35 Cal. 31 (P.C.) appld.; *Vyankatesh Oil Mills Co.* v. *N.V. Velmahomed* (1928) A.B. 191; *Vagha Jesing* v. *Manilal Bhogilal,* (1935) A.B. 262; *Hari Singh* v. *Karamchand Kanshi Ram* (1927) A.L.115; *Sobhandari Appa Rao* v. *Parthasarathi Appa Rao* (1932); A.M. 533; *Nathaniel Uraon* v. *Mahadeo Uraon* (1957) A.P. 511 disting; *Ponnuswami Gounder* v. *Rama Boyan* (1979) A.M. 130, 132 (A suit for specific performance by some of the promisees making others party defendants *pro forma.).*

92 *Motilal* v. *Ghellabhai* (1892) 17 Bom. 6, 13; *Aga Gulam Husain* v. *A.D. Sassoon* (1897) 21 Bom. 412, 421; *Manghanmal Matanomal* v. Pahlajrai (1927) 105 I.C. 544; 1928 A.S. 16; subject to special grounds of exception, as where the plaintiff's partners have ceased to have any interest, *Mulibai* v. *Shewaram Menghraj* (1925) 90 I.C. 111; 1926 A.S. 78.

93 *Balkrishna* v. *Municipality of Mahad* (1885) 10 Bom. 32; *Ramakrishna* v. *Ramabai* (1892) 17 Bom. 29.

94 *Ramsebuk* v. *Ramlall Koondoo* (1881) 6 Cal. 815; *Kalidas* v. *Nathu Bhagvan* (1883) 7 Bom. 217; *Ram Narain* v. *Ram Chunder* (1890) 18 Cal. 86; *Alagappa Chetti* v. *Vellian Chetti* (1894) 18 Mad. 33; *Nabendra Nath Basak* v. *Shasabindoo,* 1941 A. Cal. 595; 197 I.C. 321.

95 *Kandhiya Lal* v. *Chandar* (1884) 7 All. 313, 322.

96 *Ib.: Ahinsa Bibi* v. *Abdul Kader* (1902) 25 Mad. 26, 35; *Mahamed Ishaq* v. *Sheikh Akramul Huq* (1908) 12 C.W.N. 84, 86, 93.

97 *Siluvalmuthu Mudaliar* v. *Muhammad Sahul* (1926) 51 Mad. L.J. 648; 98 I.C. 549, where the word "implead" is wrongly used for adding a party as plaintiff. *Rameshwar Bux Singh* v. *Ganga Bux,* 1950 A.A. 598 (F.B.).

98 *Manikya Rao* v. *Adenna,* 1949 A.M. 654.

99 See Lewin on *Trusts,* 16th edn., 184.

1 *Dular Chand* v. *Balram Das* (1877) 1 All. 453; *Jowala Nath* v. *Rupa* (1882) Punj. Rec. No. 175; *Vyankatesh Oil Mill* v. *Velmahomed* (1927) 30 Bom. L.R. 117; 109 I.C. 99; 1928 A.B. 191. But if a contract is entered into with one partner only it is competent for him to maintain a suit by himself without making his partners co-plaintiffs: *Mehr Singh* v. *Chela Ram* (1906) Punj. Rec. No. 127. See *Ahinsa Bibi* v. *Abdul Kader* (1902) 25 Mad. 26; *Iman-ud-din* v. *Liladhar* (1892) All. W.N. 104.

2 *Nath Bank Ltd.* v. *Sisir Kumar,* (1954) A. Cal. 303.

subsequently added as plaintiffs, whether on objection taken by the defendant[3] or by the Court of its own motion,[4] the whole suit will be dismissed if it is at that time barred by limitation as regards the other promisees.

With regard to partnership suits the Code of Civil Procedure, 1908, O.30, r. 4, provides as follows:—

"(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit."

"(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have (a) to apply to be made a party to the suit, or (b) to enforce any claim against the survivor or survivors".[5]

Observe that sub-rule (1) applies only where the firm, named as such, is a party to the suit. It does not enable one of several co-contractors to sue in his own name alone. Where a suit was brought in a firm-name for an alleged debt to the firm, and the Court doubted whether the firm was proved to exist, but was clear that, if it did, no contract with it was shown, so that the name of the firm was in effect struck out of the suit, one of the alleged partners (who was already a party) claimed to carry on the suit, taking advantage of the above rule, in his own name without joining his co-contractor's, and this was rightly disallowed.[6]

Partnership Suit.—Notwithstanding s. 45 Contract Act a partner in a registered firm can sue in the firm's name under 0.30 rule 4 C.P.C. and need not join the legal representatives of a deceased partner as parties to the suit.[7]

Validity of discharge by one of several joint promisees.—See notes under the same head to. s. 38 (above).

Suit by a surviving partner.—The general rule of English law is (contrary to the present section) that joint contracts are enforceable by the survivors or survivor alone. There is an equitable exception, founded on mercantile custom, as to debts due to partners; but even in this case, "though the right of the deceased partner devolves on his executor, the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased".[8] The present section extends the mercantile rule of substantive right to all cases of joint contracts. But it does not follow that it was intended to alter the rules of procedure in cases where the mercantile rule of substance was already admitted. It seems therefore to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the life-time of the deceased.[9] It has been so laid down by the High Courts of Allahabad, Bombay, Madras and Lahore; but the contrary has been maintained by the Calcutta High Court.[10] English law and the alteration of it by the Act were discussed, and the difficulty occasioned by the words "as between him and them" in

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3 *Ramesbuk* v. *Ramlall Koondoo* (1881) 6 Cal. 815; *Kalidas* v. *Nathu Bhagvan* (1883) 7 Bom. 217; *Fatmabai* v. *Pirbhai* (1897) 21 Bom. 580.

4 *Imam-ud-din* v. *Liladhar* (1892) 14 All. 524; *Ram Kinkar* v. *Akhil Chandra* (1908) 35 Cal. 519.

5 Reference to this Rule was omitted in a Bombay case of 1927, which however arrived at the same result: *Devshi* v. *Bhikamchand,* 29 Bom.L.R. 147; 100 I.C. 993; 1927 A.B. 125.

6 *Hari Singh* v. *Kuram Chand Kanshi Ram* (1926) 8 Lah. 1; 100 I.C. 721; 1927 A. Lah. 115.

7 *Godavari Pravara Canal Co-operative Purchase and Sale Union Ltd.* v. *Krishnarao and another* (1974) A.B. 52; *Tarachand* v. *Hulkarmal* (1979) A.D. 160 (suit can be filed by all partners or under 0.XXX rule 4 but a single partner cannot sue in his own name).

8 Williams on *Executors,* 13th ed., 379.

9 *Gobind Prasad* v. *Chandar Sekhar* (1887) 9 All. 486; *Motilal* v. *Ghellabhai* (1892) 17 Bom. 6; *Vaidyanatha Ayyar* v. *Chinnasami Naik* (1893) 17 Mad. 18; *Debi Das* v. *Nirpat* (1898) 20 All. 365; *Ugar Sen* v. *Lakshmichand* (1910) 32 All. 638; *Mulk Raj* v. *George Knight* (1906) Punj. Rec. No. 10; *Mool Chand* v. *Mul Chand* (1923) 4 Lah. 142; 71 I.C. 951; 1923 A.L. 197.

10 *Ram Narain* v. *Ram Chunder* (1890) 18 Cal. 86. But see *Bal Kissen Das Daga* v. *Kanhya Lal* (1913) 17 Cal. L.J. 648, at pp. 651, 652; 21 I.C. 509.

connection with this point was considered by Farran J. in *Motilal* v. *Ghellabhai.*[11] The learned Judge there stated,

"It is difficult to give these words their full effect if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract as far as the other contracting party is concerned rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter then sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown, anomalous, and we think that, as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we were not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Causes Court need not be changed."

The case is not literally covered by s. 47 of the Indian Partnership Act (formerly s. 263 of the Contract Act), but it may be held that a contrary intention within the meaning of the present section sufficiently appears from the nature of the transaction when it is once ascertained to be a partnership transaction, regard being had to the uniform and well-understood course of practice.

With regard to the supposed anomaly, it disappears when we remember that in mercantile usage the firm is regarded as a person distinct from the individual partners so long as the partnership exists and is not fully wound up; and this view is now to a certain extent recognised in English procedure by allowing actions to be brought by and against partners in the name of the firm.[12] Very much the same procedure has been introduced by the Code of Civil Procedure, 1908.[13]

In so far as the firm is treated like a person, the executors of a deceased partner are no more appropriate parties to the recovery of a partnership debt than the executors of a deceased shareholder to the recovery of a debt due to an incorporated company.

Death of all the partners.—On the death of the last surviving partner in a partnership the representatives of all the partners are entitled to be impleaded and the suit will be proceeded with and not abate.[14]

Deceased partner's estate.—The High Court of Bombay has decided, after full examination of the Rule and the present section of the Act in the light of both Indian and English authorities, that where a partner had died before the commencement of a suit against the firm, the Rule does not enable the plaintiff to make the deceased partner's separate estate liable without adding his legal representatives as parties.[15]

Suit by Co-mortgagees.—A suit for ejectment and rent by a co-mortgagee lessor without impleading the legal representatives of a deceased co-mortgagee lessor is not maintainable.[16] Where a mortgagee dies leaving male and female heirs in accordance with the Hindu Succession Act, 1956, no one heir even the *karta* of the coparcenary can bring a suit on the mortgage without joining all the heirs as parties to the suit; the reason is that mortgage being one and indivisible and the mortgage having devolved on all the heirs jointly, no suit can be brought except on the principle of individuality.[17]

A suit to enforce a mortgage in favour of a firm can be brought under 0.30 rule 4 C.P.C. and the persons suing will be all the partners constituting the firm whose name is registered in the Register of Firms when the cause of action arose.[18]

Suit by representative of deceased partner.—The representative of the estate of a deceas-

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11 (1892) 17 Bom. 6, 14.
12 R.S.C., Order XLVIIIA; Pollock, *Digest of Law of Partnership,* 15th ed., p. 133.
13 See Order XXX.
14 *Jagat Industries Corporation* v. *Union of India* (1981) A.D. 34, 39.
15 *Mathuradas* v. *Ebrahim Fazalbhoy* (1927) 51 Bom. 986; 105 I.C. 305; 1927 A.B. 581.
16 *Moolchand* v. *Smt. Renuka Devi* (1973) A. Raj. 63, 67; *Rama Motibhai* v. *Dalwadi Tupoo Rama* (1956) A.B. 264; *Rameshwar Bux Singh* v. *Ganga Bux Singh* (1950) A.A. 598 reld. on.
17 *Govinda Reddy* v. *Gola Obulamma* (1971) A.AP. 363, 376 F.B.
18 *Gurushiddayya Kalkayya Selimath* v. *Shah Hirachand Vanechand* (1972) A. Mys. 209, 212.

ed partner may maintain a suit for the recovery of a partnership debt, and may join the surviving partners as defendants in the suit where they refuse to join as plaintiff.[19]

Right of performance of representative jointly with survivor.—Where, by the terms of a mortgage, interest was payable by the mortgagor to two mortgagees jointly, it was held that upon the death of one of the mortgagees his legal representative was entitled to moiety of the interest due under the mortgage.[20]

Survivorship in case of Government Securities.—The Indian Securities Act, 1920 (X of 1920), s. 4, runs as follows.—

"4. (1) Notwithstanding in section 45 of the Indian Contract Act, 1872—

(*a*) when a Government security is payable to two or more persons jointly, and either or any of them dies, the security shall be payable to the survivor or survivors of those persons, and

(b) when a Government security is payable to two or more persons severally, and either or any of them dies, the security shall be payable to the survivor or survivors of those persons, or to the representative of the deceased, or to any of them.

(2) This section shall apply whether such death occurred or occurs before or after this Act comes into force.

(3) Nothing herein contained shall affect any claim which any representatives of a deceased person may have against the survivor or survivors under or in respect of any security to which sub-section (1) applies."[21]

Time and Place for Performance

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

"**Engagement.**"—The word "engagement" in this section is a survival from the language of the original draft, in which, for some reason not easy to understand, it is constantly used instead of "agreement" or "promise." Here it is synonymous with "promise."

Reasonable time.—It is difficult to understand why decisions should be reported on the question of what is a reasonable time, which is declared by the Act itself to be always a question of fact; but having been reported, they must be mentioned. Where the defendants agreed to supply coal to the plaintiffs from time to time, as required by the plaintiffs, on reasonable notice given to them, a notice given by the plaintiffs on the 22nd July, 1898, for the supply of 2,648 tons of coal on or before 31st August, 1898, was held not to be reasonable.[22] Jenkins C.-J. said:

"Perhaps it might have been physically possible for the defendants to carry out such an order, but it would clearly have required an effort which the plaintiffs had no right to demand. I do not think that a notice involving such an effort from businessmen with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties when this document was given."

Where the defendant agreed to discharge a debt due by the plaintiff to a third party and in default to pay to the plaintiff such damages as he might sustain, and no time was fixed for the performance of the obligation, it was held that the failure of the defendant to perform it for a period of three years amounted to a breach of the contract, as that was a sufficient and reasonable time for performance.[23] Where no time is fixed by contract, the performance of the

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19 *Aga Gulam Husain* v. *A.D. Sassoon* (1897) 21 Bom. 412, 421.
20 *Kanthu Punja* v. *Vittamma* (1901) 25 Mad. 385.
21 A fourth sub-section was added in 1928, but is not relevant in this connection.
22 *The Bengal Coal Co. Ltd.* v. *Homee Wadia & Co.* (1899) 24 Bom. 97, 104.
23 *Dorasinga* v. *Arunachalam* (1899) 23 Mad. 441; *Subramanian* v. *Muthia* (1912) 35 Mad. 639; 17 I.C. 721.

contract must be within a reasonable time. It is not necessary in such cases to give notice before treating the contracts as rescinded.[24] A clause is a sale deed provided for payment of a balance of Rs. 25,000 out of the purchase price "as soon as possible but at a time when the former (the purchaser) is in a position to make the payment". That stipulation means within a reasonable time and is governed by section 46, and could not be treated as a contingent contract under section 31, Contract Act.[25]

In a case where a consent decree was passed for conveyance by one party to another on payment of a specified amount, but no time was fixed for completion, it was held that reasonable time would depend on the facts of each particular case and in that case as the decree was still enforceable it would be unreasonable to say that the time to obtain transfer had expired. The transfer should be obtained at any time within the period of limitation.[26]

If a contract does not specify the time within which the purchase price was to be paid and the contract performed the law will imply a reasonable time in which it had to be performed. It would be an implied term of the contract and hence of the decree passed thereon that the parties would perform the contract within a reasonable time and therefore the purchase price had to be paid within a reasonable time.[27]

By the terms of a charterparty the cargo was "to be discharged with all dispatch according to the custom of the port" of discharge, it was held by the House of Lords that this bound the charterer to discharge the cargo within a reasonable time regard being had to every impediment arising out of the custom or practice of the particular port, which the charterer could not have overcome by the use of reasonable diligence.[28] If the "performance is to be in a customary manner" the manner is judged as at the time when performance is due.[29]

But where the act to be done is such that both parties are to concur, the implied condition is that each party shall use reasonable diligence in performing his part. The implied engagement is not that the act shall be done within a fixed or a reasonable time, or within the time usually taken, but that each shall use reasonable diligence in performing his part.[30]

Compare the Negotiable Instruments Act, 1881 (XXVI of 1881), s. 105, which runs as follows:—

"In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour, and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays shall be excluded."

Time and place for performance of promise where time is specified and no application to be made.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration.

A promises to deliver goods at *B*'s warehouse on the 1st January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

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24 *Official Receiver* v. *Baneshwar Prasad Singh* (1962) A.P. 155; *Binda Prasad* v. *Kishore Saran* (1929) A.PC. 195 refd. to: *Bachhraj* v. *Nand Lal* (1966) A.M.P. 145; *Dinkerrai* v. *Sukh Dayal* (1948) Bom. 91; (1947) A.B. 293; *Sat Prakash* v. *Bodhraj* (1958) A. Punj. 111.

25 *Sohan Singh* v. *State Bank of India* (1964) A. Punj. 123.

26 *Smt. Jnanda Debi* v. *Nath Bank Limited* (1979) A. Cal. 246, 248.

27 *M. Hungerford Investment Trust Ltd.* v. *Haridas Mundhra* (1972) A.SC. 1826, 1833; *Postlethwaite* v. *Freeland* (1880) 5 App. Cas. 599. Chitty: On Contracts (24th Ed.) para 1274.

28 *Postlethwaite* v. *Freeland* (1880) 5 App. Cas. 599.

29 *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.* (1939) A.C. 562; *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl GmbH* (1960) 2 Q.B. 318; affd in (1962) A.C. 93, 113-114; (1961) 2 All E.R. 179; (1961) 2 W.L.R. 633.

30 *Ford* v. *Cotesworth* (1868) 4 Q.B. 127; (1870) 5 Q.B. 544. Chitty on Contracts (24th edition) Para 1274.

Common Law rule.—This section, with the illustration, simplifies the rule. According to the Common Law as laid down in a nineteenth century case on the subject,[31] the illustration would have run thus: "*B* is not bound to be at the warehouse to receive the goods after the usual hours of business, and if he is not there *A* has not performed his promise. If *B* is there and could receive the goods before midnight, but refuses to do so, *A* has performed his promise." There are some further minute distinctions in English law which it would be useless to cite here.[32] The amendment made by this section is obviously in accordance with good sense, though the English rule is capable of a logical explanation.

Delivery on Sunday.—In a suit for damages against the defendant, a German, for non-delivery of goods, it was contended that he was not bound to deliver the goods on Sunday, which was the last day named in the contract for performance. It was held that the "Lords Day Act" did not apply to India, and that, in the absence of a custom to the contrary, he was bound to deliver the goods on that day if they had not already been delivered.[33]

Application for performance on certain day to be at proper time and place.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question "what is a proper time and place" is, in each particular case, a question of fact.

The proper place will, of course, be the place named in the contract, if any. Where more than one place is named, "it is for the person to whom payment is to be made to fix the place at which he will be paid; until he has selected the place at which he will be paid there can be no default." The English decision from which we quote would presumably be followed here.[34]

Place for performance of promise where no application to be made and no place fixed for performance.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.[35]

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Rule of Common Law.—In the Common Law the rule as to money payments (which, however, is rendered practically obsolete by the methods of modern business) is that, if no place is named, the debtor is bound to find the creditor, provided he is within the jurisdiction[36] but if the

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31 *Startup* v. *Macdonald* (1843) 6 Man. & G. 593; 64 R.R. 810.

32 They are stated in Leake, 8th ed., 648-58.

33 *Lalchand Balkissan* v. *John L. Kersten* (1890) 15 Bom. 338. It was held that the Act could not in any event apply to the defendant, who was a German; but the Act, where it is in force, has clearly a territorial, and not a personal, operation. See also *Kasiram* v. *Harnandroy* (1920) 32 Cal. L.J. 140; 58 I.C. 396. *Rolloswin Investments Ltd.* v. *Chromolit,* (1970) 2 All E.R. 673 (Contract made on Sunday valid; case under English law).

34 *Thorn* v. *City Rice Mills* (1889) 40 Ch.D. 357, 360.

35 *Qu.* whether failure to perform this preliminary duty amounts to a breach of the whole contract. See *Armitage* v. *Insole* (1850) 80 R.R. 388; 14 Q.B. 728.

36 See Haldane v. *Johnson* (1853) 8 Ex. 689; 91 R.R. 705; *Kedarmal Bhuramal* v. *Surajmal Govindram* (1907) 9 Bom. L.R. 903, at p. 911; *Puttappa Manjaya* v. *Virabhadrappa* (1905) 7 Bom. L.R. 993.

obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them. "And so note a diversitie between money and things ponderous, or of great weight."[37] The present section seems to lay down a reasonable rule for all cases without distinction; but more than one judge has expressed the opinion that is does not preclude the application of the Common Law rule that the debtor must seek his creditor out.[38] Perhaps however this is only where the promisor fails to apply for the appointment of a reasonable place.[39] The words "no place is fixed" do not exclude any inference the Court may draw as to the intention of the parties from the nature and circumstances of the contract, especially where the obligation is to pay money.[40] This is essentially a question of fact, but cases[41] in which an inference as to the intention of the parties has been drawn illustrate the section. As to negotiable instruments, see heading below.

The Allahabad High Court[42] has interpreted the Privy Council judgment in *Soniram Jeetmal* v. *R.D. Tata & Co. Ltd.*[43] to mean that in the absence of anything to the contrary the parties to a contract of payment of money by a debtor to the creditor will be deemed to have intended that payment be made by the debtor to the creditor at the place of latter's business. The Privy Council did not lay down that the Common Law rule applies to India, but in the absence of the specification of place of payment by the contract, it would be legitimate for the Court to infer from the circumstances that debtor should pay the creditor at the latter's place of business. "It was a mere implication of the meaning of the parties."

Common Law rule of debtor seeking creditor.—A Full Bench of the Punjab High Court has held that the rule of Common Law that the debtor should seek the creditor is not applicable in India.[44] But a Madras Full Bench in a case dealing with payments by factories and establishments under the Employees' State Insurance Act applied the Common Law rule of debtor seeking the creditor. The money was to be paid to the Insurance Corporation at Madras under section 39 of that Act and that place was held to have jurisdiction for a criminal prosecution.[45] The rule was applied by the Andhra Pradesh High Court and it was held that a wife can sue for her *hiba* jewels where she resides.[46] The rule was again applied by the Calcutta High Court in *State of the Punjab* v. *A.K. Raha Ltd.*[47] and the application of the rule is not excluded by the debt being disputed. The Bombay High Court held the rule applicable where section 49 is inapplicable, as the rule is reasonable and is in conformity with justice and

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37 Co. Lit. 210 b. The danger of travelling about England with any considerable sum of money, which was serious in Littleton's time and appreciable in Coke's, does not seem to have been thought of as an objection. But archaic law rarely favours debtors.

38 *Motilal* v. *Surajmal* (1906) 30 Bom. 167, at p. 171; see also *Dhunjisha* v. *Fforde* (1887) 11 Bom. 649, 656; *Annamalai Chettiyar* v. *Daw Huin,* 1936 A.R. 251; 163 I.C. 397; *Srilal Singhania* v. *Anant Lal* (1940) 1 Cal. 323; 191 I.C. 52; 1940 A. Cal. 443; *Ramalinga Iyer* v. *Jayalakshmi,* 1941 A.M. 695; (1941) 1 Mad. L.J. 784; *Satibai* v. *Vishnibhai,* 1953 A.B. 280.

39 *Soniram Jeetmull* v. *R.D. Tata & Co.* (1927) L.R. 54 I.A. 265, 269; 29 Bom. L.R. 1027; 102 I.C. 610; 1927 A.P.C. 156.

40 *Ibid. Galley & Co.* v. *Appalaswami,* 1946 A.M. 300, 226, I.C. 133; *Mahaluxmi Bank Ltd.* v. *Chotanagpur Industrial & Commercial Association,* 1955 A. Cal. 413.

41 *Nathubhai* v. *Chhabildas* (1935) 59 Bom. 365; 37 Bom. L.R. 357; 157 I.C. 248; 1935 A.B. 283; *Muhammad Esuff Rowther* v. *M. Hateem & Co.,* 1934 A.M. 581; 67 Mad. L.J. 296; 153 I.C. 111; *Sheik Mehtab* v. *Dharamrao* (1945) Nag. 252, 1944 A.N. 330.

42 *Manohar Oil Mills* v. *Bhawani Din* (1971) A.A. 326, 327.

43 54 I.A. 265; (1927) A.PC. 156; Halsbury's Laws of England Vol. VIII Para 288 p. 168. refd. to.

44 *Hiralal Girdhari Lal* v. *Baijnath Hurdial* (1960) A. Punj. 450 (F.B.); *Niranjan Singh* v. *Jagit Singh* (1955) A. Punj. 128 appd.; *Kadirsa Rawther* v. *Shanmugha Mudaliar* (1960) A. Ker. 188 (a case of sale of goods).

45 *Employees' State Insurance Corporation* v. *Haji Mohamed Ismail Sahib* (1960) A.M. 64. (It was a Criminal case under section 526 (1), Cr. P.C.). But in *Venkatesha* v. *M/s. Kamlapat* (1957) A.M. 201, the applicability of the rule was doubted.

46 *Maria Munnisa Begum* v. *Noore Mohammad* (1956) A.A.P. 231.

47 (1964) A. Cal. 418.

equity.[48] A debtor, however, cannot be held liable to pay wherever the creditor may choose to shift his business.[49] The application of Common Law rule would be engrafting something on section 20 of the Civil Procedure Code and in a vast country like India it will not only be inconvenient but oppressive.[50] In the absence of a contract to the contrary a debtor does not have to seek the creditor beyond the jurisdiction of the country.[48] The Privy Council in *Soniram Jeetmull* v. *R.D. Tata & Co. Ltd.* did not apply the Common Law rule to India. If the Common Law rule is applicable, it is submitted, it would not be inapplicable to debts incurred before the partition merely on the ground that subsequently the country is partitioned. But it would be inequitable to expect debtors to seek creditors wherever they might have settled after the partition. The rule of English law though not applicable to India can be used for construing the terms of a contract to determine the place of payment.[51] In Bilticut transactions deposits as advance in respect of transaction which proved ineffective have to be returned to the depositor at this place of business as it is a debt.[52]

Place of delivery.—Where by an agreement for the sale of goods it was stipulated that the goods were "to be delivered at any place in Bengal in March and April 1891," and it was added, "the place of delivery to be mentioned hereafter," the Privy Council held that the buyer had the right to fix the place, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable. The use of the words "place of delivery to be mentioned hereafter" did not take away that right, nor did they leave the question of the place of delivery to be settled by a subsequent agreement. If the latter had been meant, the expression used would have been "agreed on" instead of "mentioned." It was also held that such a contract does not fall within s. 94 of the Act (now s. 36 (1) of the Indian Sale of Goods Act, 1930), but rather resembles what is contemplated in the present section.[53]

Where money is deposited with an Indian money lender who is a permanent resident of India, it is implicit that the money lender will pay back the money in India in Indian Currency. The fact that the money lender has invested the money in a foreign firm of money lenders of which he was a partner will not make him a banker so as to claim that the money will be rapid at a foreign branch of the firm where the money is invested. The essence of relationship of banker and customer is the giving of facility to draw money by cheques and a loose naming the money lender as a banker is not sufficient to make him a bank.[54]

Negotiable instruments.—The section does not apply to negotiable instruments: the various High Courts speak with one voice on this point. Where no place is specified for payment, what rule is to apply? The High Court of Calcutta has held that the relevant rule is the common law rule that a debtor must follow his creditor,[55] but this is fallacious as this is not the common law rule where negotiable instruments are concerned. Full Bench decisions of the High Courts of Madhya Bharat and Hyderabad, and bench decisions of the High Courts of Bombay, Madras and Punjab, and single judge decisions in Nagpur[56] agree that the Court

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48 *Bharumal Udhomal* v. *Sakhawantmal* v. *Veshomal* (1956) A.B. 111.
49 *Madan Lal* v. *Chawla Bank Ltd.* (1959) A.A. 612.
50 *Piyara Singh* v. *Bhagwandas* (1951) A. Punj. 33; *Naranjan Singh* v. *Jagjit Singh* (1955) A. Punj. 128.
51 *Johrimull Prahladrai* v. *Hiralal Seth* (1961) A.P. 198; *Manohar Oil Mills* v. *Bhawani Din* (1971) A.A. 326.
52 *F. Shah Chandanmal* v. *Hazari Lal* (1962) A. Raj. 122.
53 *Grenon* v. *Lachmi Narain Augurwala* (1896) 23 I.A. 119; 24 Cal. 8.
54 *Vinaitheethal Achi* v. *Chidambaram Chettiar* (1972) A.M. 238, 240; *Karuppan Chettiar* v. *Somasundaram Chettiar,* (1961) A.M. 122 folld.
55 *Srilal Singhania* v. *Anant Lal* (1940) 1 Cal. 323; 191 I.C. 52, 1940 A. Cal. 443.
56 *J.N. Sahni* v. *Madhya Bharat State,* 1954 A.M.B. 184 (F.B.); *S. Eshawarayya* v. *Thakur Devisingh,* 1953 A. Hyd. 289; *Jivatlal Pratapshi* v. *Lalbhai Fulchand Shah* (1942) Bom. 620; 1942 A.B. 251; *Raman Chettiyar* v. *Gopalachari* (1908) 31 Mad. 223; *Piyara Singh* v. *Bhagwan Das,* 1951 A. Punj.

where the promisee resides has no jurisdiction: jurisdiction lies in the place where the maker executed the note or now resides in the case of promissory note, or in the case of a bill of exchange the place where the drawee resides. English law is to the same effect.[57]

Place of performance in pakki adat contracts.—In the case of *Pakki adat* agency the place of payment is the place where the constituent resides, unless he has chosen to fix another place by express direction.[58]

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by C. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted, *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, or send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.[59]

Manner and time of performance.—This rule is elementary. It may be doubted where illustration (c) does not rather belong to s. 63, but no practical difficulty can arise. The facts of illustration (d) must not be confused with those which have given rise to troublesome questions in cases of contracts by correspondence (ss. 4 and 5 above). Here a complete contract is assumed to exist. It is hardly needful to add that where the request is to send not legal currency, but a cheque or other negotiable instrument, this does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time.[60] For further illustrations of the section see cases in footnote.[61] Obligation to pay dividend arises at the registered office of the company. *Hanuman Parshad* v. *Hiralal*, (1971) A.S.C. 206: (1970) 3 SCR 788.

If money is due from one person to another, it can be discharged by payment in cash unless another mode of payment is agreed upon.[62] A cheque issued by one customer of a Bank in favour of another customer with instructions by the payee of the cheque to credit the proceeds to his (payee's) account is a good payment.[63] Under section 50, the payment of a debt may be made in cash or in such other manner as the creditor may prescribe. Therefore, if money out of a compulsory deposit under the Provident Fund Scheme is, at the instance of the depositor, to be paid in sterling and for that purpose it has to be and is paid to the Reserve

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33; *Dalsukh Nathmal* v. *Motilal Balchand* (1940) Nag. 502, 1938 A.N. 262; *Gopikisan* v. *Jethmal*, 1935 A.N. 144, 155 I.C. 958; *Horoburgh* v. *Chandroji* (1957) A.M.P. 90.

57 Halsbury, *Laws of England* 4th Edn. Vol. 4, para 423, p. 187.

58 *Kedarmal* v. *Surajmal* (1908) 33 Bom. 364. As to the incidents of *pakki adat* in general, see *Kanji* v. *Bhagwandas* (1905) 7 Bom. L.R. 57, at p. 65, and s.c. on app. *sub nom. Bhagwandas* v. *Kanji* (1906) 30 Bom. 205.

59 See *Commissioner of Income Tax* v. *Ogale Glass Works Ltd.*, 1954 A.SC. 429, 434-6.

60 See *Kedarmal* v. *Surajmal* (1907) 9 Bom. L.R. 903; at p. 911; *Hairoon Bibi* v. *United India Life Insurance Co.*, 1947 A.M. 122. See also *Commissioner of Income-tax* v. *Kameshwar Singh* (1933) 35 Bom. L.R. 731, 1933 A.P.C. 108; *Keshav Mills Co.* v. *Commissioner of Income-tax* (1950) Bom. 750, 52 Bom.L.R. 72, 1950 A.B. 166.

61 *Hairoon Bibi* v. *United India Life Insurance Co.*, 1947 A.M. 122; Krishnan v. *Keral Gilt Edged Security Life Assurance Co. Ltd.*, 1952 A.T.C. 181; *Rameshwardas Poddar* v. *Paper Sales Ltd.* (1943) 45 Bom.L.R. 957, 1944 A.B. 21, 211 I.C. 155. *Hanuman Parshad Gupta* v. *Hiralal* (1971) A.SC. 208 (manner and place of payment of dividends): (1970) 3 SCR 788.

62 *Haji Sheikh Hassanoo* v. *Natesa Mudaliar & Co.* (1959) A.B. 267.

63 *Mohan Lal* v. *Loan Company of Assam* (1960) A. Asm. 191.

Bank, it is a good discharge and good payment to the extent of money paid.[64] Plaintiff asking defendant to sell his rice and "send" the proceeds to the plaintiff implies a request to send money by post.[65] To support a plea of payment passing of cash need not be shown. Payment made by means of transfer entries is sufficient.[66] Bilticut contracts include the liability of the seller to take the goods to the Railway Station and get the Railway Receipts prepared at his own expense and in the case of "Station Delivery" contracts the seller's duty is to take the goods to the Railway Station but expenses of getting the Railway Receipt prepared are borne by the buyer. In either case the Railway freight is paid by the buyer.[67]

Payment to an agent, who to the debtor's knowledge had no authority to receive the payment, does not discharge the debtor.[68]

Performance of Reciprocal Promises

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations.

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods unless *A* is ready and willing to deliver them on payment.[69]

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Simultaneous performance.—The section expresses the settled rule of the Common Law. To understand the principle rightly, we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another. But the terms of a promise may express or imply conditions of many kinds; and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition. It is obviously immaterial whether it is called a condition or not, if in substance it has that effect. To say "I will pay when you deliver the goods" is more courteous than to say "If you do not deliver the goods in a reasonable time you will not be paid"; but "when" implies "if" and the result is the same. And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section. A covenant by the husband to pay an annuity to his wife during her lifetime "whilst she shall comply with the covenants and conditions on her part" was held to be discharged and had the effect of absolving the husband from liability to pay on the breach of covenant on her part not to molest as the two covenants were inter-dependent.[70]

Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise. In that case it is said to be a *condition precedent* to the right of action on the reciprocal promise.

Where the performances are intended to be simultaneous, as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concur-

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64 *Union of India* v. *Kashi Prasad* (1962) A. Cal. 169.

65 *Union of India* v. *Lallan Prasad & Co.* (1963) A.P. 216; *Commissioner of Income-tax* v. *Ogale Glass Works* (1955) 1 S.C.R. 185; 1954 A.SC. 429.

66 *Narayandas* v. *Sangli Bank* (1966) A.S.C. 170; (1965) 3 S.C.R. 777.

67 *Bachhraj Amolak Chand* v. *Nand Lal Sita Ram* (1966) A.M.P. 145.

68 *Mackenzie* v. *Shib Chunder Seal* (1874) 12 B.L.R. 360.

69 *Chengravelu Chetty & Sons* v. *Akarapu Venkanna & Sons* (1924) 86 I.C. 299; 49 Mad.L.J. 300, where the section is cited, but this illustration seems to be overlooked.

70 *NewCombe* v. *NewCombe* (1934) 34 S.R. (N.S.W.) 446; *Huntoon Co.* v. *Kolynos (Incorporated)* (1930) 1 Ch. 528, 548-549.

rent conditions, and the promises to be *dependent*. Observe that "concurrent conditions are only a modified form of conditions precedent".[71] Where there are reciprocal promises, a promisor need not perform his part of the contract unless the promisee is ready and willing to perform his. Therefore a seller, who had promised to supply bricks which were to be transported in the buyer's trucks by road, delayed delivery, cannot be liable in damages if the buyer did not pay the price before taking delivery as was stipulated between the parties.[72]

Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness to perform it, are said to be *independent*.

It is doubtful whether these terms are of much or any real use. "The real question, apart from all technical expressions, is what in each instance is the substance of the contract.[73] But the terms cannot be said to be wholly obsolete, and acquaintance with them is necessary for the understanding of the English decisions.

In order to apply the rule of this section we must know whether the promises are or are not "to be simultaneously performed." This is a question of construction, depending on the intention of the parties collected from the agreement as a whole. Before Lord Mansfield's time the Courts were inclined to hold every promise or covenant complete in itself and independent.[74] But in 1773 Lord Mansfield said that "the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties",[75] and similarly Lord Kenyon in 1797: "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done";[76] and such is the modern law.

There is distinct question from that of "condition precedent," namely whether failure to perform some parts of a contract deprives the party in fault of any right to remuneration for that which he has performed, and entitles the other to put an end to the contract, or is only a partial breach which leaves the contract as a whole still capable of performance. In dealing with cases of this kind it may be very difficult to ascertain the true intention of the parties. We have to "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for, or whether it merely partially affects it and may be compensated in damages".[77] Illustration (b) suggests, though it does not actually raise or decide, a point which has given much trouble, and is not settled either by any of the general provisions of the Act, or by any disposition of the chapter on the Sale of Goods. If *A* fails to deliver the first instalment of the goods, or delivers a short quantity, may *B* put an end to the contract? The better opinion, supported by decisions of the Court of Appeal in England and of the Supreme Court of the United States,[78] is that, in the absence of any specific indication of a contrary intention, he may. But there are also decisions difficult to reconcile with this view.[79] The Sale of Goods Act, 1893, s. 31, followed by s. 38 of the Indian Sale of Goods Act, 1930, has purposely left the point open as "in each case depending on the terms of the contract and the circumstances of the case."

In a C.I.F. contract, it is the duty of the seller to offer shipping documents against price and the buyer cannot ask for actual goods and it is not the seller's duty to see that the buyer can clear the goods. But where goods were sold while they were on the high seas it could not be

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71 Langdell, Summary, s. 32.
72 *Orissa Cement Ltd.* v. *India Fire Bricks & Insulations Co. Ltd.* (1972) Cut. 1111, 1142; *Abdullah Bey* v. *Tenenbaum* (1934) A.PC. 91, reld. on.
73 Per Martin B. *Bradford* v. *Williams* (1872) L.R. 7 Ex. 259, at p. 261.
74 For the history of the change see Langdell, Summary, ss. 139-143.
75 *Kingston* v. *Preston,* cited in *Jones* v. *Barkley,* Doug. 659; Finch, Sel. Ca. 735, 736.
76 *Morton* v. *Lamb* (1797) 7 T.R. 125; 4 R.R. 395; Finch, Sel. Ca. at p. 741.
77 Per Cur., *Bettini* v. *Gye* (1876) 1 Q.B.D. 183.
78 *Honck* v. *Muller* (1881) 7 Q.B.D. 92; *Norrington* v. *Wright* (1885) 115 U.S. 189.
79 *Simpson* v. *Crippin* (1872) L.R. 8 Q.B. 14; *Freeth* v. *Burr* (1874) L.R. 9 C.P. 208, which decides only that failure in payment for one instalment is not a repudiation of the whole contract, and to that extent is confirmed by *The Mersey Steel and Iron Co.'s Case* (1884) 9 App. Ca. 434; see notes on these cases, cited under s. 39, above.

said as a matter of law that, in the absence of a contract to the contrary, it is the duty of a buyer to get an import licence, if it is required under the law; but to effectuate such a transaction he can avail himself of the import licence of the seller.[80]

It seems difficult at this day (except as to the unsettled question last mentioned, which is confined to the sale of goods by instalments) to add anything in principle to the modern rule; and Indian decisions are, as might be expected, merely illustrative.

A contract for the sale of shares in a company to be transferred into the name of the purchaser upon payment of the price by him on or before a certain day falls within this section, so that transfer of the shares and payment of the purchase-money should be concurrent acts.[81] An arbitration award that *B* do pay to *D* the sum of Rs. 2,000 and *D* to deliver 200 ordinary shares held by him and in default of payment within fortnight *B* to pay interest from the expiry of the fortnight was interpreted to mean that payment by *B* was not dependent upon tender of shares by *D*.[82]

Waiver of performance.—The section does not, of course, give any special remedy to a party who has chosen to perform his part without insisting on the reciprocal performance which was intended to be simultaneous with his own, as where a seller of goods "for cash on delivery" chooses to deliver the goods without receiving the price.[83]

Readiness and willingness.—In a suit for damages for non-delivery, the plaintiff has to show his readiness and willingness and his capacity to pay or reasonable preparation for securing the purchase price and his demanding the goods on the due date.[84] In the case of a contract for the sale of shares in a company it is not necessary, in order to prove that a vendor was ready and willing to perform his part of the agreement, that he should be the beneficial owner of the shares, or that he should tender to the purchaser the final documents of title to the shares. It is enough that he should be able and willing to constitute the purchaser the legal owner of the shares agreed to be sold. Thus, where the vendor tendered to the purchaser share allotment and receipt papers, and together with each a transfer paper and an application paper, both signed in blank by the original allottee, it was held that the vendor was ready and willing to perform his promise.[85] But where neither the transfer nor the form of application for transfer was offered to the purchaser, nor had the vendor any such documents signed by the original allottee in his possession, it was held that the vendor could not be said to be ready and willing to perform his promise, as the allottee had it in his power to decline to complete the contract until he had executed the transfer and the application paper.[86] Further, it is not necessary to prove readiness and willingness that the vendor should have made an actual tender to the purchaser of the transfer deed.[87] Nor is it necessary that the vendor should have the shares in his possession continuously from the date of the contract down to the time of performance. If a party bound to do an act upon request is ready to do it when it is required he will fully perform this part of the contract, although he might happen not to have been ready had he been called upon at some anterior period.[88] But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, or where he has absconded or is so financially embarrassed that he could not have paid for them if they had been delivered, the vendor is exonerated from giving proof of his readiness and willingness to

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80 *Narayanaswami* v. *Soundarajan & Co.* (1958) A.M. 43, 50.

81 *Imperial Banking and Trading Co.* v. *Atmaram Madhavji* (1865) 2 B.H.C. 246; *Imperial Banking and Trading Co.* v. *Pranjivandas Harjivandas,* 2 B.H.C. 258.

82 *Brahma Swaroop* v. *Diwan Chand* (1963) A. Cal. 583.

83 *Sooltan Chund* v. *Schiller* (1878) 4 Cal. 252. The case turned really on s. 39 (see notes thereon, above), and it is not seriously arguable that s. 51 had anything to do with it.

84 *Dina Nath Dutt* v. *Mahavir Gupta* (1958) A. Punj. 289; *F. Ganeshdas* v. *Ram Nath,* 9 Lah. 148.

85 *Imperial Banking and Trading Co.* v. *Atmaram Madhavji* (1865) 2 B.H.C. 246. See also *Parbhudas Pranjivandas* v. *Ramlal Bhagirath* (1866) 3 B.H.C. 69, where "share receipts" with applications for transfer were tendered to the purchaser.

86 *Jivraj Megji* v. *Poulton* (1865) 2 B.H.C. 253.

87 *Imperial Banking and Trading Co.* v. *Pranjivandas Harijivandas* (1865) 2 B.H.C. 258.

88 *Jivraj Megji* v. *Poulton* (1865) 2 B.H.C. 253, 256; *Maganbhai Hemchand* v.*Manchabhai Kallianchand* (1866) 3 B.H.C. 79, 86. See *The Bank of India* v. *Jamsetji Chinoy* (1950) 77 I.A. 76, (1950) Bom. 606, (1950) A.PC. 90.

deliver the shares.[89] Similarly as to goods, it is a still more elementary proposition that a vendor may be ready and willing to deliver without having the goods in his actual custody or possession; it is enough if he has such control of them that he can cause them to be delivered.[90] And where the vendor of goods repudiates the contract on being called upon for delivery it is enough for the purchaser to prove that he was ready and willing to carry out his part of the bargain, and had made preparations with the object of having the money ready in hand to pay for the goods on delivery. This section does not require him to show that he made an actual tender of the money.[91] But a mere demand for delivery of goods without payment or tender is not evidence of the buyer being ready and willing to pay on delivery.[92]

Where the contract between the parties was that the vendee will reconvey the property to the vendor if he paid the purchase price back to the vendee by a specified date, it was held that the contract fell within s. 51 rather than s.55 as it was a contract of reciprocal promises. Therefore the vendor by tendering the price within the specified time had performed his part of the contract and was entitled to a decree of specific performance.[93]

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods.[94]

Inordinate delay on both sides is evidence of the contract being abandoned, and, if that inference is drawn, the contract is enforceable by neither party.[95]

The plaintiff sued for specific performance alleging that he had paid Rs. 1,500/- and was willing to pay the balance. But the Court found the plea of payment of Rs. 1500/- to be untrue and therefore the plaintiff failed on the ground of not being ready and willing to perform his part of the contract, and he was not entitled to get discretionary relief on account of a false plea.[96]

Averment of performance.—According to the Common Law rules of pleading, where a contract consists of reciprocal promises to be simultaneously performed, neither party to the contract can maintain an action without averring a performance, or an offer to perform, on his own part;[97] but the necessity for such specific averment has been abolished in England for more than half a century, and now no averment at all of the performance of conditions precedent is required in the first instance in either England[98] or India. The English rule of practice has been reproduced here in the Code of Civil Procedure, 1908.[99]

Order of performance of reciprocal promises.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

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89 *Dayabhai Dipchand* v. *Maniklal Vrijbhukan* (1871) 8 B.H.C.A.C. 123; *Emil Adolf Zippel* v. *Kapur & Co.*, 1932 A.S. 39; 139 I.C. 114 (purchaser absconding); *Jagannath* v. *Aaron & Co.* (1940) Rang. 593; 191 I.C. 776; 1940 A.R. 284 (purchaser financially embarrassed).

90 *Kanwar Bhan-Sukha Nand* v. *Ganpat Rai-Ram Jiwan* (1926) 94 I.C. 304; 1926 A.L. 318.

91 *Shriram* v. *Madangopal* (1903) 30 Cal. 865. See Indian authorities summed up in *Ganesh Das-Ishar Das* v. *Ram Nath* (1927) 9 Lah. 148, 163-165; 111 I.C. 498; cp. *Kidar Nath Behari Lal* v. *Shimbhu Nath Nandu Mal* (1926) 8 Lah. 198; 99 I.C. 812; 1927 A.L. 176.

92 And the want is not supplied by the fact, if so it was, that the seller was not ready and willing to deliver: *Chengravelu Chetty & Sons* v. *Akarapu Venkanna & Sons* (1924) 49 Mad. L.J. 300; 86 I.C. 299.

93 *Benode Behari Das Gupta* v. *Benoy Bhushan Choudhury* (1973) A. Gau. 66; *R.C. Candiok* v. *Chunilal Sabharwal* (1971) A.SC. 1238; *Nanik Lal* v. *Shankar Lal* (1962) A. Cal. 103 reld. on.

94 *Sooltan Chund* v. *Schiller* (1878) 4 Cal. 255.

95 *Pearl Mill Co.* v. *Ivy Tannery Co.* (1919) 1 K.B. 78.

96 *K. Venkatasubbayya* v. *K. Venkateswarlu* (1971) A. AP. 279; *Subbarayudu* v. *Tatayya* (1937) Mad. W.N. 1158; *Butchiraju* v. *Sri Ranga Satayanarayana* (1967) A.AP. 69; but this was reversed by S.C. in C.A. No. 1076 (N) of 1966 (S.C. reld. on).

97 2 Sm.L.C. 9, 15 (13th ed.).

98 R.S.C., Order XIX, r. 14; 2 Sm.L.C. 16. Under the old rule it was enough to aver substantial readiness and willingness: *Rawson* v. *Johnson* (1801) 1 East. 203; 6 R.R. 252.

99 See Order VI, r. 6.

Illustrations

(a) A and *B* contract that *A* should build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock in trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

This section is founded on the same English authorities as s. 51, and on similar reasons, and does not appear to require any further commentary.[1] The case of *Edridge* v. *R.D. Sethna,*[2] to which reference was made in the commentary on s. 39, is an instance of the order of performance being fixed by the nature of the transaction, and *Kaikhushroo* v. *C.P. Syndicate*[3] is another such instance.

Liability of party preventing event on which the contract is to take effect.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B;* and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

Impossibility created by act of party.—This is in substance the rule not only of the Common Law, but of all civilised law.[4] No man can complain of another's failure to do something which he has himself made impossible. The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. Section 53 is identical with the English law that prevention by one party is constructively tantamount to fulfilment by the other. Such other may seek specific performance or compensation by rescinding, annulling or abandoning the entire contract.[5] Section 53 was held not applicable to a contract with Government where the latter did not agree to supply any article for execution of the contract but merely agreed to assist in obtaining controlled articles necessary for execution.[6] A man agrees to sell standing wood; the seller is to cut and cord it, and the buyer to take it away and pay for it. The seller cords only a very small part of the wood, and neglects to cord the rest; the buyer may determine the contract and recover back any money he has paid on account.

"This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only".[7] A compromise decree provided for *B*'s promise to take *A*'s son in adoption and *A*'s agreeing to leave *B* in possession of property. By marrying off his son *A* made *B*'s performance of the contract impossible of performance. *B* must, therefore, he held to have performed his promise.[8]

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1 Elementary illustration (certain payments to precede grant of a lease): *Anant Bharthi* v. *Sarup Singh* (1928) 26 All.L.J. 492; 115 I.C. 793; 1928 A.A. 360.
2 (1933) 60 I.A. 368; 58 Bom. 101; 36 Bom. L.R. 127; 146 I.C. 739; 1933 A.P.C. 233.
3 (1949) F.C.R. 501, (1950) 52 Bom.L.R. 189, 1950 A.F.C. 8.
4 See the rule applied in *Mackay* v. *Dick* (1881) 6 App. Ca. 251, by the House of Lords on an appeal from Scotland.
5 *Nagayya* v. *Bapamma* (1958) A.A.P. 504; *Roberts* v. *Bury Improvement Commissioners* (1869-70) 5 C.P.C. 310; *Hatham* v. *East India Co.,* 39 E.R. 1295.
6 *Namayya* v. *Union of India* (1958) A.A.P. 533.
7 *Giles* v. *Edwards* (1797) 7 T.R. 181; 4 R.R. 414.
8 *Nagayya* v. *Bapamma* (1958) A.A.P. 504.

In a case of contract of supply of bricks to the Government, the Government stopped taking delivery, the measure of damages in such a case is the difference of the contract price and the market price on the date of the breach. In such a case the plaintiff's suit for damages will fail if he fails to prove the market price.[9]

If the prevention by default goes only to one particular term or condition of the contract, the party so prevented from fulfilling that term or condition is entitled to treat it as fulfilled, and insist on payment or other reciprocal performance accordingly; or if there was an agreed penalty in the contract for non-fulfilment, or an option to rescind the contract, the other party cannot take advantage of it. Especially is this the case with stipulations as to the time of completion. "If the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default".[10]

A railway contractor ordered a steam excavating machine, to be capable of digging a certain quantity of material in a working day, and it was agreed that he was to be bound to accept it only if it performed this on a fair trial at the place where it was to be used. After a partial trial the contractor said the machine had failed, and refused to accept or pay for it. The maker contended that the contractor had himself failed to provide the conditions for a fair trial.

This view of the facts was adopted by the Court and both the Court below and the House of Lords held, as a consequence in law, that the buyer, having by his own fault prevented the application of the test agreed upon, must accept and pay for the machine as if the test had been satisfied. As to the original duty of the buyer to secure the conditions for a fair trial, Lord Blackburn laid down this general rule:

"Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."[11]

Devlin J. has observed in *Mona Oil Equipment Co.* v. *Rhodesia Railways Ltd.*[12] that the prevention must be wrongful, either a breach of contract express or implied, or a wrongful act independent of contract. Thus in *William Cory* v. *City of London Corporation,*[13] where the plaintiff contracted with the corporation on a long term basis to remove refuse by barge, and the corporation subsequently as Port Health Authority passed a new bye-law to come into force in over two years' time requiring all refuse barges to have hatches completely covering the refuse, thereby greatly increasing the plaintiff's expenses the Court of Appeal held that the corporation had not committed any breach of contract, for even if a term not to pass such a bye-law could be implied in the contract it would be *ultra vires* the corporation to fetter itself in the use of statutory powers vested in it for public purposes. Devlin J. has also pointed out that the law can enforce co-operation only to a limited degree, to the extent necessary to make the contract workable.[14]

A Privy Council decision illustrates the circumstances in which a claim to compensation may be sustainable under this section. In *Kleinert* v. *Abosso Gold Mining Co.,*[15] *P* contracted with *D* to remove waste rock lying at a dump at *D*'s mine within two years, provided that there were not more than fifty thousand tons, *D* agreeing to supply a crusher. The crusher supplied by *D* was so inadequate, crushing only three tons per hour, that work had to be stopped. *P* recovered damages for the expense to which he had been put in preparing for the work, and for the loss of profit he would otherwise have made by supplying crushed stone to a third party.

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9 *State of Bihar* v. *P.K. Jain* (1981) A.P. 280, 287; *Jamal* v. *Molla Dawood & Sons Ltd.* 43 I.A. 6; *Bhikraj Jaipuria* v. *Union of India* (1962) ASC 366 reld on; *Binjo Steel Furniture Ltd.* v. *Union of India* (1967) ASC 378 dist.

10 *Roberts* v. *Bury Commissioners* (1869) L.R. 5 C.P. 300, 329; *Holme* v. *Guppy* (1838) 3 M. & W. 387; 49 R.R. 647; see per Parke B. at p. 649.

11 *Mackay* v. *Dick* (1881) 6 App.Ca. 251, 263.

12 (1949) 2 All E.R. 1014, 1016. See also per Lord Wright in *Luxor* v. *Cooper* (1941) A.C. 108, 148.

13 (1951) 2 K.B. 476.

14 At p. 1018.

15 (1913) 58 Sol. Jo. 45, on appeal from the S.C. of the Gold Coast. The decision was based on common law principles as laid down in *Mackay* v. *Dick (supra)*.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

Illustrations

(a) *A* hires *B*'s ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builders' work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within a week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

(*P* owes *N* a sum of money, payable in annual instalments, under a compromise decree. *P* mortgages land to *S* on the terms that *S* shall have possession for a certain term of years and employ the mortgage money, which, in fact, is not paid to *P*, in discharge of the annual instalments. *S* fails to pay the instalments. *P* becomes entitled to redeem his land forthwith: *Sanwaley Prasad* v. *Sheo Sarup* (1926) 2 Luck. 279; 98 I.C. 770; 1927 A.O. 12.)

Default of promisor in first performance.—This section completes the declaration of the principles explained under s. 51. In practice the difficulty is to know whether the promises in the case in hand are or are not "such that one of them cannot to performed," etc. One way in which the test is expressed in English authorities is that, if a plaintiff has himself broken some duty under the contract, and his default is such that it goes to the whole of the consideration for the promise sued upon, it is a bar to his suit, but if it amounts only to a partial failure of that consideration, it is a matter for compensation by a cross-claim for damages.[16]

Where a contract between a shipowner and a charterer was contained in the following words,

"*Hooper, S.* to arrive after completion of two country voyages for London on notice in May or June," and the shipowner gave notice after the vessel had completed one voyage only, and the charterer refused to ship the goods,

it was held, in a suit by the shipowner for damages for breach of the contract, that the defendant was under the circumstances justified in refusing to perform his promise.[17] Garth C.J. put the decision on the ground that the clause "after completion of two country voyages" was used to indicate to the charterer the time when the ship would be ready, and that it was as essential a part of the contract as any other more direct stipulation as to time.[18] Markby J. based his judgment on the fact that this clause constituted a material part of the description of the

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16 See the observations of the Privy Council in *Oxford* v. *Provand* (1868) L.R. 2 P.C. 135, 156. In *Vairavan Chettiar* v. *Kannappa Mudaliar*, 1925 A.M. 1029; 86 I.C. 436; the only question was whether a certain voucher, held to be nothing more, varied the obvious effect of the contract. In *Ghanashyam* v. *Udayanath*, 1949 A. Or. 14, it was pointed out that this section does not apply to an executed contract.

17 *Fleming* v. *Koegler* (1878) 4 Cal. 237.

18 *Ibid*, at p. 247.

vessel, and that the ship offered not having completed two country voyages, but only one such voyage, did not answer the description in the contract.[19] From either point of view the above clause formed a condition precedent to the performance of the contract by the shipowner, and the case would thus seem to fall under this section, though there is no reference to it in the judgments. Where the condition relates to a supposed existing state of facts, as in *Behn* v. *Burness*,[20] it is not so easy to find the most appropriate section of the Act; but the words of s. 18, sub-s. (3), appear sufficient to cover such a case. In *Simson* v. *Virayya*[21]

the defendant agreed to sell to the plaintiffs 5,000 bags of gingelly seed to be delivered within a specified time. Two-thirds of the price was paid in advance, and it was stipulated that the defendant should give notice to the plaintiffs as instalments of 1,000 bags were ready for delivery—and that the plaintiffs should pay the balance of proportionate price on each instalment when ready for delivery. No delivery was made within the stipulated time, and after the expiration of that period the defendant delivered 3,000 bags to the plaintiffs. The plaintiffs did not pay the proportionate price on those bags when ready for delivery, though required by the defendant, and the defendant thereupon rescinded the contract, and declined to deliver the remaining bags.

In a suit for damages by the plaintiffs for non-delivery, the Court held, following *Freeth* v. *Burr*[22] and distinguishing *Withers* v. *Reynolds*,[23] that the contract was an entire one, and that, the payment by the plaintiffs not being a condition precedent to the preparation of the remainder for delivery, the defendant was not justified in rescinding the contract. Unseaworthiness of a ship does not, by itself, give the charterer the right to rescind. *A fortiori* not maintaining the vessel in a thoroughly efficient state cannot by itself entitle the charterer to rescind. In *Hongkong Fir Case*[24]

the plaintiffs, the owners, had chartered their ship to the defendants. The ship had antiquated machinery and incompetent crew. On her voyage to Osaka and at Osaka, several weeks had been lost because of the above reasons and it took considerable period to make the ship seaworthy. The charterers repudiated the charter and the plaintiffs sued for breach of contract and succeeded on the ground that charterers could not repudiate but sue for damages i.e. the plaintiffs were guilty of breach of warranty and not a condition.

But the Court of Appeal did not uphold this dichotomy but upheld the judgment on the conditions of the clauses of the contract. See the commentary on s. 51, above.

Effect of failure to perform at fixed time, in contract in which time is essential.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

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19 *Ib.*, at p. 251. From this point of view the case was like *Behn* v. *Burness* (1863) 3 B. & S. 751; 124 R.R. 794, where the description of a ship in a charter-party as "now in the port of Amsterdam" was held to be "a substantive part of the contract" amounting to a condition.

20 *Supra.*

21 (1886) 9 Mad. 359.

22 L.R. 9 C.P. 208.

23 (1831) 2 B. & Ad. 882; 36 R.R. 782.

24 *Hongkong Fir Shipping Co.* v. *Kawasaki Kissen Kaisha Ltd.* (1961) 2 W.L.R. 716, 726; (1962) 2 Q.B. 26; (1962) 1 All E.R. 474.

Effect of acceptance of performance at time other than that agreed upon.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.[25]

Time—when of essence of contract.—In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction. A sale deed had to be executed within six weeks and it was held that time was not of the essence of the contract as before the sale deed was executed a mortgagee had to be paid off and the names of the vendors had to be mutated. This showed that time was not of the essence of the contract.[26] The second paragraph of s. 55 is English law, and compensation is recoverable, even in the case of sale of land where time was not of the essence, by a purchaser who has suffered damage through the delay of the vendor in delivering possession.[27]

Where the contract itself provides for extension of time, time is not of the essence of the contract for the supply of goods by a contractor to Government. But default by the contractor in such a case, although it does not make the contract voidable, would entitle the Government to claim damages under the second paragraph of S. 55.[28]

Time is of the essence of the contract in the following three cases:

1. Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with.[29]

2. Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house for immediate occupation; the purchase of business land or premises such as a public house as a going concern, the option for the purchase of property; mercantile contracts such as a contract for sale of goods where time for delivery is fixed or for the sale of shares liable to fluctuate in value where the contract stipulated a time of delivery but see Sale of Goods Act 1893 S. 10.[30]

(3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring contract to be performed within reasonable time. What is reasonable time the Court will take into account all the circumstances. Where notice is given fixing reasonable time, time becomes the essence of the contract for both sides including the party giving the notice. But no notice need be given if it is clear that the party in default does not intend to proceed. The inclusion in the contract of an

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25 "This clearly means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time": *Muhammad Habib Ullah* v. *Bird & Co.* (1921) 48 I.A. 175, 179; 63 I.C. 589; 1922 A.P.C. 178. Agreement to postponement of performance for an unspecified time operates as extension for a reasonable time: *ib.* p. 180. The dispute in the courts below had been mainly on the facts. S.C. 43 All. 257. *Rickards* v. *Oppenheim* (1950) 1 K.B. 616.

26 *Goyindlal* v. *C.K. Sharma* (1978) A.A. 446; *Govind Prasad* v. *Hari Dutt* (1972) A.SC 1005.

27 *Phillips* v. *Lamdin* (1949) 2 K.B. 33.

28 *Anand Construction Works* v. *State of Bihar* (1973) A. Cal. 550, 555.

29 Chitty: On Contracts (24th) Ed.) Para 1271 relying on *Hudson* v. *Temple* (1800) 2 Beav 536; *Steedman* v. *Drinkle* (1916) 1 A.C. 275; (1914-15) All E.R. Rep. 298 PC; *Brickles* v. *Snell* (1916) 2 A.C. 599; *Mussen* v. *VanDiemen's Land Co.* (1938) Ch. 253; (1938) 1 All E.R. 210; *Harold Wood Brick Co. Ltd.* v. *Ferris* (1935) 2 K.B. 198; (1935)All E.R. Rep. 603 (C.A.).

30 Chitty on Contracts (24th.Ed.) Para 1271. Treital: Outlines of The Law of Contract (2nd Ed.) 298.

express provision for the service of notice requiring performance within a specified time where the recipient of the notice has failed to complete performance by the due date does not exclude the rights and remedies at law or equity which subsist apart from this notice.[31]

The Privy Council has observed that this section does not lay down any principle, as regards contracts to sell land in India, different from those which obtain under the law of England.[32] Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties, and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language;[33] or it may be shown by the nature of the property or by surrounding circumstances showing the intention of the parties that the contract was to be completed within a limited period;[34] it may be inferred from what passed between the parties before, but not after, the contract is made.[35] The period fixed for completion in the Privy Council case above referred to was two months. Requisitions on title were made by the purchaser and were not complied with by the vendor, who subsequently claimed to be entitled to put an end to the contract, because the purchaser had failed to complete within the stipulated time. The purchaser having brought a suit for specific performance against the vendor, their Lordships held, applying the principles above stated that there was no intention that time should be of the essence of the contract, and the purchaser was entitled to specific performance.[36]

The Supreme Court has held[37] that in the case of sale of immovable property there is a presumption against time being of the essence of the contract. The fixation of period within which the contract has to be performed does not make time of the essence of the contract. The intention to treat time of the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption.

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31 Chitty: On Contract (24th Ed.) Para 1271; Treital: Outline of Law of Contract (2nd Ed.). P. 297; *Re: Stone & Saville's Contract* (1963) 1 W.L.R. 171; (1963) 1 All E.R. 353; *Woods* v. *Mackenzie Hill Ltd.* (1975) 2 All E.R. 170; (1975) 1 W.L.R. 613.

32 *Jamshed* v. *Burjorji* (1916) 43 I.A. 26; 40 Bom. 289; 32 I.C. 246; relied on in *Sachidananda* v. *G.P. & Co.* (1964) A. Or. 269 and *Abdul Hamid* v. *Abbasbhai* (1962) 1 Pak.S.C.R. 86; P.L.D. (1962) 1 S.C. 1 (Pak.) *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868; *Govind Prasad Chaturvedi* v. *Hari Dutt Shastri* (1977) A.SC. 1005, 1008, (1977) 2 S.C.R. 862.

33 *Suryanarayanamurthi* v. *S.* (1925) 48 Mad.L.J. 150; 85 I.C. 521; 1925 A.M. 211, is useless as reported, the terms not being stated. *Kishen Prasad* v. *Kunj Behari Lal* (1925) 24 All.L.J. 210; 91 I.C. 790; 1926 A.A. 278 (terms of compromise decree) is more to the purpose. *Burn & Co. Ltd.* v. *Thakur Sahib of Morvi State* (1925) 30 C.W.N. 145; 90 I.C. 52; 1925 A.P.C. 188, is a decision on a very special contract. *Mohamed Zafar* v. *Hamida Khatoon* (1944) All. 743, 1945 A.A. 70; *Bhalchandra* v. *Mahadeo,* 1947 A.N. 193; *Ram Kalpa* v. *Kasi Nath,* 1950 A.Cal. 582, 54 C.W.N. 690; *Zakir Sadagar* v. *Dolegobind Ghose,* 1955 A.P. 201; *Roberts* v. *Berry* (1853) 3 De G. M. & G. 284, 291.

34 Per Turner L.J. in *Roberts* v. *Berry* (1853) 3 De G.M. & G. 284, 291.

35 *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254, 259; *Madan Mohan* v. *Jwala Parshad* (1950) A.E.P. 278; *Jamshed Irani* v. *Burjorji Dhunjibhai,* 43 I.A. 26; (1940) Bom. 284; (1915) A.PC. 83; *Dominion of India* v. *Bhikraj Jaipuria* (1957) A.P. 586; confd. on another point in (1962) A.SC. 113; *Abdul Hamid* v. *Abbasbhai* (1962) 1 Pak. S.C.R. 86; P.L.D. (1962) 1 S.C. 1 (Pak); referring to *Green* v. *Serin,* 13 Ch.D. 589; *Smith* v. *Hamilton* (1951) 1 Ch.D. 174.

36 *Jamshed* v. *Burjorji, supra* note 46, followed in *Mahadeo* v. *Narain* (1919-20) 24 C.W.N. 330; 57 I.C. 121; *Sadiq Hussain* v. *Anup Singh* (1923) 4 Lah. 327; 76 I.C. 91; 1924 A.L. 151; *Kanshi Ram* v. *Baij Nath* (1926) 98 I.C. 890; *Kalidas Ghosh* v. *Mugneeram Bangur,* 1955 A.Cal. 298; *Arun Prokash* v. *Tulsi Charan,* 1949 A. Cal. 510; *Debendra Nath* v. *Sakhilal* (1950) 55 C.W.N. 320, 1950 A. Cal. 526; *Madan Mohan* v. *Jwala Parshad* 1950 A.E.P. 278; *Kamu* v. *Gonda Ram,* 1947 A.L. 352; *Kumaraswamy* v. *J. Alasius,* 1950 A.T.C. 61; *Sankalchand Kuberdas* v. *Jotiram Ranchhod* (1949) 51 Bom. L.R. 156, 1949 A.B. 193; *Subedar Dubey* v. *Madho Dubey,* 1953 A.A. 529; *Amarnath* v. *Mohan Singh,* 1954 A.M.B. 134.

37 *Govind Prasad Chaturvedi* v. *Hari Dutt Shastri* (1977) A.SC. 1005, 1008; (1977) 2 SCR 862; *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A. SC. 868, 871 folld. - *Joseph Varghese* v. *Annamma* (1971) 1 Ker 494.

Property was agreed to be sold for 17,000/-. The purchaser paid Rs. 12,000/- by instalments and was also in possession of the property. The vendor called upon the purchaser to pay full amount of the price which he failed to do. The vendor then sued for possession and in the alternative for the balance of the price remaining unpaid. Such a suit is competent because the purchaser had failed to perform his part of the contract.[38]

In the case of sale of immovable property, presumption is against time being of the essence of the contract. The mere fact that there is a term of the contract of sale imposing a penalty in case of default does not make time of the essence of the contract.[39]

Whether or not time is of the essence of the contract must depend on the facts and circumstances of each case having regard to the provisions of s. 25, Contract Act. Intention of the parties together with surrounding circumstances must be looked at, The mere fact that the contract mentioned the right of the vendor to forfeit earnest money in case of default in payment of balance of the price and there was no mention of the cancellation of the contract was not accepted by the Court[40] as an argument against time being of the essence of the contract.

In the case of sale of land there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of the Court[41] may infer that it is to be performed in reasonable time if the conditions are:

(1) from the express terms of the contract;
(2) from the nature of the property and
(3) from surrounding circumstances e.g., the object of making the contract.

A contract of sale of immovable property in which one of the terms was that the seller will apply for and obtain permission to sell within 2 months can be specifically enforced even where an application was made and withdrawn by the seller. In such a case the seller can be ordered to make the application if the buyer is ready and willing to perform the contract and time is not of the essence of the contract.[42] A provision that a contract of sale shall be deemed to be cancelled if within 2 months from the date of the contract or within further period agreed to the consent of the Treasurer is not obtained and neither party shall be liable to the other for any damages, was held to be "voidable" in the event of the consent not being obtained by either party.[43] The Australian High Court has held that an agreement which does not provide in terms for any time-limit or for any right of withdrawal by either party continues in force for indefinite period.[44]

Option of repurchase.—An option to repurchase (being an exceptional provision for the seller's benefit) must be exercised strictly within the time limited.[45] The Court of Appeal in a

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38 *Ranchhodas Chhaganlal* v. *Devaji Supdu Dorik* (1977) A.SC. 1517, 1519.

39 *Mangal Ram Namasudra* v. *Premananda Namasudra* (1972) A. Asm. 8, 10; Gomathinayagam Pillai v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A. SC. 868 folld.; *Pakhar Singh* v. *Kishan Singh* (1974) A. Raj. 112, 114.

40 *Trilakyanath Maity* v. *Provabati Santra* (1974) A. Cal. 261, 264. See also *Pakhar Singh* v. *Kishan Singh* (1974) A. Raj. 112, 114; *Andhra Pradesh State Electricity Board* v. *Patel & Patel* (1977) A. AP. 172.

41 *Deep Narayan Sinha* v. *Dinanath Singh* (1981) A.P. 69,73; *G. Pillai* v. *Palani Swami* (1967) A. SC. 568.

42 *Mrs. Chandnee Madden* v. *Dr. C.L. Katyal* (1964) 2 S.C.R. 495 (1964) A.S.C. 978; *Eldee Velvet & Silk Mills (P) Ltd.* v. *Shri Anant Ram Whig* (1971) 2 Del. 244, 268.

43 *Suttor* v. *Gundowa Proprietary Ltd.* (1950) 81 C.L.R. 418, 441-2; see also *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254, 258; *Chandanee Madden* v. *Dr. C.L. Katyal* (1964) A.S.C. 978.

44 *J. Kitchen & Sons Pty. Ltd.* v. *Stewarts Cash & Carry Stores* (1942) 66 C.L.R. 116, 125; *Llanelly Railway & Dock Co.* v. *London & N.W. Ry. Co.* (1875) 7 H.L. 550, 567; refd. to (per Lord Selborne).

45 *Samapuri Chettiar* v. *Sudarasanachariar* (1919) 42 Mad. 802, 1919 A.M. 544; *Maung Wala* v. *Maung Shwe Gon* (1923) 1 Rang. 472; 82 I.C. 610; 1924 A.R. 57; *Balasundara* v. *Muthuvenkatachala,* 1954 A.M. 799; *Phukan Ali* v. *Mt. Sahjadi,* 1954 A. Ass. 54; *Protap Chandra* v. *Kali Charan,* 1952 A. Cal. 32, following *Dibbins* v. *D.* (1896) 2 Ch. 348; *Shriram* v. *Rambilas* (1947) Nag. 127, 228 I.C. 499, 1947 A.N. 208; *Shanmugam Pillai* v. *Annalakshmi,* 1950 A.F.C. 38, (1950) S.C.J. 1; *Krishna Chandra Sharma* v. *Ram Gulam* (1958) A.M.P. 295. In *Shambhulal* v. *Secretary of State,* 1940 A.S. 1; 189 I.C. 785; it was said that the inclusion of clauses providing for extension of time in certain contingencies and for payment of a fine or penalty for each day or week during which the contract remains uncompleted after a specified date is inconsistent with time being of the essence of the contract. This seems too broadly stated. If the "fine" or "penalty" be an agreed measure of compensation for delay then clearly time would not be of the essence, but otherwise, if it be intended to have a coercive effect,

case of sale of shares held that an option to purchase or repurchase must be exercised strictly in accordance with the conditions stipulated.[46]

Re-conveyance.—The concept of reconveyance involves an earlier conveyance by the party in whose favour reconveyance is provided for. If the conveyance merely relates to 3 acres out of a much larger plot and the agreement to sell back was not of the same property but of an equal area of land out of the same large plot, it cannot be termed reconveyance.[47]

Renewal of a lease, option for—Time of essence.—"An option for renewal of a lease or for the purchase or repurchase or property must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse."[48]

The reason is that renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited.[49] At common law stipulations as to time in a contract giving an option for renewal of a lease were considered to be of the essence of the contract even if not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts.[50] Relief will not be given in equity against failure to give notice in time save under special circumstances.[51] Those special circumstances are unavoidable accident, fraud, surprise, ignorance not wilful or inequitable conduct on the part of the lessor precluding him for refusing to give the renewal.[52] Delay due to oversight is not a ground for relief.[53] An agreement to reconvey must be enforced and option exercised within a reasonable time if no time-limit is fixed.[54] Reasonable time for repurchase in the case of a wasting asset like an aircraft is 3 months and a demand to repurchase within five months did not fulfil the obligation of repurchase within a reasonable time.[55] The Calcutta High Court in a recent judgment has held that even where there is a provision in an agreement for reconveyance that in default of payment of purchase price by a particular date, the original vendor will lose his right of getting the reconveyance, the agreement does not make time to be of the essence of the contract. Unfortunately the Supreme Court and other judgments were not brought to the Court's notice and only *Govind Prasad Chaturvedi's case* (1977) A.SC. 1005 which does not directly deal with this point, was quoted.[56]

But in option contracts there is a standing offer which can be accepted at any time being reasonable time except when it lapses by the death of the other party or by his breach by

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the question will depend on the construction to be placed on the terms of the contract taken as a whole. Cf. *Burjorji Shapurji* v. *Madhavlal Jesingbhai* (1934) 58 Bom. 610; 36 Bom. L.R. 798; 152 I.C. 575; 1934 A.B. 370; *Jamshed Irani* v. *Burjorji Dhunjibhai* 43 I.A. 26; (1940) Bom. 289; (1915) A.P.C. 83; *Hare* v. *Nicoll* (1966) 1 All E.R. 285, 289 (a case of Sale of Shares).

46 *Hare* v. *Nicoll* (1966) 1 All E.R. 285 (Case of Sale of Shares).

47 *Joesph Verghese* v. *Annamma* (1971) 1 Ker. 494, 501.

48 Halsbury's *Laws of England,* Vol. 8 (3rd ed.), p. 165, quoted with approval by Danckworts L.J. in *Hare* v. *Nicoll* (1966) 2 Q.B. 130, 145; (1966) 1 All E.R. 285; (1966) 2 W.L.R. 441; and by Bachawat J. in *Caltex (India) Ltd.* v. *Bhagwandevi* (1969) A.SC. 405, 407.

49 *Caltex (India) Ltd.,* v. *Bhagwandevi* (1969) A.SC. 405, 407. *K. Simrathmull* v. *Nanjalingiah Gowder* (1963) A.SC. 1182; (1962) Supp. 3 S.C.R. 476; *Shanmugam Pillai* v. *Annalakshmi Ammal* (1950) A. FC. 38; *Dewan Manmohanlal* v. *Peary Lal* (1972) 2 All. 426; (1973) A.A.16, 18; *Hassan Nurani Malak* v *Mohan Singh* (1974) A.B. 136, 138; *Samarapuri Chettiar* v. *Sutharsana Chettiar,* 42 Mad. 802; *Shriram* v. *Rambilas* (1947) A.N. 802.

50 *Caltex (India) Ltd.* v. *Bhagwandevi* (1969) A.SC. 405, 407; *Jamshed Irani* v. *Burjorji,* 43 I.A. 26; explained. It does not lay down any law different from English law applicable to sale of lands.

51 Halsbury's *Laws of England,* Vol. 23 (3rd Ed.), p. 626; quoted with approval in *Caltex (India) Ltd.* v. *Bhagwandevi* (1969) A.SC. 405, 407.

52 *Caltex (India) Ltd.* v. *Bhagwandevi* (1969) A.SC. 405, 407; *Eaton* v. *Lyon,* 30 E.R. 1223, 1224-5; (1798) 3 Ves. 690, 692-3; *Reid* v. *Blagrave* (1831) 9 L.J.Ch. 245, 248; refd. to.

53 *Caltex (India) Ltd.* v. *Bhagwandevi* (1969) A.SC. 405, 407; *Reid* v. *Blagraye* (1831) 9 L.J. Ch. 245. 248 reld. on.

54 *Alamelu Ammal* v. *Radhakrishna Naidu* (1964) A.M. 304; *Arjuna Mudaliar* v. *Lakshmiammal* (1949) A.M. 265; *Rajammal* v. *Gopalaswami* (1951) A.M. 767; *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* (1968) 1 W.L.R. 74, 81; *Caltex (India) Ltd.* v. *Bhagwan Devi* (1969) A.SC. 405, 408; *Hemanta Kumari Das* v. *Safatulla Biswas,* 37 C.W.N. 9; (1933) A. Cal. 477; *Ramlal Dubey* v. *Secretary of State,* 29, C.L.J. 314; (1918) A. Cal. 59 appd.

55 *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* (1968) 1 W.L.R. 74.

56 *Sambhunath Chakravarty* v. *Smt. Sushma Sinha* (1980) A. Cal. 5,7; *Ardeshir H. Mana* v. *Flora Sassoon* (1928) APC. 208 refd. to.

transferring the property to a third party.[57] It is only then that absence of time-limit becomes relevant. A unilateral contract or obligation like an option in a lease does not bind the promisor unless and until the conditions specified in it whether trivial or substantial have been fulfilled.[58] There was a condition in a contract of supply of goods to the Railway distinguishing between "physical possession" of the Railway Administration and "delivery to Railway as a carrier." And therefore the condition of time as the essence of the contract was held not complied with when the goods were delivered to the Railway for carriage but were delayed due to negligence of the Railway Servants.[59] Express stipulation as to time is a condition precedent even if time is extended by consent. *British Paints (India) Ltd.* v. *Union of India* (1971) A. Cal. 393.

Even in the case of sale of land, time can be made of the essence of the contract by giving a notice to the other side guilty of undue delay to perform the contract in a reasonable time.[60] This can also be done in a contract where the stipulation of time as the essence has been waived.[61] But time cannot be made the essence of the contract by unilateral action.[62] Even if time is of the essence of the contract, there is no breach of contract by the purchaser if the seller has not perfected his title to the goods by the date the contract is to be completed.[63] Where the vendee insisted on vacant possession of the premises sold before he completed his part of the contract although that was not a term of the contract, he is not entitled to specific performance and the question whether time is or is not of the essence of the contract is irrelevant.[64] If in a contract time is of the essence of the contract, it is voidable at the option of the promisee but does not by itself come to an end after the expiry of the period. The termination has to be by proper notice under section 66 of the Contract Act.[65] A contract subsists as long as payments remain to be made and amounts await settlement. There mere fact that payments were not made within a reasonable time after completion does not mean that contracts must be taken to have been broken.[66]

Where the Government gave extension of time to the contractor and defaulted in making running payment, time cannot be held to be of the essence of the contract.[67] Time is not of the essence of the contract where the time for performance was extended thrice and the object of the purchase was not a commercial undertaking.[68]

Where by a compromise agreement in a suit time was made of the essence of the contract and the plaintiff failed to perform the terms of the compromise by the stipulated date e.g. execution and registration of the *kobala* and payment of the relevant amount, the plaintiff will

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57 *Sakalaguna Naidu* v. *Chinna Munisami* (1928) P.C. 174; 51 Mad. 533; *Alamelu Ammal* v. *Radhakrishna* (1964) A.M. 304.

58 *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* (1968) 1 W.L.R. 74, 81; referring to *Weston* v. *Collins* (1865) 2 L.T. 4; *Finch* v. *Underwood* (1878) 2 Ch. D. 310 C.A.; which were followed in *Hare* v. *Nicoll* (1966) 2 Q.B. 130; (1966) 2 W.L.R. 441; (1966) 1 All E.R. 285 (C.A.); and *West Country Cleaners (Falmouth) Ltd.* v. *Saly* (1966) 3 All E.R. 210; (1966) 1 W.L.R. 1485.

59 *Union of India* v. *Gangadhar Mimraj* (1962) A.P. 372.

60 *Mulla Badrud Din* v. *Tufail Ahmad* (1963) A.M.P. 31; *Kuttamba Rao Sastry* v. *Dakshina Murthy* (1960) A.A.P. 178; *Jamshed Irani* v. *Burjorji,* 43 I.A. 26; *Moiud Din Rowther* v. *Chaturbhuja* (1933) A. Mad. 736; *Subbayya* v. *Veerayya* (1957) A.A.P. 307.

61 *Dominion of India* v. *Bhikhraj Jaipuria* (1957) A.P. 586. See *Hartley* v, *Hymans* (1920) 3 K.B. 47,55; (1920) All E.R. Rep. 328 (A case of sale of goods) and *Hare* v. *Nicoll* (1961) 1 All E.R. 285 (Sale of Shares).

62 *Aryan Mining & Trading Corporation* v. *Elias & Co. Ltd* (1959) A.Cal. 472; *Mohan Krishnan* v. *Chimanlal & Co.* (1960) A.M. 452, 454.

63 *Dina Nath* v. *Mahavir* (1958) A. Punj. 289.

64 *Bal Saroop Daulat Ram* v. *Lakhbir Singh* (1964) A. Punj. 875; *Bindesri Prasad* v. *Jairam Gir,* 14 I.A. 173; *Niranjan* v. *Mohammad Yunus* (1932) A.L. 265 reld on.

65 *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254, 258.

66 *Janardhanan* v. *Joseph* (1958) A. Ker. 169; *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.S.C. 236 reld. on.

67 *Mohinder Singh & Co.* v. *Executive Engineer* (1971) A. J & K 130, 135; *Jamshed K. Irani* v. *Burjorji Dhunjibhai* 43 I.A. 26; (1915) A.PC. 83; *Charles Rickards Ltd.* v. *Oppepnheim* (1950) 1 All E.R. 420; (1950); I K.B. 616; *Dominion of India* v. *Ram Rakha Mal & Sons* (1957) A. Punj. 141; *Shambhulal* v. *Secretary of State* (1940) A.S.1. reld. on.

68 *Devendra Basappa Doddannavar* v. *Smt. Sonubai Tuljansa Kosandal* (1971) A. Mys. 217, 220; *Narayanaswami Pillai* v. *Dhanakoti Ammal* (1967) A.M. 220; *Roberts* v. *Berry* (1853) 3 De G M & G 284; *Sriram Cotton Pressing Factory* v.*Narayanaswami* (1965) A.M. 352 appld.

not be allowed to get relief on the ground of equity for having substantially complied with the contract.[69]

There is no place, however, in mercantile contracts for the presumption that time is not of the essence of the contract;[70] indeed the Supreme Court of the United States has laid it down broadly that "in the contracts of merchants time is of the essence".[71] The Supreme Court has held that stipulation as to time is ordinarily of the essence of the contract in mercantile contracts[72] and when this important condition is broken the aggrieved party is entitled to rescind the contract under section 55 of the Contract Act.[73] This is especially so as to shipping contracts. As to the sale of goods, "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract".[74] Generally it is to be observed that in modern business documents men of business are taken to mean exactly what they say. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance".[75] Parties to mercantile contracts, therefore, cannot rely upon the present section to save them from the consequences of unpunctuality. Thus whether the defendant agreed to deliver his elephant to the plaintiff for *khedda* operation (to capture wild elephants) on 1st October, 1910, and the defendant subsequently obtained an extension of the time till the 6th October. but did not deliver the elephant till the 11th October, it was held that the very circumstance that the defendant asked for extension of the time showed that time was intended to be of the essence of the contract, and that the plaintiff was therefore justified in refusing to accept the elephant on the 11th October and was entitled to damages for breach of the contract.[76] Where a contract for the sale of goods provides for delivery to be taken by the buyer within a specified period, and reserves liberty to the seller, if delivery is not taken within the fixed period, to sell the goods on the buyer's account and at his risk, the mere fact that the contract contains a clause that after the expiry of that period the goods shall remain at the buyer's risk will not take the case out of the general rule that in mercantile contracts time is of the essence of the contract.[77] Again, on a sale of goods notoriously subject to rapid fluctuations of market price, the time of delivery is of the essence.[78] Applying this rule it was held that having regard to the nature of the property which consisted of shares of a highly speculative nature and the fact that the transaction was a commercial transaction, time was of the essence of the contract.[79] In a contract for the purchase of shares on payment by a stipulated date, it is presumed in the absence of any contrary indication that the parties impliedly stipulate and mutually intend that time shall be of the essence of the contract.[80] It has been held on this same ground, that the value is likely to fluctuate, that in an agreement to exhibit a cinema picture time is of the essence.[81] In England it has been held that in the case of a sale of a dwelling-

69 *Kartik Chandra Bera* v. *Bhushan Chandra Guria* (1977) A. Cal. 52; *Jadabendra* v. *Monorama Debya.* (1970) A. Cal. 199; *Kandarpa Nag* v. *Banwari Lal Nag* (1921) A. Cal. 356 refd. to.

70 *Reuter* v. *Sala* (1879) 4 C.P.D. 239, 249 per Cotton L.J. "Where both parties are engaged in business and articles are purchased by one party from the other party for business purposes I am clearly of opinion that the transaction falls within the term 'mercantile transaction' ": *Lucknow Automobiles* v. *Replacement Parts Co.,* 1940 A.O. 443; 190 I.C. 554; *Madina Rice Mills* v. *Sampangirmiah,* 1953 A. Mys. 66.

71 *Norrington* v. *Wright* (1885) 115 U.S. 189.

72 *Mahabir Prasad Rungta* v. *Durga Datta* (1961) A.S.C. 990; (1961) 3 S.C.R. 639; *Dominion of India* v. *Bhikraj Jaipuria* (1957) A.Pat. 586; affd. on appeal (1962) 2 S.C.R. 880; (1962) A.S.C. 113 on another point; *Bowes* v. *Shand* (1877) 2 App. Cas. 455, 463; *China Cotton Exporters* v.*Behari Lal Ram Charan* (1961) A.S.C. 1295; (1961) 3 S.C.R. 845.

73 *Mahabir Prashad Rungta* v. *Durga Dutt* (1961) 3 S.C.R. 639, 645;(1961) A.S.C. 990, 992; Anson: *Law of Contract* (22nd Edn.) 436 (24th Edn.) 462.

74 Sale of Goods Act, Act III of 1930. s. 11.

75 Lord Cairns in *Bowes* v. *Shand* (1877) 2 App.Ca. 455, at p. 463.

76 *Bhudar Chandra* v. *Betts* (1915) 22 Cal. L.J. 566; 33 I.C. 347.

77 *Delhi Cloth Mills Co. Ltd.* v. *Kanhia* (1913) Punj. Rec. No. 80, p. 285.

78 *Balaram, & c., Firm* v. *Govinda Chetty* (1925) 49 Mad.L.J. 200; 91 I.C. 257; 1925 A.M. 1232.

79 *Hare* v. *Nicoll* (1966) 1 All E.R. 285, 290; *Roberts* v. *Berry* (1853) 3 De G.M. & G. 284, 291 (Dictum of Turner L.J. appd.) Chitty: On Contracts (24th Ed) para 1271.

80 Per Winn L.J. in *Hare* v. *Nicoll* (1966) 1 All E.R. 285, 294.

81 *Sreedhara* v. *Thanumalayan,* 1953 A.T.C. 90, 94. In England time has been held of the essence for the same reason in a sale of an inn as a going concern: *Lock* v. *Bell* (1931) I Ch. 35, and in the case of a lease of a colliery business: *MacBryde* v. *Weekes* (1856) 22 Beav. 533. See also *supra.*

house for immediate residence, time is of the essence of the contract and a purchaser can rescind if the vendor is out of time,[82] but a bench decision of the East Punjab High Court came to a contrary decision in *Madan Mohan* v. *Jwala Parshad,*[83] but the Court was not referred to the English case. Where a tender for supply of bricks for construction of a road during the season of a year is accepted by and contract entered into with Government then the question for decision in a suit for damages against the Government is not whether the contract is extended for the next season but whether under the contract there is termination of the contract by efflux of time or mutual consent.[84] A contract between a colliery owner and a transport operator to transport coal at Rs. 2/8/- per ton; the payment to be made on the 10th of every month and the colliery owner was to keep the road in proper repair. The non-payment of bill on presentation on the due date or within reasonable time thereafter and non-repair of the road were held to fall within section 55 entitling the transporter to rescind the contract and sue for damages.[85] But a contract between a Railway and a merchant for the supply of foodgrains is not such a contract and time is not of the essence of the contract because of the lack of essential ingredient of mutuality, there being no question of trade or commerce in that transaction.[86] Express stipulation as to time is a condition precedent even if time was extended from time to time. *British Paints (India) Ltd.* v. *Union of India,* (1971) A. Cal. 393.

Either party's rights.—Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being of the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end.[87] the party who serves such a notice will himself be bound by it.[88] Where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned, although no such notice has been given.[89] Also parties may bind themselves to use special diligence in completion, without naming any particular date, for example, by the words "as soon as possible", which were construed in *Hydraulic Engineering Co.* v. *McHaffie*[90] as meaning within a reasonable time, with an undertaking to do the thing in the shortest practicable time. But in *Attwood* v. *Emery,*[91] similar words were interpreted to mean merely "as soon as the seller could" with reference to *his* ability to furnish the article ordered, consistently with the execution of prior orders in hand. The proposition that a reasonable time must be allowed to see whether a prohibition against transfer under a regulation would be maintained, or a permit to transfer would be granted has been applied to contracts which fail to be carried

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82 *Tilley* v. *Thomas* (1867) L.R. 3 Ch.App. 61.

83 1950 A.E.P. 278, 280.

84 *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254.

85 *Mahabir Prasad Rungta* v. *Durga Dutt* (1961) A.S.C. 990; (1961) 3 S.C.R. 639.

86 *Dominion of India* v. *Bhikraj Jaipuria* (1957) A.Pat. 586, affd. on appeal on section 175(3) of Government of India Act. (1962) A.S.C. 113

87 *Stickney* v. *Keeble* (1915) A.C. 386; *Shamjibhai* v. *Hemchand,* 1952 A.N. 220, 234; *Smith* v. *Hamilton* (1951) Ch. 174; *Hanuman Prasad* v. *Nanjappa,* 1949 A.M. 858; *Ramnath Unnissa* v. *Shimoga Co-operative Bank Ltd.,* 1951 A.Mys. 59, 62. Cases of this class do not really come within the present section, as observed in *Burn & Co.* v. *Thakur Shaheb Sree Lukhdirjee* (1923) 28 C.W.N. 104; 83 I.C. 260; affirmed 90 I.C. 52; 1925 A.P.C. 188. On the other hand a party to a contract in which time is of the essence may be entitled to relief against forfeiture of payments already made, on proper terms, although not entitled to specific performance: *Steedman* v. *Drinkle* (1916) A.C. 275 (J.C.); *Muhammad Habib Ullah* v. *Bird & Co.* (1921) 48 I.A. 175; 43 All. 257; 63 I.C. 589; 1922 A.P.C. 178. In *Stockloser* v. *Johnson* (1954) 2 W.L.R. 439, the Court of Appeal held that the plaintiff must satisfy the Court that it was unconscionable for the defendant to retain the money, and Romer L.J., held that the plaintiff must also show that he is ready and willing to complete if the defendant were prepared to waive the breach, but the other two learned judges, Denning and Somervell L.JJ., did not regard this as essential. In *Chiranji Lal* v. *Jisuk Ram,* 1953 A.Or. 105, the Court was prepared to give equitable relief against forfeiture, but did not discuss any of the principles upon which the remedy is based.

88 See the unusual case of *Finkielraut* v. *Monohan* (1949) 2 All E.R. 234, where the vendor, suspecting that the purchaser would not be ready, served a notice making time of the essence, but it was the vendor himself who was not ready, and the purchaser obtained rescission and return of his deposit.

89 *Pearl Mill Co.* v. *Ivy Tannery Co.* (1919) 1 K.B. 78; *Alakhram* v. *Kulwantin Bai* (1950) Nag. 386, 1950 A.N. 238. All the circumstances must, of course, be considered.

90 (1878) 4 Q.B.D. 670, 673; see *Teju Kaya & Co.* v. *Gangji Nensey & Co.* (1933) 57 Bom. 292; 34 Bom.L.R. 1629; 142 I.C. 381; 1933 A.B. 71.

91 (1856) I.C.B. (N.S.) 110.

out within a reasonable time.[92]

The section applies to all cases of reciprocal promises, including contracts for the sale of goods whether the property in the goods sold has or has not passed to the purchaser. Thus in a Calcutta case[93] where time was of the essence of the contract, and the vendor rescinded the contract, it was contended for the buyer that, the property in the goods sold having passed to him, this section did not apply, and the vendor was not entitled to put an end to the contract, but that his only remedy was to resell the goods under s. 107 (s. 54 of Sale of Goods Act, 1930). It was held that s. 107 declared only one of the remedies which the vendor had on breach of the contract by the purchaser, and that the vendor was entitled to the benefit of s. 55.

It would seem that the provisions of this section apply to consent decrees.[94] In a compromise decree, a provision that if the conditions regarding filling of the draft sale deed is not fulfilled, the suit shall stand dismissed would make the term essential and time cannot be extended.[95]

Auction Sale.—In an auction sale of property the condition as to payment of deposit and of the balance of the purchase price within a specified time are essential conditions and the time was of the essence of the contract.[96]

Other principles affecting the time fixed for performance.—The time fixed for performance may be postponed by waiver or subsequent variation of the agreement. If before the time fixed for performance, the party obliged to perform renounces his obligation or puts it out of his power to perform, the other party may at his option treat it as anticipatory breach without waiting for the time of the performance;[97] but in a contract of payment by instalments time may continue to be the essence of the contract despite a waiver of strict compliance with a fixed date for payment of earlier instalments.[98]

Where sleepers were required for a two million tons project the programme for which depended on timely supply of sleepers, the Court[99] held that in view of documentary evidence showing that fact, time was of the essence of the contract.

Waiver.—If the seller has repudiated the contract and after filling a criminal complaint by the buyer, he accepts from the seller any portion of the goods agreed to be sold to him, then he must be held to have waived his right to damages for late delivery.[1] Where a party waives his right by taking benefit under a contract after the time fixed under the contract has elapsed or after a condition stipulated has not been fulfilled he cannot rely on time being of the essence of the contract or the condition being the "root of the matter", in order to avoid a contract.[2] A clause in an insurance policy that no provision or requirement of the policy shall be deemed to be waived unless it was expressly stated in writing to be waived by the insurer was held not applicable to a case where after a fire in the premises the insured did not put in a claim within 15 days of the happening of the loss as required by a clause of the policy and relied on estoppel based on the ground that the insurer took possession of the premises soon after the fire and remained in possession for 4 months and called upon the insured to furnish information as to the claim in accordance with other terms of the policy. On appeal to the Privy Council the judgment was affirmed on the ground of estoppel by conduct.[3] If the

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92 *Andrew Millar & Co. Ltd.* v. *Taylor & Co.* (1916) 1 K.B. 402.
93 *Buldeo Doss* v. *Howe* (1880) 6 Cal. 64.
94 See *Bhagwat Gopal* v. *Appaji* (1916) 18 Bom.L.R. 803; *Parbhu Ram* v. *Jhalo Kuer* (1917) 2 Pat.L.J. 520, 522; 42 I.C. 408; *Shanker Gakhaum* v. *Ratanji Premji* (1923) 47 Bom. 607; 79 I.C. 226; 1923 A.B. 441; *Burjorji Shapurji* v. *Madhavlal Jesingbhai* (1934) 58 Bom. 610; 36 Bom.L.R. 798; 152 I.C. 575; 1934 A.B. 370; *Beni Sah* v. *Sew Sah,* 1949 A.Cal. 661.
95 *Rayadurai* v. *Muthuswami* (1962) A.M. 489.
96 *Duraikannoo* v. *Saravana Chettiar* (1963) A.M. 468; *Moiud Din Rowther* v. *Chaturbhuja* (1933) A.M. 736.
97 Chitty: On Contracts (24th Ed.) Para 1273.
98 *Tropical Traders Ltd.* v. *Goonan* (1964) 111 CLR 41, 52-55. See *Bird* v. *Hildage* (1948) 1 K.B. 91, 94-96; (1947) 2 All. E.R. 7; *Barclay* v. *Messenger* (1874) 43 L.J. Ch. 449, 456.
99 *Tata Iron & Steel Co. Ltd.* v. *Ramlal Kandoi* (1971) 2 Cal. 493, 501.
1 *Chalisgaon Lakshminarayan Mills Ltd.* v. *Amrit Lal Kanji* (1964) A.B. 76, 81.
2 *Vishram Arjun* v. *Shankariah* (1957) A.A.P. 784.
3 *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1920) 28 C.L.R. 305; on appeal (1922) 2 A.C. 541; (1922) 31 C.L.R. 27, 38 (P.C.).

primary obligation under a contract is secured by a secondary covenant to pay a penalty or liquidated damages, the obligor obtains no option of breaking his obligation upon payment of the penalty.[4]

Whether time is of the essence of the contract has to be gathered from the intention of the parties. Where the contract for extension of time in certain contingencies provides penalty or for fine per day or per week during which the work remains unfinished, such a clause would render the clause of essence of time ineffective. Rescission of such a contract without fixing a further period making time of the essence of the contract by a State Government would be illegal and security deposit could not be forfeited.[5]

Unilateral extension of time.—The promisee cannot unilaterally extend the time for performance of the contract to get advantage of a favourable market. S. 63 has no application to this i.e., promisee extending the time unilaterally for his benefit. He can sue for the breach by the promisor but not claim aggravated damages resulting from extension, caused by the promisees' action or inaction subsequent to the breach.[6]

A vendor has no right to make time of the essence of the contract unless the following two conditions are satisfied:

(i) the vendor must be able to, ready and willing to proceed to completion; and

(ii) when the vendor purports to make time of the essence of the contract, the purchaser must be guilty of such default as to entitle the vendor to rescind the contract subject to it being done by a reasonable notice.[7]

Time of essence of contract in contracts of labour and work.—The rule of *Hartley* v. *Hymans*[8] that a party can give a reasonable notice in the case of sale of goods and make time the essence of the contract, where he has waived his right as to time under the contract applies to contracts of work and labour.[9]

Even where a contract for works provided that time shall be of the essence of the contract, such a stipulation will have to be read alongwith other provisions. For instance if the contract contains provision for extension of time in certain circumstances or provides for the payment of fine for each day or week of delay, such clauses will be construed as rendering ineffective the clause as to time being of the essence of the contract.[10]

Bricks, agreed to be supplied at a stipulated time were not so supplied but the promisee accepted them without notice to the supplier at the time of taking delivery demanding compensation. This will make the promisee suit for damages unmaintainable.[11]

"The contract becomes voidable at the option of the promisee."—*A* agrees to sell and deliver 6 candies of cotton to *B* on 12th July, 1909. *A* fails to deliver the goods on 12th July. On 4th September, 1909, *B* writes to *A* stating that if *A* failed to deliver the cotton within a week, he will claim damages according to the market rate at the date of the letter. *A* takes no notice of this letter. On 3rd October, 1909, *B* writes another letter to *A* stating that as *A* had failed to deliver the goods, he would claim damages on the footing of the market rate at the date of the second letter. *B* is not entitled to damages on that footing, but to the difference between the contract rate and the market rate on 12th July, 1909, the latter being the date of the breach. The present section does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. It is immaterial that no notice

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4 *Mulluck Chand* v. *Surendra Nath* (1957) A. Cal. 217; Halsbury's *Laws of England* Vol. XI (3rd Edn.), p. 458, para 731.

5 *Hind Construction Contractors* v. *State of Maharashtra* (1979) A.SC. 720; (1979) 2 S.C.R. 1147; *Lamprell* v.*Billericay Union* (1849) 3 Ex.283, 308; *Webb* v. *Hughes* (1870) 10 Eq. 281; *Charles Rickards* v. *Oppenhaim* (1950) 1 K.B. 616 quoted.

6 *Sundreswaran* v. *Sri Krishna Refineries* (1977) A.M.109, 114. *Muthayamanigaran* v. *Lakku Reddiar*, 22 Mad. L.J. 412 folld.

7 *Re: Barr's Contract: Moorwell Holdings Ltd.* v. *Barr* (1956) Ch. 551, 556: (1956) 2 All E.R. 853, 856; *Green* v. *Sevin* (1879) 13 Ch.D. 539 appld.; *Smith* v. *Hamilton* (1950) 2 All E.R. 928, 933 considered.

8 (1920) 3 K.B. 47, 55; (1920) All E.R. Rep. 328.

9 *Charles Rickards Ltd.* v. *Oppenheim* (1950) 1 K.B. 616, 624.

10 *Hind Construction Contractors* v. *State of Maharashtra,* (1979) A.SC. 720, 724; (1979) 2 S.C.R. 1147; *Lamprell* v. *Billericay* (1849) 3 Exch. 283; 308; *Webb* v. *Hughes* (1870) 10 Eq.281; *Charles Rickards Ltd.* v. *Oppenhaim* (1950) I K.B. 616; appld. (1950) 1 All E.R. 420 applied.

11 *Orissa Cement Ltd.* v. *India Fire Bricks & Insulation Co. Ltd.* (1972) Cut. 1111, 1136.

was given by *A* to *B* that the contract was at an end.[12] The parties can elect to extend the time for performance even where the time stipulated has expired and if the goods are not delivered the buyer can claim damages as on the extended date but there can be no extension unilaterally and no damages on the basis of extended time can be claimed.[13]

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.[14]

Illustrations

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage. *A* goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

Impossibility in general.—Nothing resembling this section has been found among the materials known to have been used by the framers of the Act. It varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions which English and American Courts have of late more and more tended to regard as matters of construction depending on the true intention of the parties.[15] It is not permissible to import the principles of English law *dehors* the statutory provisions, English cases have a persuasive value and are only helpful in showing how the English Courts have decided cases under similar circumstances.[16]

With regard to the first paragraph, the result is the same as in England. In the Common Law we may say that parties who purport to agree for the doing of something obviously impossible must be deemed not to be serious, or not to understand what they are doing; also (but

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12 *Mutthaya Maniagaran* v. *Lekku* (1914) 37 Mad. 412; 14 I.C. 255; *Anandran Mangturam* v. *Bholaram Tanumal* (1946) Bom. 218; *Paper Sales Ltd.* v. *Chokhani*, 1946 A.B. 429.

13 *Aryan Mining & Trading Corporation* v. *B.N. Elias & Co. Ltd.* (1959) A. Cal. 472; *Mohammad Hamidullah* v. *Bird & Co.*, 48 I.A. 175; (1922) A.P.C. 178.

14 This section was elaborately discussed in *Hussainbhoy Karimji* v. *Haridas* (1927) 105 I.C. 319; 1928 A.S. 21, with comparison of English authorities on frustration. The case itself was simple: contract for delivery by ship within limited time, shipping not procurable by reason of war requisition. For an illustration of a foreseeable circumstance see *Surpat Singh* v. *Sheo Prasad* (1945) 24 Pat. 197, 1945 A.P. 300; *Pragdas Mathuradas* v. *Jeewanlal* (1949) 51 Bom.L.R. 178, 1948 A.P.C. 217.

15 That the question is in English law at bottom a question of construction has been reaffirmed by Lord Simon in *British Movietonews, Limited* v. *London and District Cinemas, Limited* (1952) A.C. 166, 184-6.

16 *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310, 319; (1954) A.SC. 44, 49; *Raja Dhruv Dev Chand* v. *Raja Harmohindar Singh* (1968) A.SC. 1024. Contra *Parshottam Das* v. *Batala Municipal Committee* (1949) A.E.P. 301, 304 (holding s. 56 not exhaustive) overruled. Contra *Ramanand* v. *Gokal Chand*, 1951 A.Simla 189, 201 per Kapur J. (no longer good law as to exhaustiveness of s. 56). See also *P. D. Mehra & Sons* v. *Ram Chand Om Prakash* (1952) A.Punj. 34, 37 (per G. D. Khosla J.).

less aptly) that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration. "Impossible in itself" seems to mean impossible in the nature of things.[17] Illustration (a) raises a curious little question. If *A* agrees with *B* to discover by magic a treasure supposed to be buried within certain limits at a spot not exactly known, and, after performing magic rites, does by good fortune discover the treasure, and *A* and *B* both believe that the magic was efficacious, can *A* recover any reward from *B*, and if so, under the agreement by rejecting the specification of means to be employed as immaterial, or under s. 70 of the Act, or how otherwise? The case of performance being, at the date of the agreement, impossible by reason of the non-existence of the subject-matter of contract has been dealt with under the head of Mistake (s. 20, above).

The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words; there are conditions which may be implied from the nature of the transaction; and in certain cases where an event making performance impossible "is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made"[18] performance or further performance of the promise as the case may be, is excused. On this principle a promise is discharged if, without the promisor's fault,[19] (1) performance is rendered impossible by law;[20] (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced,[21] or an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible;[22] (3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure.[23]

In the last-named class of cases a disabled promisor must give the best practicable notice to the promisee, and the promisee has the reciprocal right of rescinding the contract if it is a continuing contract and the disability makes it as a whole impossible of performance, though some part might afterwards be performed; this, on the ground not of breach of contract, which there has not been, but that the consideration has failed. In such a case the promisor cannot show that he was ready and willing to perform his promise.[24] These rules have no bearing on cases where the parties have contemplated and provided for the contingency. In such cases the Court has only to construe the terms of their agreement.[25]

The Supreme Court has in *Satyabrata Ghose case* interpreted this section. There

17 In earlier editions of Sir W. Anson's book, a promise to go to Rome in a day is given as an example of an impossible promise; in later editions the example is a promise to go round the world in a day; but future editions may have to go further still. Now after man's lunar expeditions it will be difficult to say what is impossible.

18 *Baily* v. *De Crespigny* (1869) L.R. 4 Q.B. at p. 185; *Reilly* v. *The King* (1924) A.C. 176. Contrast *Maritime National Fish, Ld.* v. *Ocean Trawlers Ld.* (1934) A.C. 524.

19 See *infra*.

20 *Ibid.*

21 *Taylor* v. *Caldwell* (1863) 3 B. & S. 826; 129 R.R. 573; *Howell* v. *Coupland* (1876) 1 Q.B.D. 258; *Kimjilal Manohardas* v. *Durgaprasad Debiprosad* (1919-20) 24 C.W.N. 703; 58 I.C. 761. In *Narasu* v. *P.S.V. Iyer* (1953) Mad. 381, 1953 A.M. 300, *D*, a cinema owner, agreed to exhibit a film produced by *P*, as long as the weekly net collections did not fall below a certain figure. After a few weeks, part of the rear wall of the cinema collapsed following heavy rain, and the police authorities condemned the building. *D* pleaded s. 56 with success.

22 *Krell* v. *Henry* (1903) 2 K.B. 740, C.A. But failure of a condition which the parties did not know of, and therefore cannot have regarded as material, will not discharge the contract: *Blackburn Bobbin Co.* v. *T. W. Allen & Sons* (1918) 2 K.B. 467, C.A. On the English view of the whole matter see the rewritten chapter on "Conditions, and herein of Frustration" (ch.7) in Pollock on *Contract*, 13th ed., which merits the close attention of all students of law. The word "impossible" is to be construed in its practical and not its literal sense: the illustrations are not happy: *Satyabrata* v. *Mugneeram*, 1954 A.S.C. 44, 46, 48. To the same effect is *P. D. Mehra & Sons* v. *Ram Chand Om Prakash*, 1952 A.Punj. 34, 37 (F.B.), though the Supreme Court is unwilling to concede as much weight to English decisions on impossibility as is the Punjab Full Bench.

23 *Robinson* v. *Davison* (1871) L.R. 6 Ex. 269.

24 *Poussard* v. *Spiers & Pond* (1876) 1. Q.B.D. 410.

25 *Elliott* v. *Crutchley* (1904) 1 K.B. 565, C.A., affirmed in H.L. (1906) A.C. 7.

Mukherjea J. enunciated the doctrine as contained in section 56 thus:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do."[26]

As the theories of the doctrine of frustration which the English courts have evolved have been noticed and discussed by the Supreme Court, though section 56 has to the extent that it goes, been held to be exhaustive and importability of English law *dehors* the statutory provisions not permissible, the various theories and their criticism may gainfully be discussed here.

Difference between.—The main distinguishing feature between sections 32 & 56 is this that under s. 32 a contract is dissolved under its own force and s. 56 applies when the contract becomes impossible of performance and crumbles down due to an outside force.[27]

Doctrine of Frustration—English law.—Common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible.[28] English courts have evolved various theories to soften the rigours of the rule and the doctrine of absoluteness has been abandoned[29] and for that purpose they have tried to formulate the true basis of discharge of contract when its performance is made impossible by intervening causes over which the parties have no control.[30] The High Court of Australia has held that an undertaking, absolute in form, should be construed according to its words and not as being subject to any general principle, that it is to be limited by an express condition, relating to events, which may unexpectedly happen in future.[31]

The first modification of this absoluteness was in cases of supervening illegality.

A charterparty regarding a British ship was frustrated by the outbreak of war between Britain and a foreign country where the cargo was to be loaded.[32]

The second modification was made in cases of supervening physical impossibility, e.g.

where a music hall hired for 4 days was burnt down.[33]

The third modification was made where the commercial object was frustrated,

a room in Pall Mall was let for viewing the King's coronation but the procession was postponed because of King's illness.[34]

Sanctity of contracts.—Observations of Denning L.J. in *British Movietonews case*[35] that sanctity is not now attached to contracts which was previously attached were not accepted by

26 *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 317-18; (1954) A.S.C. 44, 46. See also *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.S.C. 9, 11, *Ahmad Khan* v. *Shahanshah Jahan Begum* (1973) A.A. 529, 531.

27 *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.* 76 Cal. W.N. 528, 541, 544; *Satyabrata Ghose* v. *Mugnee Ram Bangar* (1954) A.SC. 44,48 reld. on.

28 *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 525; *Raja Dhruv Dev Chand* v. *Raja Harmohindar Singh* (1968) A.SC. 1024; *Paradine* v. *Jane* (1647) Aleyn 26 (Case of tenant dispossessed by King's enemies).

29 Chitty: On Contracts (24th Ed.), paras 1401-1403; Treitel: *The Law of Contract* (5th Ed.), p. 649 (2nd Ed.) p. 604.

30 *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 525.

31 *Scanlans New Neons Ltd.* v. *Toopheys Ltd.* (1942-3) 63 C.L.R. 169, 198 (per Latham C.J.).

32 *Atkinson* v. *Ritchie* (1809) East 530; Cf. *The Teutonia* (1871) 3 A. & E. 39.

33 *Taylor* v. *Caldwell* (1863) 3 B. & S. 826; Cf. *The Teutonia* (1871) 3 A. & E. 394; see also under Indian Law, *infra*.

34 *Krell* v. *Henry* (1903) 2 K.B. 740; (1900-3) All E.R.Rep. 20.

35 *British Movietonews Ltd.* v. *London & Distt, Cinemas Ltd.*, (1951) 1 K.B. 190, 201; (1950) 2 All E.R.

the House of Lords on appeal. Viscount Simonds said:[36]

"... It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has been or need be any change in the well-known principles of construction(except so far as the recent Act of 1943 provides) in the application of the law of frustration to commercial agreements and if indeed as Denning L.J. appears to suggest such cases as Lee's, Reed's and Bennet's illustrate such a change they would be regarded as of doubtful authority."

Licence—Sanctity of contract and freedom of speech.—The national Front a political body hired a Council Hall for holding a conference for which they paid a hire of £ 6000. Later the council on a change in its political constitution by Labour Party replacing Conservative Party repudiated the contract of lending the hall and the National Front sued for specific performance which was granted and the Court of Appeal confirmed the order on the ground of "that specific performance could be granted for a contract of short duration having regard to the fact that the court must defend any interest in land, estate or a licence, by injunction or specific performance, it was appropriate so to do." Further the court should in an appropriate case order specific performance where a licence had been wrongfully repudiated and Sanctity of contract and freedom of speech were relevant matters to be taken into consideration.[37]

Frustration—controversy as to juridical basis.—In English law there is a controversy about the juridical basis of the doctrine of frustration: (i) it rests on an implied term of the contract that the parties will not be bound if a certain event happens or does not happen; or (ii) it rests not on an implied term of the contract between the parties, but on the impact of the law on the situation in which an unexpected event would make it unjust to hold parties to their bargain[38] (per Viscount Simonds). Doctrine of frustration is difficult to state. Lord Sumner[39] described the terms used in different cases which were summarised in *Scanlan's case*[40] by Latham C.J. under nine heads. These may be summed up in three categories suggested by Mr. A.D. (now Lord) McNair,[41] which were adopted in Australia in *Scanlan's case,*[42] (1) what is just and reasonable or fair and just;[43] (2) disappearance of the basis or foundation of contract;[44] and (3) implied term.[45] To this may be added Lord Wright's construction theory in *Denny Mott's case*[46] Lord Porter in this case[47] mentioned three grounds of frustration thus: "whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown...." The Supreme Court in India has referred to these theories in *Naihati Jute Mills Ltd.* v. *Khyaliram*[48] and *Satyabrata Ghose* v. *Mugneeram Bangur Bangur & Co.*[49] as

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390, 396; relying on *John Lee & Son* v. *Railway Executive* (1949) 2 All E.R. 581; *Dennis Reed Ltd.* v. *Goody* (1950) I All E.R. 919; *Bennet Walden & Co.* v. *Wood* (1950) 2 All E.R. 134; *British Movietonews Ltd.* refd. to in *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110, 116.

36 1952 A.C. 166; referred to in *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 807; (1960) A.SC. 589, 594; Sir *Lindsay Parkinson & Co. Ltd.* v. *Commissioner of Work* (1949) 2 K.B. 632 held did not help the construction of Denning L.J.

37 *Verall* v. *Great Yarmouth Borough Council* (1980) 1 All E.R. 839, 843; *Glasher* v. *Woolgar & Roberts* (1891) 41 Sol. Jo. 573; *Booker* v. *Palmer* (1942) 2 All E.R. at p. 677. disappd.

38 Davis Contractors Ltd. v. *Fareham Urban Distt. Council* (1956) A.C. 696; (1956) 2 All E.R. 145, 150; (1956) 3 W.L.R. 37, 49; *Bush* v. *Whitehaven Port & Town Trustees,* 2 Hudson's *Building Contracts* (4th Ed.), 122 overruled.

39 *Bank Line Ltd.* v. *Arthur Capel & Co.* (1919) A.C. 435, 457-8.

40 *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (1943) 67 C.L.R. 169, 186.

41 Frustration of Contract by War in Law, 56 L.Q.R. 173-182.

42 *Scanlan's New Neon Ltd.* v. *Toohey's Ltd.* (1943) 67 C.L.R. 169, 187.

43 Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.* (1919) A.C. 435; (1918-19) All E.R. Rep. 504.

44 Lord Haldane in *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397, 403-4: (1916-17) All E.R. Rep. 104.

45 By Lord Loreburn in *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co. Ltd,* (1916) 2 A.C. 397, 404; (1916-17) All E.R. Rep. 104.

46 *Denny Mott & Dickson* v. *James B. Fraser & Co. Ltd.* (1944) A.C. 265; (1944) I All E.R. 678; refd. to in *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110, 116.

47 *Ibid,* 281; refd. to in *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110, 116; *Davis Contractors* v. *Fareham Urban Distt. Council,* 1956 A.C 696, 719 (Lord Reid).

48 (1968) A.SC. 522, 525.

49 (1954) S.C.R. 310; (1954) A.SC. 44 on appeal from (1951) A.Cal. 332.

(i) Implied term[50] (per Lord Loreburn);
(ii) Disappearance of the substratum of the contract;[51]
(iii) What is just and reasonable.[52]

(1) Frustration—Just and reasonable.—Lord Wright's theory that the Courts simply determine what is fair and just, i.e. the Court exercises its power "in order to achieve a result which is just and reasonable"[53] or one which justice demands[54] introduces an element of uncertainty and has not received the imprint of binding authority.[55] This view really abandons the theory of implied term and simply states that it is the law that in particular circumstances the contract shall come to an end. The description of circumstances is not stated except in so far as the termination of the contract is believed by the Court to be a "fair and just" result in all the circumstances of the case,[56] i.e. in the absence of express intentions of the parties the Court determines what is just.[57] This theory is indistinguishable from the view expressed by Lord Atkinson in *Metropolitan Water Board* v. *Dick Kerr & Co. Ltd.*[58] that in some circumstances it would be unreasonable to require the parties to go on with the adventure. It is associated with the implied term that reasonable men could not be supposed to intend the contract to be binding on them under unreasonable conditions.[59]

Denning L.J. in *British Movietonews Ltd.* v. *London & Distt. Cinemas Ltd.*[60] said that the court really exercises a qualifying power in order to do what is "just and reasonable" in the new situation. It has an absolving power. But the House of Lords on appeal disapproved of the way the law was stated by Denning L.J. Said Viscount Simon.[61]

"The principle remains the same. Particular application of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists. In any view it is a question of construction as Lord Wright pointed out in *Constantine's case*[62] and as has been repeatedly asserted by other masters of law"

In *Alopi Prasad* v. *Union of India*[63] the Supreme Court was of the opinion that when it is said that in such circumstances the Court reaches a conclusion which is 'just and reasonable' as in *Joseph Constantine Steamship Line* v. *Imperial Smelting Corporation*[64] or one which

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50 *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 A.C. 397.
51 *Russkoe* v. *John Stirk & Son Ltd.* (1922) 10 LI.LR. 214, 217; quoted in Anson: *Law of Contract* (22nd Ed.), p. 466 and adopted by Goddard J. in *J. Tatem Ltd.* v. *Gamboa* (1939) K.B. 132; (1938) 3 All E.R. 135.
52 *British Movietonews Ltd.* v. *London Cinemas Ltd.* (1951) 1 K.B. 190 not appd. by H.L. on app. (1952) A.C. 166; but see *Davis Contractors Ltd.* v. *Fareham U.D.C.* (1956) A.C. 696; (1956) 2 All E.R. 145.
53 *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154 at p. 186; Legal Essays and Addresses (Lord Wright), p. 258; *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 188; *The Eugenia* (1964) I Q.B. 226; (1964) 2 W.L.R. 114, 121. (It will not be just in the new situation to hold the parties bound in its new terms): Denning L.J. in *British Movietonews Ltd.* v. *London Cinemas Ltd.* (1951) I K.B. 190 but not accepted on app. (1952) A.C. 166; refd. to in *Naihati Jute Mills* v. *Khiyaliram* (1968) A.S.C. 522, 526; *Ram Kumar* v. *P.C. Roy & Co.* (1952) A.Cal. 397, 402; *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, (1954) A.S.C. 44.
54 *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* (1926) A.C. 497, 510; see 56 L.Q.R. 180.
55 *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 188 (Latham C.J.).
56 *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 187; *The Eugenia* (1964) 2 W.L.R. 114, 121; (1964) 2 Q.B. 226. (It would not be just in the new situation to hold the parties bound in its new terms.)
57 56 L.Q.R. 180.
58 1918 A.C. 119 at p. 131; (1916-17) All E.R. Rep. 122.
59 *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 187, 195, 201; but see p. 188; *Heimann* v. *Commonwealth of Australia* (1938) 38 S.R. (N.S.W.) at p. 695 (per Jordan C.J.); *Bell* v. *Lever Bros.*(1932) A.C. 161, 226; (1931) All E.R. Rep. 1.
60 (1951) 1 K.B. 190 (a case of supply of news reels to Cinemas held not to be frustrated by the war coming to an end—uncontemplated turn of events).
61 (1952) A.C.166, 184, quoted in *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36; and in *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 322; (1954) A.SC. 44.
62 *Joesph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154; (1941) 2 All E.R. 165. Observations of Denning L.J. were not adopted by the Supreme Court in *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 807; (1960) A.SC. 589, 594 (Shah J.).
63 (1960) 2 S.C.R. 793, 806; (1960) A.SC. 588, 594.
64 1942 A.C. 154, 186; (1941) 2 All E.R. 166 (Lord Wright).

justice demands as per Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.*[65] the result is arrived at by putting a just construction upon the contract in accordance with an implication.... from the 'presumed common intention of the parties'.[66]

In *The Eugenia*[67] the doctrine of frustration was stated thus:

> if it should happen, in the course of carrying out a contract that a fundamentally different situation arises for which the parties have made no provision—so much so that it would not be just in the new situation to hold them bound in its terms—then the contract is at an end. The theory of implied term is now discarded.

In this case although both sides realised that there was a risk of the closure of the Suez Canal yet no provision was made in the charterparty. Then one has to see how different the situation is. Merely more onerous or more expensive for one party than he thought is not sufficient. It must be positively unjust to hold the parties bound. The courts have to draw the line as a matter of law.[68]

(2) Disappearance of the basis of the contract or the foundation is gone.—The doctrine of frustration has also been based upon a theory of the disappearance of the "basis or the foundation of the contract". This theory like all other theories except in the cases which are founded upon the physical impossibility of performing a term of the contract as in *Taylor* v. *Caldwell*[69] present in acute form the conflict between *pacta sunt servanda* and *non haec in foedera veni.*

Frustration—Destruction of the basis.—The theory of the disappearance or destruction of the basis of a contract "goes back through *Nicoll & Knight* v. *Ashton Edridge & Co.*[70] to *Taylor* v. *Caldwell*".[71] It reached its full development in *Krell* v. *Henry*[72] to which many of the subsequent frustration cases may, more or less clearly, be traced. The decision in *Krell* v. *Henry*[72] has perhaps aroused as much difference of legal opinion as any decision given by English Courts during this century.[73] Krell's case[72] was a case of frustration of commercial object.

Foundation of the Contract Theory.—This theory was stated by Lord Haldane in *Tamplin case.*[74]

In *W.J. Tatem Ltd.* v. *Gamboa,*[75] Goddard J. regarded the foundation theory as the surest ground on which to rest the doctrine of frustration. He stated it thus,

> that the foundation of the contract has gone by destruction of the subject-matter or by reason of long interruption or delay so that the performance is in effect that of a different contract.

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65 (1926) A.C. 497, 510; (1926) All E.R. Rep. 51 (P.C).

66 Speech of Lord Simon in *British Movietonews Ltd.* v. *London & District Cinemas Ltd.* (1952) A.C. 166, 185, 186; (1951) 2 All E.R. 617; *Alopi Prasad* v. *Union of India* (1960) 2 S.C.R. 793, 806; (1960) A.SC. 588, 594 (per Shah J.).

67 *The Eugenia* (1964) 2 W.L.R. 114, 121; (1964) 2 Q.B. 226; *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169,187.

68 *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1962) A.C. 93, 116, 119; (1961) 2 W.L.R. 639; (1961) 2 All E.R. 179; *The Eugenia* (1964) 2 W.L.R. 114, 122; (1964) 2 Q.B. 226; *The Massalia* (1961) 2 Q.B. 278 overruled. See under "Onerous" for other cases.

69 *Taylor* v. *Caldwell,* 122 E.R. 309; (1863) B. & S. 826 (a case of the burning down of the Music Hall let for 4 days): *Nicoll & Knight* v. *Ashton Edridge* (1901) 2 K.B. 126; *Krell* v. *Henry* (1903) 2 K.B. 740. See *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 63 C.L.R. 169, 188; *Universal Cargo Corpn.* v. *Citati* (1957) 2 Ch. 404; (1957) 2 All E.R. 70 (where time is not of the essence, delay of the charterer must be such as to frustrate the object of the charterparty): *Russkoe* v. *John Stirk & Sons Ltd.* (1922) LI.L.R. 214 quoted in *Naihati Jute Mills* v.*Khyaliram* (1968) A.SC. 522, 526.

70 (1901) 2 K.B. 126.

71 (1863) 3 B. & S. 826; 122 E.R. 309.

72 (1903) 2 K.B. 740.

73 *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 63 C.L.R. 169, 188; 52 L.Q.R. pp. 168 *et seq.*, 324 *et seq.;* See 56 L.Q.R. p. 173.

74 *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397, 406.

75 (1939) 1 K.B. 132, 137; (1938) 3 All E.R. 135 (adopting the theory of Atkin L.J. in *Russkoe Obschestvo* v. *John Stirk & Sons* (1922) 10 LI.L.R. 214 quoted by Shelat J. in *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 526.

This theory has been criticised by many writers.[76]

True construction as test of which is sometimes designated "Change in the obligation" theory.—According to Lord Reid in *Davis Contractors' case* frustration depends at least in most cases on true construction of the terms read in the light of the contract and the relevant surrounding circumstances when the contract was made.[77] Lord Radcliffe in *Davis Contractors' case*[78] stated the doctrine thus:

"... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do."

True construction of an agreement must depend upon the import of the words used and not upon what the parties subsequently choose to say.[79]

(3) Frustration—Implied Term.—The third principal theory of frustration is to be found in the doctrine of the "implied term" which can be distinguished only with some difficulty from the basis on the substratum theory. The implied term theory was stated by Bowen L.J. in *The Moorcock*.[80] It was said by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[81] that the term is to be implied by law *ab initio* in order to supply what the parties would have inserted had the matter occurred to them. It is "a device by which rules as to absolute contracts are reconciled with a special exception which justice demands."[82] Lord Loreburn in *F.A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Products Co. Ltd.*[83] based the doctrine on an "implied term" theory. This theory was slightly differently expressed by Lord Watson in *Dahl* v. *Nelson Donkin & Co.*[84] In the former case it is a genuine team not expressed, in the latter it is a fiction added to the contract by the law,[85] i.e. a term which the parties as reasonable men would have imported into the contract. This was clarified still further in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*[86] where Lord Wright said that the theory of implied condition was inconsistent with the true theory of frustration, which is really a theoretical explanation. With this basis of implied condition, Lord Reid in *Davis Contractors* v. *Fareham U.D. Council*[87] did not agree. Lord Sands in *James Scott & Sons Ltd.* v. *Del Sel*[88] was also of the same opinion. In *Scottish Navigation Co. Ltd.* v. *W.A. Souter & Co.*[89] A.T. Lawrence J. said.

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76 See Treitel: *The Law of Contract* (5th Ed.) pp. 682-683; McNair: *Legal Effects of War* (3rd Ed.), pp. 143 *et seq.;* 35 L.Q.R. 84; 50 L.Q.R. 173. See also *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co. Ltd.* (1916) 2 A.C. 397, 404.

77 *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council* (1956) A.C. 696, 720-1, 728-29; *British Movietonews Ltd.* v. *London & Distt. Cinemas Ltd.* (1952) A.C. 166, 185 (Viscount Simon); *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioner of Works* (1949) 2 K.B. 632, 667; (1950) I All E.R. 208 (Asquith L.J.); *Thorn* v. *London Corporation* (1876) 1 App. Cas. 120, 127 (Lord Cairns); *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 321; 1954 A.SC. 44, 48 referring to *Movietonews Ltd. case;* (1952) A.C. 166.

78 *Davis Contractors Ltd.* v. *Fareham U.D.C.* (1956) A.C. 696, 728; also Lord Reid at pp. 719-20 refd. to in *Naihati Jute Mills* v. *Khiyaliram* (1968) A.SC. 522, 526.

79 *Ganga Saran* v. *F. Ram Charan Ram Gopal* (1952) A.SC. 9,11.

80 *The Moorcock* (1889) 14 P.D. 64. Said Scrutton L.J. in *Moriarty* v. *Regents Garage Co.* (1921) 2 K.B. 760, 780 "we are getting a little tired of the *The Moorcock*"

81 (1926) A.C. 497, 509-510; See per Lord Watson in *Dahl* v. *Nelson Donkin & Co.* (1881) 6 App. Cas. 38 at p. 59.

82 *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* (1926) A.C. 497, 510; But see *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522, 527; *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310, 323; (1954) A.S.C. 44, 48.

83 (1916) 2 A.C. 397 quoted in *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36, 42; (1952) A.SC. 9, 11.

84 (1881) 6 App. Cas. 38; (1881-85) All E.R. Rep. 572.

85 Anson: *Law of Contract* (22nd Ed.) 464 quoted in *Naihati Jute Mills Ltd.* v. *Khiyaliram* (1968) A.SC. 522, 526; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (1926) A.C. 497, 509.

86 (1944) A.C. 265, 275.

87 (1956) A.C. 696, 720; *Horlock* v. *Beal* (1916) I A.C. 486 (Stopping of wages to the wife if the ship was caught in Germany): *Bank Line Ltd.* v. *Arthur Capel & Co.* (1919) A.C. 435 refd. to.

88 (1922) S.C. 592, 597 ("Tiger days excepted" given as an illustration of artificiality). See *Denny, Mott & Dickson* v. *James B. Fraser & Co. Ltd.* (1944) A.C. 265, 275 refd. to in *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 321; (1954) A.S.C. 44, 49.

89 (1917) I K.B. at p. 249 quoted in *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-43) 67 C.L.R. 169, 198 (Latham C.J.).

"no such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the contract."

It is not enough to say that in the event of something unexpected happening some term must be implied: it is must be clear also what the term should be.[90] The term to be implied must not be inconsistent with any express term of the contract. These statements are justified by the language used and the views expressed by Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*[91] and the Lords before whom was argued the *Tamplin case.*[92] See also *In re Comptoir Commercial Anversois* v. *Power Son & Co.*[93]

The Madras High Court has in a case implied the theory of implied term as a basis of frustration. It held that such an intention can be gathered from surrounding circumstances, the conditions under which the contract was entered into, the compelling dents that the law would make in it for the general good and welfare of the community. If such an irresistible intension was at the back of the parties, then a Court taking all the circumstances into consideration will imply a term in the contract.[94]

Full provision made in contract.—Where the contract makes provision (that is full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by a different name.[95] Where the lease deed provided that the rent was unconditional and was to be unaffected by any act of State or God and under no circumstances was there to be remission in the rent, it is not open to the lessee to plead for relief on the ground of cyclone or the presence of a cultivating tenant.[96] In India, said Shah J. in *Alopi Parshad's case,*[97] there is nothing which justifies the view that a change of circumstances "completely outside the contemplation of parties" at the time when the contract was entered into will justify the court, while holding the parties bound by the contract, in departing from the express terms thereof," None of the principles invoked for supporting the proposition that the contracts had been frustrated were applied to the *Neons case*[98] by the Australian High Court. There Latham C.J. summarised[99] his opinion in reference to the statement of the law as to frustration by Russell J. in *In re Badische Co. Ltd.*[1] thus: The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of the parties but results automatically from a term of the contract.

S. 56.—The unqualified language of the Act, which lays down a positive rule of law does

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90 *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council* (1956) A.C. 696, 715.

91 (1919) A.C. 435.

92 *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397.

93 (1920) 1 K.B. at pp. 878-9.

94 *Bansi Lal Fomra* v. *Thadaya Co-operative A & I Society Ltd.* (1976) 1 Mad. L.J. 39, 48; *Gundayya* v. *Subbayya* (1957) A.M. 89 reld. on; *C.K.G. Sethia* v. *Partabmull Rameshwar* (1950) 1 All E.R. 51 refd. to.

95 Per Lord Sumner in *Bank Line* v. *Capel (A) Co. Ltd.* (1919) A.C. 435,455; quoted in *Naihati Jute Mills* v. *Khiyaliram* (1968) A.SC. 322,328; *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397; See also in *In re Comptoir Commercial Anversois* v. *Power Son & Co.* (1920) 1 K.B. at pp. 878-9.

96 *Gopalkrishna Mudaliar* v.*Thiyagarajaswami Devastanam* (1974) I Mad. L.J. 184, 187; *Velur Devasthanam* v. *Sundaram Nainar* (1959) I Mad.L.J. 24; *Sri Mahalingaswami Devasthanam* v. *A.T. Sambanda Mudaliar* (1962) Mad. 273; (1962) A.M. 122; *Sri Amuruyi Perumal* v. *Sabapathi Pillai* (1962) Mad. 262 (1962) A.M. 132 reld. on.

97 *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 807; (1960) A.SC. 588, 594; *Parkinson & Co. Ltd.* v. *Commissioners of Works* (1949) 2 K.B. 632; (1950) I All E.R. 208; and *British Movietonews Ltd.* v. *London & Distt. Cinemas* (1951) I K.B. 190; (1950) 2 All E.R. 590 dist.

98 *Scanlans New Neons Ltd.* v. *Tooheys Ltd.* (1942-43) 67 C.L.R. 169, 198; applying *Blackburn Bobbin Co. Ltd.* v. *T.W. Allen & Sons Ltd.* (1918) 1 K.B. at p. 543; on app. (1918) 2 K.B. 467; and *Jardine* v. *Jane,* 82, E.R. 897 appd.; Leake on Contract (6th Ed.), 494-498, refd. to.

99 *Scanlans New Neons Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 201.

1 Russell J. *in re Badische Co. Ltd.,* (1921) 2 Ch. 331, 379 refd. to.

not leave the matter to be determined according to the intention of the parties.[2] The illustrations do not, indeed, appear to go beyond English authority. but this cannot detract from the generality of the enacting words. There is no reason to suppose that a broad simplification of the English rules was not intended, nor does it appear that any inconvenience has ensued or is to be expected. It is to be observed, on the other hand, that some of the English cases could not be decided in the same way under this section without straining the language. *H* agreed to hire the use of *K*'s rooms in London on the days of 26th and 27th June, 1902, for the purpose of seeing the intended coronation processions. By reason of the King's illness no procession took place on either of those days. It was held that *K* could not recover the balance of the agreed rent, as the taking place of the processions "was regarded by both contracting parties as the foundation of the contract".[3] Here it remained quite possible for *K* to lease the use of the rooms to *H*, and for *H* to use them; it was only the object of the act contracted for that had failed, and that object was not mentioned in the contract itself, though *H* took the rooms in consequence of seeing an announcement posted up in them that windows to view the coronation processions were to be let. In India such a case would, perhaps, fall more appropriately under s. 32. One way round the difficulty of regarding the decision in *Krell* v. *Henry* as representing the law of India has been to take the view that s. 56 is not exhaustive. This is in accordance with the opinion of a bench of the East Punjab High Court in *Parshotam Das* v. *Batala Municipal Committee.*[4] and in *Rama Nand* v. *Gokal Chand,*[5] where Kapur J. refers to the preamble of the Act itself. But in *Satyabrata* v. *Mugneeram,*[6] the Supreme Court has repelled this suggestion, so that the only way in which *Krell* v. *Henry* can be reconciled with the Act is either to regard it as falling under s. 32, or to rely on the readiness of the Supreme Court to construe the word 'impossible' in its practical rather than in its literal sense.[7]The Supreme Court has in quite a few cases interpreted the law of frustration as contained in section 56 of the Contract Act, which confines the doctrine within the boundaries of the section.

The doctrine of frustration takes note not only of physical or literal impossibility but also of circumstances which make it impossible and illegal on the part of one of the parties to perform the contract. If in a given case there is material that the supervening events have shaken the very root of it and the foundation of the contract, it would be impracticable to accept performance by a reasonable and prudent man then the Court will excuse performance. Thus where a Sugar Control Order restricts release of sugar for domestic purposes, the contract to supply contracted sugar became impossible of performance.[8]

It has been observed that the different legal theories formulated in England do not concern Indian cases because of the statutory provisions in the Indian Contract Act, the only doctrine there being that of supervening impossibility or illegality as laid down in section 56 taking the word "impossible" in its practical and not literal sense.[9] The word "impossible" means

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2 *Satyabrata* v. *Mungneeram* 1954, A.S.C. 44, 48, per Mukherjea J.; (1954) S.C.R. 310; see *Davis Contractors case,* 1956 A.C. 696, 728 (Lord Radcliffe).

3 *Krell* v. *Henry* (1903) 2 K.B. 740. In *Chandler* v. *Webster* (1904) 1 K.B. 493, it had been held that payments already made could not be recovered back; but this case, often criticized, was finally overruled by the House of Lords in *Fibrosa Spolka Akcvina* v. *Fairburn Lawson* (1943) A.C. 32. so far as regards cases where by reason of the frustrating event, there has been a total failure of consideration; but see now Law of Reform (Frustrated Contracts) Act, 1943, and notes to s. 65, *infra.* The rule in *Chandler* v. *Webster* was not accepted in India. See *Boggiano & Co.* v. *The Arab Steamers Co. Ltd.* (1916) 40 Bom. 529; 33 I.C. 536; Gandha Korliah v. *Janoo Hassan* (1925) 40 Mad. 200; 91 I.C. 780; 1926 A.M. 175; *Sivanadian Chettiar* v. *Batchu Jurayya,* 1925 A.M. 727. The *Fibrosa Case* merely does something to bring English law into line with Indian law, although Indian law still offers a wider remedy by way of refund.

4 1949 A.E.P. 301, 304.

5 1951 A. Sim. 189, 201.

6 1954 A.S.C. 44, 47; *Raja Dhruv Dev Chand* v. *Raja Mohinder Singh* (1968) A.S.C. 1024, overruling (n.93) on the question of s.56 not being exhaustive, and (n.94) on that point is contrary to Supreme Court decision.

7 *Ibid,* pp. 46, 48.

8 *Bansilal Fomra* v. *Thadava Co-operative Agricultural & Industrial Society* (1976) 1 Mad. L.J. 39, 51.

9 *Satyabrata* v. *Mugneeram & Co.* (1954) S.C.R. 310, 322; (1954) A.SC. 44 (Cases decided by H.L. and other English cases refd. to); *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 526; *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36, 42 (1952) A.SC. 9,11.

impracticable, useless or that which uproots the foundation.[10] The doctrine of frustration according to Indian law is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. It would be incorrect to say that section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration. To the extent that the Indian Contract Act deals with a particular subject it is exhaustive upon the same. English cases have a persuasive value and are only helpful in showing how the English courts have decided cases under similar circumstances.[11] If the language of an Indian Statute is obscure it may be permissible to seek assistance from English decisions but not when the words are clear and unambiguous. It would in that case be unreasonable to interpret in the light of alleged background of the Statute.[12]

Essential Conditions.—The following conditions[13] are essential before s. 56 becomes applicable;

(a) A valid and subsisting contract between the parties;
(b) There must be some part of the contract yet to be performed;
(c) The Contract after it is entered into becomes impossible to be performed.

These conditions do not apply to leases.

S. 56 not applicable, when.—Whereas an agreement as defined in the Contract Act is consensual in nature, a contract under the Abkari Act is to be construed as it is more of less unilateral in the sense that the lessee or licencee undertakes to abide by the terms and conditions contained in the lease licence prescribed by the Government. The rule of law as contained in s.56 and applicable to consensual contracts is to be subordinated to the rule of law that can be established under a specific statute like the Abkari Act. The rights of parties are to be governed by the provisions of the Abkari Act and the Rules made thereunder. The "lessee" or licencee cannot invoke the doctrine of frustration under s. 56 to matters falling under the Abkari Act.[14]

Impossible.—The doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of parties[15] or the change in circumstances makes the performance of the contract impossible. In fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of contract impossible.[16] In India, the law dealing with frustration must primarily be looked at as contained in sections 32 and 56 of the Contract Act.[17] The rule in section 56 exhaustively deals with the doctrine of frustration of contracts

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10 *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 317-8; (1954) A.SC. 44; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 527.

11 *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 319; (1954) A.S.C. 44, 47; *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican P.P. Ltd.* (1962) 2 A.C. 397, 403; (1916-17) All E.R. Rep. 104; refd. to; *Joseph Constantine Steamship Co. Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154, 168; (1941) 2 All E.R. 165; observations of Lord Maugham quoted; *Raja Dhruv Dev Chand* v. *Raja Harmohindar Singh* (1968) A.S.C. 1024 overruling *Purshottam Dass* v. *Batala Municipal Committee,* (1949) E.P. 301, 304, where s. 56 was held not exhaustive; also contra *Rama Nand* v. *Gokal Chand* (1951) A.Sim. 189, 201, no longer good law on the extent of s. 56; *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110.

12 *State of Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876; (1962) A.S.C. 779, 786.

13 *Walamji Lalji* v. *Anil Chandra Bangal* (1975) A.Cal. 92,97,78 Cal. W.N. 735. *Mahadev Prasad Shaw* v. *Calcutta Dyeing & Cleaning Co.* (1961) A. Cal. 70 reld. on.

14 *Sunnam Sattiah* v. *State of Andhra Pradesh* (1980) A.AP. 18, 24.

15 *Kesarichand* v. *Governor-General-in-Council* (1949) Nag. 718; appd. in *Satyabrata* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 318; (1954) A.S.C. 44 on appeal from (1951) A.Cal. 332; *Jwala Prasad* v. *Jwala Bank Ltd.* (1957) A.A. 143; *Mugneeram & Co.* v. *Gurbachan Singh* (1965) A.S.C. 1523; 1965 2 S.C.R. 630 on app. from (1959) A. Cal. 576, 581; *Ganga Saran* v. *F. Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.S.C. 9.

16 *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 318; (1954) A.S.C. 44, 47; *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican P.P. Ltd.* (1916) 2 A.C. 397, 403; (1916-17) All E.R. Rep. 104 ref. to; observations of Viscount Maugham in *Joseph Constantine Steamship Co. Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154, 168; (1941) 2 All E.R. 165, refd. to.

17 *Ganga Saran* v. *F. Ram Charan Ram Gopal* (1952) S.C.R. 36, 42; (1952) A.S.C. 9, 11; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.S.C. 522, 526.

and it cannot be extended by analogies borrowed from the English Common Law.[18] The Court can give relief on the ground of subsequent impossibility when if finds that the whole purpose or the basis of the contract has frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract.[19] The word "impossible" in relation to a contract between commercial people must be understood in a commercial sense.[20]

Positive Law.—Section 56 lays down a positive rule relating to frustration and does not leave the matter of frustration to the Courts to be determined according to the intention of the parties.[21] And the Courts cannot travel outside the terms of that section.[22] When an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract, it is the court which can pronounce the contract to be frustrated and at an end. The Court has to examine the contract, the circumstances under which it was made, the belief, knowledge and intention of the parties being evidence of whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object.[23] This in England is termed a rule of construction;[24] in India this is really a rule of positive law and as such comes under section 56 of the Contract Act.[25]

According to s. 9 of the Contract Act, the terms of a contract may be expressed or implied. Therefore, where as a matter of construction the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of a certain event, the dissolution of the contract would take place under the terms of the contract itself and that would be outside the scope of section 56. Although in English law these are treated as cases of frustration, in Indian law, they would fall under section 32 of the Contract Act which deals with contingent contracts or similar other provisions contained in the Act.[26]

The Supreme Court has dealt with the doctrine of impossibility under section 56 in the undermentioned cases.[27]

In *Ganga Saran* v. *Ram Charan Ram Gopal,*[28] the facts were these:

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18 *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024; Contra *Parshotam Das Shankar Das* v. *Municipal Committee, Batala* (1949) A.E.P. 301, overruled on this point. Observations of Kapur J. in *Rama Nand* v. *Gokal Chand* (1951) A. Simla 189, 201, where the preamble was expressly refd. to in conflict with the later Supreme Court decisions on this question, e.g. *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.SC. 1024; *Rajendra Nath Sarma* v. *Ramadhin* (1971) A. Asm. 160, 162.

19 *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522, 527 (per Shelat J.); *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310, 323; (1954) A.S.C. 44, 48; *Sushila Devi* v. *Hari Singh,* (1971) A.S.C. 1756 (Doctrine applicable where something is not humanly possible); *Sannam Sattiah* v. *State of A.P.* (1979) E.A.P. 18.

20 *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.* 76 Cal. W.N. 528.

21 *Satyabrata* v. *Mugneeram & Co.* (1954) S.C.R. 310, 322; 1954 A.S.C, 44; *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522, 527. *Sushila Devi* v.*Hari Singh* (1971) A.SC. 1756, 1759.

22 *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024; see also *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110.

23 *Satyabrata* v. *Mugneeram & Co.* (1954) S.C.R. 310, 324; (1954) A.S.C. 44, 48; *Morgan* v. *Manser* (1947) 2 All E.R. 666, refd. to; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.S.C. 522, 527; *Ganga Saran* v. *F. Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.S.C. 9.

24 *Morgan* v. *Manser* (1947) 2 All E.R. 666.

25 *Satyabrata* v. *Mugneeram & Co.* (1954) S.C.R. 310, 324; (1954) A.SC. 44, 48; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 527; *Ganga Saran* v. *F. Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.SC. 9; *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110; *Sushila Devi* v. *Hari Singh* (1971) A.SC. 1756, 1759.

26 *Satyabrata* v. *Mugneeram & Co.* (1954) S.C.R. 310, 323; (1954) A.SC. 44, 48; *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 527.

27 *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.S.C. 9, *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310; (1954) A.S.C. 44; *Alopi Prasad* v. *Union of India* (1960) 2 S.C.R. 793; (1960) A.S.C. 589; *Mugneeram & Co.* v. *Gurbachan Singh* (1965) 2 S.C.R. 630; (1965) A.S.C. 1523; *Naihati Jute Mills* v. *Khyaliram* (1968) A.S.C. 522; *Seth Mohanlal* v. *The Grain Chambers Ltd.* (1968) A.S.C. 772; *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024 (a case of an agricultural lease); *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110 (Frustration arising from the act or election of a party).

28 (1952) S.C.R. 36; (1952) A.SC. 9; *Hurnandrai* v. *Pragdas,* 50 I.A. 9; 1923 A.PC. 54 reld. on.

the parties entered into 5 contracts by which the defendant undertook to supply 184 bales of cloth manufactured by Victoria Cotton Mills. The contract provided that the sellers would continue sending the goods to the buyers as soon "as they are prepared" by the mills and they would go on supplying to the buyers "as soon as the goods are supplied to the sellers" by the mills. Further goods were to be supplied out of the goods which will be "prepared by the mills".

The defence of frustration by circumstances beyond the control of the sellers was held unsustainable in a suit for damages for failure to supply the goods. The contract, it was held, was not contingent upon the happening of an uncertain future event; i.e. the goods being supplied by the mills. The words "prepared by the mills" were only descriptive of the goods to be supplied and the words "as soon as they are prepared" and "as soon as they are supplied to us" by the said mills indicated the process of delivery.[29] The contract did not fall within the second paragraph of section 56. The doctrine was unavailable "when the non-performance was attributable to his own fault". In *Satyabrata Ghose* v. *Mugneeram Bangur & Co.*,[30] the Supreme Court again examined the nature and extent of the doctrine and defined its boundaries.

In that case under a development scheme considerable area of land was to be developed by the defendant. A contract of sale of a plot out of that land was entered into with the plaintiff after the war broke out. The sale deed was to be executed within one month after the scheme was completed. But before development began, a considerable portion of the land was requisitioned and the entry of the owner on the land during the period of requisition was made illegal. The defendant company offered to return the earnest money with cancellation of the contract or completion of the coveyance of the land in the condition it was and if neither of the alternatives was acceptable the agreement would be considered cancelled and the earnest money confiscated. In a suit by the plaintiff for the enforcement of the contract, the defendant pleaded discharge by frustration.

But the Supreme Court held that the doctrine was inapplicable having regard to the nature and terms of the contract, the actual existence of conditions at the time when it was entered into, there being no time-limit in the agreement for completion of the scheme and the fact that the order of requisitioning was by its nature of a temporary character which did not affect the fundamental basis of the contract nor did the performance of the contract become impossible within the meaning of s. 56 of the Contract Act.[31]

Courts have no power to absolve—performance more onerous.—In *Alopi Parshad's case*[32] it was held that the Courts have no power to absolve a party from liability to perform a contract merely because the performance becomes more onerous; and the express covenants in a contract cannot be ignored only on account of unexpected and uncontemplated turn of events after the contract. *Alopi Parshad's case*[32] was this:

A.P. & Co. had been appointed buying agents for the purchase of *Ghee* for the Government of India in May 1937 and were to be paid a buying commission and certain other charges. This contract was modified in June 1942 three years after the commencement of World War II by mutual consent.

The Court found that the agents were fully aware of the altered circumstances and held that the mere fact that the circumstances in which the contract was made were altered the contract was not frustrated. The Supreme Court held that if a consideration of the terms of the contract in the light of circumstances, when it was made, shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerges the contract ceases to bind at that point, not because the court in its discretion considers it just and reasonable to qualify the terms of the contract but because on its true construction it does not apply in that situation.[32]

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29 *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36; (1952) A.S.C. 9; *Hurnandrai Pragdas*, 50 I.A. 9; (1923) A.P.C. 54 appd.; see also *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.S.C. 522, 526.

30 (1954) S.C.R. 310, (1954) A.SC. 44, reld. on in *Okara Grain Buyers Syndicate* v. *United Commercial Bank* (1961) A.Punj. 66, affirmed on app. (1968) A.SC. 1115.

31 *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310; (1954) A.SC. 44; *Mugneeram Bangur & Co.* v. *Gurbachan Singh* (1959) A.Cal. 576; on app. (1965) 2 S.C.R. 630, 637; (1965) A.SC. 1523, 1526.

32 *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 807; (1960) A.S.C. 589, 594 (per Shah J.); Denning L.J.'s observations in *British Movietonews Ltd.* v. *London & Distt. Cinemas* (1951) 1 K.B. 190, 201, not adopted; but see (1952) A.C. 166, 184, on app. to the Lords quoted in *Ganga Saran* v. *Ram Charan Gopal* (1952) S.C.R. 36 and in *Satyabrata Ghose Mugneeram* (1954) S.C.R. 310, 322; (1954) A.SC. 165. See *infra*.

Discharge when Time is of the essence.—In *Mugneeram & Co.* v. *Gurbachan Singh*[33] the Supreme Court held that if time is of the essence of the contract or if time for performance is set out in the contract, it may be that it would stand discharged even though its performance may have been rendered unlawful for an indeterminate period provided unlawfulness attached to the performance of the contract at the time it ought to have been performed. Thus if the performance of the contract is rendered unlawful by reason of some subsequent event, the contract, would stand discharged but the discharge will not necessarily take place from the date on which the further performance was rendered unlawful unless it is for all time.[33] Where the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed.[33]

The facts of *Gurcharan Singh's case*[33] were similar to that of *Satyabrata Ghose's case*[31] and, as a matter of fact, related to the same development scheme. In *Naihati case,*[34]

a party in India who in July 1958 entered into a contract for purchase of jute from Pakistan was aware of the restrictions on the issue of licences and still undertook to obtain the licence and it was specifically provided that the delay in obtaining a licence in November was to be excused but the contract was to be settled at the market rate on January 2, 1959, in case of failure to deliver the licence in December 1958.

This contract was held as an undertaking to pay damages on default and defence of frustration was not available. In such a case,[35] said Shelat J.,

"the doctrine of discharge by frustration is not available nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term."

Other Cases.—*Seth Mohanlal's case*[36] was that by

a Government Order under the Essential Supplies Act (1) fresh transactions in '*gur* and sugar' futures and options were prohibited as from an appointed day save with the permission of the Central Government as also the payment of receipt ... of any margins in connection with such futures. (2) An option in sugar or *gur* entered into before the appointed day and remaining to be performed whether wholly or in part shall be void within the meaning of the Indian Contract Act, 1872, and shall not be enforceable by law. This was construed to mean that fresh contracts were prohibited but settlements of outstanding contracts by payment of differences were not prohibited nor was delivery of goods in pursuance of contracts by the due date prohibited because on its construction the provision was held to be prospective.

There was further another order by which Railway Administration was restrained from accepting and other persons from offering for transportation by rail any *gur*.

The Supreme Court held that the difficulty arising out of the Government Order regarding transportation of goods was not an impossibility within section 56 of the Contract Act leading to frustration of the contract.

In *Dada Siba case,*[37] an area of land in Mountgomery District was taken on lease by the appellant but due to the Partition, the appellants had to migrate from West Punjab. The Punjab High Court held that the doctrine of frustration of contract did not apply to leases of immovable property. On appeal, the Supreme Court held that the rights of the parties did not, after the lease was granted, rest in the contract. Although by s. 4 of the Transfer of Property Act the portions of that Act which relate to contracts are to be taken as part of the Indian Contract Act, that section does not indicate that the provisions of the Contract Act are to be read into the Transfer of Property Act. There is a clear distinction between a completed conveyance and an executory contract and events which discharge a contract do not invalidate a concluded transfer. In *Boothalinga Agencies case*[38] the facts were: A contract was made for

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33 (1965) A.S.C. 1523, 1526; (1965) 2 S.C.R. 630, 637.

34 *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522.

35 *Ibid; Bank Line Ltd.* v. *Capel (A) Ltd.* (1919) A.C. 438, reld. on.

36 *Seth Mohan Lal* v. *The Grain Chambers Ltd.* (1968) A.S.C. 772, 779.

37 *Raja Druv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.SC. 1024; *Abdul Hashem* v. *Balahari Mondal* (1952) A.Cal. 380; *Tarabai Jivanlal* v. *Padamchand* (1950) A.B. 89; *Alanduraiappar Koil Chiithakkadu* v. *T.S.A. Hamid* (1963) A.M. 194; *Amuruvi Perumal Devasthanam* v. *Sahapathi Pillai* (1962) A.M. 132; *Inder Pershad Singh* v. *Campbell,* 7 Cal. 474; *Parshotam Das Shankar Das* v. *Municipal Committee, Batala* (1949) A.E.P. 301, not appd.; *Gurdarshan Singh* v. *Bishen Singh* (1962) 2 Punj. 5; (1963) A.Punj. 49 (F.B.), overruled.

38 *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110 (Madras judgement reversed);

the sale of imported chicory on November 26, 1955, when such sales were allowed under the law. On December 7, 1955, there was a change in Import Control Order whereby the sale of that imported article was declared to be illegal and made an offence. Therefore the contract became impossible of performance and hence void but this was not a self-imposed frustration. In *Purshotam Das* v. *Batala Municipal Committee*[39] the plaintiff sought to recover the advance paid by him for a tonga stand for a year. No tonga driver used the stand and the plaintiff was held to recover as the contract was frustrated and section 65 was applicable. The decision was based on the ground that section 56 is not exhaustive. Pollock on *Contract* (p. 228) was cited for the view that there can be frustration even though the parties have foreseen the events as possible and have made no provision with respect to them. In *Sachindra Nath Basu* v. *Gopal Chandra Ghose*[40]

P let premises to *D* for a restaurant at rather a high rent, the agreement to remain in force as long as British troops remained in the town. British trops did remain but the locality was declared out of bounds.

The contract was held not to be frustrated. The decision, it is submitted, can be supported on the ground that frustration is inapplicable to leases nor is a contract frustrated on the ground of disappointed expectations.

'A' made an agreement to sell a plot of land to 'B'. This was followed by consolidation proceedings and the vendor got consolidated piece of land in those proceedings. The purchaser brought a suit for specific performance; the question for decision was whether he had the same right against the newly acquired plot of land as he had against the original piece of land and this depended on the interpretation of s. 30 (a) & (b) of the U.P. Consolidation of Holdings Act, 1953, which provided as follows:

S.30(a) the rights, title, interest and liabilities
(i) of the former title holder shall cease; and
(ii) the tenure holder entering into possession... shall have in his *Chak* the same rights, title, interest and liabilities as he had in his original holding.

The Supreme Court held[41] that the suit for specific performance must fail as the defendant could not perform the contract as new plots had been allotted in lieu of the old plots of land which he had contracted to sell. In this the Court referred to s. 54, Transfer of Property Act, under which the purchaser under the agreement had no beneficial rights in the property agreed to be sold which could attach to the land received in substitution. It is submitted that the decision requires reconsideration, particularly when plots allotted on consolidation were the same as were agreed to be sold.

In a Hindu family governed by the Mitakshara law where the father and mother were alive a son acting for self and purporting to act for his three minor sisters agreed to sell property belonging to them for a sum of money and received by way of earnest money Rs. 1500. The sale could not be completed as the son had no right to act on behalf of his minor sisters, the natural guardian the father and then the mother being alive. The purchaser sued for the return of the earnest money and the son claimed to confiscate the earnest money for plaintiff's default. The Court applied s. 56[42] and held the contract void and by the application of s. 65 Contract Act ordered the return of the earnest money to the purchaser. It is submitted s. 56 has no application to this as there was no supervening cause for frustration, the sale being on behalf of minors by a person unauthorised was void.

A Solicitor was engaged to complete a sale and remuneration was to be paid on comple-

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Metropolitan Water Board v. *Dick Kerr & Co. Ltd.* (1918) A.C. 119; and *Denny Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*, 1944 A.C. 265; and *British Movietonews Ltd.* v. *London & Distt. Cinemas* (1951) 1 K.B. 190; (1950) 2 All E.R. 390, refd. to.

39 (1949) A.E.P. 301, 304; *Krell* v. *Henry* (1903) 2 K.B. 740, appd.; Pollock on *Contract*, p. 228, citing *Tatem* v. *Gamboa* (1939) 1 K.B. 132; (1938) All E.R. 135 reld. on; but see *Davis Contractors Ltd* v. *Fareham U.D.C.* (1956) A.C. 696, 729; (1956) 3 W.L.R. 148; (1956) 2 All E.R. 145 (P.C.) (A thing radically different from that undertaken); *Purushottam's case* was overruled in *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024.

40 (1945) 2 Cal. 90; (1949) A.Cal. 240.

41 *Pearey Lal* v. *Hori Lal* (1977) A.SC. 1226; *Shanti Prasad* v. *Akhtar* (1972) All L.J.549. overruled.

42 *Ayissa* v. *Prabhakaran* (1971) A.Ker. 239, 241.

tion of the transaction. The Solicitor procured a purchaser but the sale could not be completed due to breach on the part of the purchaser. The Solicitor would not be entitled to get the lump sum fee settled to be paid on completion of the sale. S. 56 was held inapplicable as parties could have foreseen the event and there was no supervening impossibility. Nor would s. 70 be applicable as there was an express contract.[43]

Stoppage of work by strike.—A strike of the workmen employed in executing work under a contract does not of itself make performance impossible for the purpose of this section.[44] A contract to supply gunny bags entered into during the closure due to a strike of the mills manufacturing the same is not frustrated.[45] In *The Penelope*[46] a charterparty was held to be frustrated by the general strike of 1926, although there were express provisions in the contract dealing with difficulties arising from strikes, on the ground that the strikes contemplated were of the ordinary variety, local withdrawals of labour. It is submitted that there is no difficulty in applying s. 56, where the agreement is expressly to be terminated in a certain state of affairs, and circumstances arise not dissimilar from those expressly contemplated.

Strike.—A strike is a concerted stoppage of work by workmen, done with a view to improve their wages or conditions of work or to give vent to their grievances or make a protest about something or to support other workmen in such endeavours. Applying this test the refusal of the dock workers to work at night was not a breach of contract and the stoppage of work was not continuous throughout the day and night. Accordingly the charterers were entitled to extension of layout time beyond the stipulated date under the strike clause in the charter party.[47]

Frustration of the adventure was first introduced in 1874 in *Jackson* v. *Union Marine Insurance Co. Ltd.*[48] where a ship chartered to proceed from Newport to load a cargo for San Francisco ran aground on the first day out from Liverpool and took six weeks to refloat and another eight months to repair. This frustrated the contract as the ship was not available for the particular voyage for which she was chartered. This involves the very destruction of "some basic though tacit assumption on which the parties have contracted,[49] which was the basis of *Krell* v. *Henry*.[50] To express it in another way: Non-occurrence of a particular state of things was applied to coronation cases which arose out of the postponement of the coronation of King Edward VII owing to sudden illness.[51]In *Krell's case,*[52] a room was hired for the coronation days and the coronation procession was postponed due to the king's illness. There was no physical impossibility but there

"was cessation or non-existence of an express condition or the state of things going to the root of the contract and essential to its performance".

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43 *Bisadendu Biswas* v. *Mst. Sakina Begum,* (1973) A.Cal. 135, 138.

44 *Hari Laxman* v. *Secy. of State* (1927) 52 Bom. 142; 108 I.C. 19; 1928 A.B. 61. But this decision was based on the fact that this particular strike was not unforeseen, and that other labour was available at a higher rate. Compare *The Penelope, infra,* n. 30, and *Parshotam Das* v. *Batala M.C.* (*supra*).

45 *Ram Partap Mahadeo Prasad* v. *Sasansa Sugar Mills Ltd.* (1964) A.P. 250; *Hurnandrai* v.*Pragdas,* 50 I.A. 9; (1923) A.PC. 54; *Bishendas Agarwalla* v. *Nirmalla Tea Co. Ltd.* (1950) 2 Cal. 458 dist.

46 (1928) P. 180.

47 *Tramp Shipping Corporation* v. *Greenwich Marine Inc.* (1975) 2 All E.R. 989, 991, 992.

48 (1874) 10 C.P. 125.

49 *Sir Lindsay Parkinson Ltd.* v. *Comr. of Works* (1949) 2 K.B. 632, 635.

50 (1903) 2 K.B. 740; but see *Herne Bay Steamboat Co.* v. *Hutton* (1903) 2 K.B. 683; contract was not frustrated, although the naval review was abandoned due to illness of the king; so also a trip to Epsom on Derby day and the Derby was cancelled. Examples cited in *Krell's case* at p. 75 showing the difference between object and motive.

51 *Krell* v. *Henry* (1903) 2 K.B. 740. See also Chandler v. *Webster* (1906) 1 K.B. 493, overruled in *Fibrosa Spolka Akeyjna* v. *Fairburn L.C.B. Ltd.,* 1943 A.C. 32, as to the loss lying where it fell; *Herne Bay Steamboat Co.* v. *Hutton* (1903) 2 K.B. 683, a boat chartered to see the Naval Review which was cancelled for illness of the king but no frustration as the viewing was the motive not the object of hiring.

52 *Krell* v. *Henry* (1903) 2 K.B. 740, 748. The doctrine was sought to be modified still further in *British Movietonews Ltd.* v. *London & Distt. Cinemas* (1952) A.C. 166—a case of supply of newsreels to cinemas held not to be frustrated by the war that was coming to an end— "uncontemplated turn of events".

Vaughan Williams L.J. explained the doctrine in *Krell* v. *Henry*.[53]

It applies ... "to cases where the event which rendered the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract and essential to its performance"

Such cases would, under Indian law, fall, within s. 32, the view of the Punjab High Court that s. 56 is not exhaustive has been disapproved by the Supreme Court.[54]

There is distinction between object and motive. In the former case there is frustration but not in the case of motive. *Krell's case*[53] was a case of object and *Herne Bay case*[55] that of motive. The principle of *Krell's case*[53] has been criticised by the House of Lords in *Larringa* v. *Societe Franco Americaine*.[56] Lord Finlay's criticism of *Krell's case* was quoted by Lord Wright in *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[57] In *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation*,[58] Viscount Simon pointedly said that *Krell* v. *Henry*[59] is not to be placed in the category of impossibility though the case was expressly decided on that basis.[60] In *Fibrosa Spolka Akeyjna* v. *Fairburn Lawson Combe Barbour Ltd.*[61] Viscount Simon L.C. referred to *Krell* v. *Henry*;[62] but according to the Australian High Court in *Scalans New Neon Ltd.* v. *Tooheys Ltd.*[63] the case is treated as one where an essential part of the contract was not performed. What Viscount Simon said meant only this that the case was treated as one where an essential part of the contract was not performed and Lord Porter said[64] that it "merely decided that money not due when the frustration took place was not in law payable". In *Davis Contractors Ltd.* v. *Fareham U.D.C.*[65] contract to build houses was not frustrated merely because due to labour shortage the cost went up and so did the period of construction. Lord Radcliffe said "there must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". Hardship or inconvenience or material loss do not bring about frustration. The claim for extra remuneration of a *quantum meruit* basis was rejected.

Frustration of Adventure—War conditions.—The English rules as to discharge of contracts by "frustration of adventure" (a term chiefly used in shipping cases, with "frustration of voyage" as a synonym) have been applied in new directions since the war of 1914. A full account is impracticable here.[66] Recent authority, however, has made it clearer than ever that the literal possibility or otherwise of executing the agreement according to its terms is not an adequate test; it has to be considered whether performance according to the true governing intention of the parties remains possible.[67] But a temporary interruption (such as requisition of a

53 *Ibid;* See *Fibrosa Spolka* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122, 129.

54 *Parshottamdas* v. *Batala Municipal Committee* (1949) A.E.P. 301, 304; *Rama Nand* v. *Gokal Chand* (1951) A Simla 189, 201. The former was overruled in *Raja Druv Chand's* case (1968) A.S.C. 1024, and the latter is contrary to Supreme Court decision; *Satyabrata* v. *Mugneeram* (1954) A.S.C. 44; (1954) S.C.R. 311.

55 (1903) 2 K.B. 638—(a contract to view naval review which was cancelled due to king's illness or hiring a cab to go to Epsom on the Derby day and the Derby was cancelled).

56 (1923) 92 L.J.K.B. 455.

57 (1935) A.C. 524, 528 (P.C.); see also 52 L.Q.R. 168, 324; 56 L.Q.R. 173; see *Tatem, J. Ltd.* v. *Gamboa* (1939) 1 K.B. 132; (1938) 3 All E.R. 135.

58 (1942) A.C. 154 at p. 164.

59 (1903) 2 K.B. 740, 749, 752.

60 *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 189, 190; see also *Fibrosa Spolka* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32, 49 (per Viscount Simon), 80 (per Lord Porter).

61 1943 A.C. 32, 39.

62 *Supra,* note 38; (1942) 2 All E.R. 122.

63 (1942-3) 67 C.L.R. 169, 189, 190.

64 1943 A.C. 32, 80.

65 (1956) A.C. 696, 715, 729; see also *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.M.B.H.*, 1962 A.C. 93; (1961) 2 All E.R. 179; *The Eugenia* (1964) 2 Q.B. 226; *Bank Line Ltd.* v. *Arthur Capel & Co.* (1919) A.C. 435.

66 For details see Webber, Effect of War on Contracts (1940) and McNair, Legal Effects of War, 133-169 (Cambridge Univ. Press, 3rd edn. 1948). The law of "frustration" is very fully discussed in *Joseph Constantine S.S. Line* v. *Imperial Smelting Corpn.* (1942) A.C. 154 and the judgment especially of Lord Wright and Lord Porter deserve to be carefully studied.

67 Where goods were seized as prize and then released and transhipped and arrived two years late, it was held that the arrival was not such as was contemplated by the parties: *Gouri Shankar Agarwalla* v.

ship for transport of troops) does not necessarily determine the contract.[68] However, the extension of the former rules by *Krell* v. *Henry*[69] now stands as applicable to contracts of all sorts within limits not yet thoroughly defined, as McCardie J. has pointed out in a careful analysis.[70] There is no general rule (as suggested by some dicta) that it does not apply to a sale of unascertained goods.[71]

Frustration by Total or Partial Prohibition.—In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful. This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation. In principle the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance, so far as the prohibition is not total, or when it is removed, would really be performance of the same contract. Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war, has been held to discharge the contractors. [72] So, too, a contract to deliver goods may be frustrated by emergency regulations restricting transport.[73] Where goods, the subject of a specific contract of sale, in which the property had not yet passed to the buyer, were lawfully taken for the public service, the seller was excused from delivery.[74] But a continuing contract is not discharged by a prohibitive regulation which may be determined or varied during the war and leaves a substantial part of the contract capable of execution.[75] Where after a contract has been made a notification regulating retail prices is passed and that notification does not make the performance of the contract impossible or unlawful, the parties are not discharged from the contract.[76]

An organisation set up by the Government of a State (Poland) as a separate entity with a separate legal *persona* is not a department of Government or the State. If such an organisation gets an export licence to export goods to another country in fulfilment of a contract and the Government then imposes a ban on exports, the organisation will not be liable for damages by way of compensation for failure to carry out its contract.[77]

It must not be assumed that the consequences of a contract being discharged for any of the above-mentioned reasons will be the same in India as they would have been in England; see on s. 65 below.

H.P. Moitra (1921-2) 26 C.W.N. 573; 70 I.C. 379; *Horlock* v. *Beal* (1916) 1 A.C. 486; (1916-17) All E.R. Rep. 81.

68 *Tamplin S.S. Co.* v. *Anglo-Mexican & Co.* (1916) 2 A.C. 397. It may do so if the contract is for shipment within a limited time and within that time no other tonnage can be found at a proper port. *Benoit* v. *Prudhomme* (1924) 48 Mad. 538; 87 I.C. 681; 1925 A.M. 626 (really on the construction of an express *force majeure* clause) Cp. *Hussainbhoy Karimji* v. *Haridas* (1927) 105 I.C. 319; 1928 A.S. 21.

69 (1903) 2 K.B. 740.

70 *Blackburn Bobbin Co.* v. *T.W. Allen & Sons* (1918) 1 K.B. 540, 545, Affd. in C.A. (1918) 2 K.B. 467.

71 *Re Badische Co., etc.* (1921) 2 Ch. 331 per Russel J.; Reld. on in *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 201. In the former case the effects of war on contracts lawfully made in time of peace, the performance of which would or might involve intercourse with enemies, are elaborately discussed. The facts do not admit of summary statement. See *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.*, 1945 AP.C. 144.

72 *Metropolitan Water Board* v. *Dick Kerr & Co.* (1918) A.C. 119 relied on in *Narasu* v. *P.S.V. Iyer* (1953) Mad. 381, 1953 A.M. 300

73 *Sannadhi Gundayya* v. *Subbayya* (1926) 51 Mad.L.J. 663; 99 I.C. 459, 1927 A.M. 89. There will be no frustration where there is an express provision in the contract that the buyer is to make the arrangements for transport; *Ram Kumar* v. *P.C. Roy & Co.* (1952) Cal. 397, or where no express provision is made but at the time of contracting both parties have the dearth of wagons in mind, so held in *Girija Proshad* v. *National Coal Co. Ltd.*, 1949 A.Cal. 472, but it must be remembered that according to *Tatem* v. *Gamboa* (*supra*) the agreement may be frustrated even though the parties had the matter in contemplation if the foundation of the contract has disappeared.

74 *Re Shipton, Anderson & Co.* and *Harrison Bros. & Co.* (1915) 3 K.B. 676. See also under unavailability *infra*.

75 *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council* (1916) 2 K.B. 428, C.A.

76 *Sarada Prasad* v. *Bhut Nath* (1941) 2 Cal. 78; 45 C.W.N. 660; 1942 A.Cal. 291.

77 *C. Czarnikow Ltd.* v. *Centrala & Rolimpex* (1978) 2 All E.R. 1043, 1048, 1050, 1051, 1052 (H.L.) 1978 1 All E.R. 81 affd.

"Becomes impossible."—The Indian decisions merely illustrate what amounts to supervening impossibility or illegality within the meaning of the second paragraph.

According to one learned writer,[78] impossibility may be caused in several ways:

(a) Indefinitely impossible.
(b) Destruction of subject-matter.
(c) Unavailability.
(d) Death or disability.
(e) Method of performance impossible.
(f) Statute.

(a) Indefinitely impossible.—The principle is that where supervening events not due to default of either party render the performance of a contract indefinitely impossible and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption.[79] The mere fact that a prohibition is placed on the use of the land during the period it remains in force is not sufficient to frustrate a contract.[80] Goods sent by rail were seized by the police in a theft case, the contract of carriage there upon became impossible. *F. Laxmi Devi* v. *Union of India,* (1971) A.A. 479.

(b) Destruction of subject-matter of contract.—Performance of the contract becomes impossible by destruction of the specific thing essential to that performance, e.g. the destruction of the music hall where performances were to be given.[81] So if a factory premises in which machinery is being installed are destroyed by fire,[82] or a crop of potatoes to be grown on a particular field fails,[83] or a ship under charterparty is seized by the enemy,[84] the contract is discharged. Or it may greatly deteriorate, e.g. a cargo of dates which was sunk and affected by water and sewage so as to become something else for business purposes, i.e. its merchantable character was destroyed. Though it was sold for £2,400 the cargo owners' liability to pay freight was discharged.[85] But a contract of agency to sell goods manufactured or sold by defendant was not frustrated when the factory was burnt down because it was not restricted to goods manufactured by the defendant much less at a particular factory.[86] A contract of sale of a piece of land out of a larger area to be developed was not frustrated by a temporary requisitioning of the land as the fundamental basis had not gone and it had not become impossible of performance.[87]

There is no frustration of a building lease if the main object of the lease is not destroyed. A building lease for 99 years to erect shops within a fixed time was not frustrated by government restriction after the war on building and materials making building impossible. But the House was divided on the application of the doctrine to lease. The interruption due to the war, it was held, did not destroy the identity of the arrangement contemplated in the lease or to make it unreasonable to carry out the terms of the lease. The lease had still more than 90 years to run.[88]

By Bombay Labour Welfare Fund Act of 1953, all unpaid accumulations (arrears of wages of employees included) in custody of the employers were to be paid into a fund constituted thereunder free from the bar of limitation. The Supreme Court held that that was not a supervening impossibility under s. 56 which rendered the performance of the contract of ser-

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78 Treitel: The Law of Contracts (5th Ed.) p. 654 at seq. (2nd Edn.) P. 608.
79 *Fibrosa* v. *Fairburn Etc. Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122, 125.
80 *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310, 329 (contract of sale of land where a big area out of its requisitioned); *Mugneeram Bangur & Co.* v. *Gurcharan Singh* (1965) 2 S.C.R. 630; (1965) A.SC. 1523 (also the same facts as above); *Abdul Hashem* v. *Balahari* (1952) A.Cal. 380 (requisitioning of land); *Tarabai* v. *Padamchand* (1950) A.B. 89 (requisitioning of a flat).
81 *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.
82 *Appelby* v. *Myers* (1867) 2 C.P. 651.
83 *Howell* v. *Co-opland* (1876) 1 Q.B.D. 28.
84 *Tatem (W.J.). Ltd.* v. *Gamboa* (1939) 1 K.B. 132.
85 *Asfar & Co.* v. *Blundell* (1896) 1 Q.B. 123, 128.
86 *Turner* v. *Goldsmith* (1891) 1 Q.B. 544.
87 *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310; (1954) A.S.C. 44; *Mugneeram* v. *Gurcharan Singh* (1965) 3 S.C.R. 630; (1965) A.S.C. 1523.
88 *Cricklewood Property & Investment Trust* v. *Leightons Investment Trust* (1945) A.C. 221.

vice void and hence the debt due to the employees will not stand discharged. Even if s. 56 applied the liability of the employer would arise under s. 65 of the Contract Act and he would be bound to restore it or make compensation to the employees.[89]

(c) Unavailability.—Where a thing ceases to be available, the contract is discharged, e.g. detention or seizure of a ship; 'a contract of service where the party falls ill or is interned or compelled to join the armed forces'; or requisition of the goods contracted to be sold.[90] Discharge may be by temporary unavailability of the thing or person, if performance would be substantially different from that originally undertaken, e.g. a ship going aground and long delay in repairs—8 months.[91] In *Bilticut* contracts where the seller has to get the goods booked and Railway Receipt prepared the non-availability of wagons would frustrate the contract;[92] so also where the buyer has to make the arrangement for transport[93] or where there is no express provision but at the time of the contract both parties have dearth of wagons in mind.[94] An order by Government restraining Railway Administration from accepting *Gur* for transportation by rail is not an impossibiity within s. 56 leading to frustration.[95] But in *Gundayya* v. *Subbayya*[96] a contract to deliver goods was frustrated by Emergency Regulations restricting transport.

(d) Death or Incapacity.—A personal contract, e.g. contract of service or agency is discharged by death[97] or permanent incapacity,[98] e.g. a contract to write a book and the author went mad. Contract for personal service[99] is put an end to on death, or incapacity of the promisor.[1] This would be dependent upon the ratio between the length of service and probable length of interruption.[2] Similar decisions were reached in the case of a discharge of a seaman's contract of service by his internment[3] and of a music hall artiste by his call up for service.[4] In *Morgan* v. *Manser,*[5] a music hall artiste employed in 1938 for 10 years was called up for military service in 1940 and demobilised in 1946. The contract was frustrated but there was no frustration in *Nordman* v. *Rayner & Sturgess*[6] where there was detention for one month. A long term employment contract may be frustrated by illness so as to make it probable for the employee to resume[7] but a serious illness will not frustrate the contract though it may entitle

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89 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1144; (1958) A.SC. 328, 338; *Satyabrata* v. *Mugneeram* (1954) S.C.R. 310, 323; (1954) A.SC. 44 appd.

90 *Bank Line Ltd.* v. *Arther Capel & Co.* (1919) A.C. 435; (ship requisitioned); *Morgan* v. *Manser* (1948) 1 K.B. 184 (called up for military service); *cf. Unger* v. *Preston Corporation* (1942) 1 All E.R. 200; *Re - Shipton Anderson & Co.* (1915) 3 K.B. 676 (Goods requisitioned); Treittel: Law of Contract (2nd ed.), pp. 609-611.

91 *Jackson* v. *Union Marine Insurance Co. Ltd.* (1874) 10 C.P. 125 (Ship went around and could not be repaired for 8 months—delay frustrated contract); *Bank Line Ltd.* v. *Arthur Capel & Co.* (1919) A.C. 435 (requisitioning of a ship before the beginning of the charterparty for a year which made the charter a totally different thing); *F.A. Tamplin S.S. & Co.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397 (A 5 years' charter not frustrated by requistioning the ship which had 19 months still to run); *Countess of Warwick S.S. Co.* v. *Le Nickel S.A.* (1918) 1 K.B. 372 (One year's charter frustrated by requisitioning, because it was unlikely that she would be released in time although the charter had a year to run).

92 *Bachhraji* v. *Nandlal* (1966) A.M.P. 145.

93 *Ram Kumar* v. *P.C. Roy & Co.* (1952) Cal. 397.

94 *Girija Prashad* v. *National Coal Co. Ltd.* (1949) A. Cal. 472; see *Tatem* v. *Gamboa* (1939) 1 K.B. 132; (1938) 3 All E.R. 133—The contract is frustrated even though the parties had the matter in mind if the foundation of contract is frustrated.

95 *Seth Mohan Lal* v. *The Grain Chambers Ltd.* (1968) A.S.C. 772, 778.

96 (1927) A.M. 89; (1926) 51 M.L.J. 663.

97 *Cf. Cutter* v. *Powell,* 6 T.R. 320 (Seaman dying on the voyage. Wages to be paid at the end of the voyage.

98 *Cf. Jackson* v. *Union Marine Insurance Co. Ltd.* (1874) 10 C.P. 125, 145; (1874-80) All E.R. Rep. 317, 323. (Delay in repairs put an end in business sense).

99 *Stubbs* v. *Holywell Railway Co.* (1867) 2 Ex. 311.

1 *Robinson* v. *Davison* (1871) 6 Ex. 269 (Case of music hall singer falling ill).

2 *Tsakiroglou* v. *Noblee Thorl G.M.B.P.* (1962) A.C. 93; (1961) 2 All E.R. 179.

3 *Horlock* v. *Beale* (1916) 1 A.C. 486.

4 *Morgan* v. *Mansel* (1948) 1 K.B. 184; *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310, 320; (1954) A.SC. 44.

5 *Ibid; cf. Unger* v. *Preston Corporation* (1942) 1 All E.R. 200 (a border line case).

6 (1916) 33 T.L.R. 87.

7 See *Condor* v. *Baron Knight* (1966) 1 W.L.R.87; *Marshall* v. *Harland & Wolft Ltd.* (1972) 2 All E.R. 715; *Hart* v. *Marshall & Sons* (1978) 2 All E.R. 413.

the employer to terminate if it was a mere excuse for non performance.[8]

(e) Method of performance impossible.—This can be illustrated by the undermentioned cases.[9] A contract under which a person holds a public office is discharged if the office is abolished by statute.[10]

In a suit for damages against a Hindu father for breach of a contract to give his minor daughter in marriage to the plaintiff, it was held that the performance of the contract had not become impossible simply because the girl had declared her unwillingness to marry the plaintiff, and the defendant had declared that he could not compel her to change her mind.[11] In the course of the judgment the Court said:

"The act is neither impossible in itself, nor impracticable in the ordinary sense of the term.... Though physical force cannot for one moment be thought of, it is no doubt the duty of defendant according to the terms of his contract to use to the utmost his persuasive powers and his position as parent in order to induce his daughter to be married."

It is submitted that no court in India would countenance the use of such persuasive powers by a father or a guardian over his children or wards. In any case it is wholly academic as marriage is not a contract to which the provisions of the Contract Act would apply. This has been discussed at another place. The decision would under the present marriage laws or social conditions be unsupportable.

Similarly, where the parties to a suit agreed that the plaintiff and his younger brother were to execute a sale deed within a week conveying the property in dispute in the suit to the defendant for a certain sum, and, in default, the suit was to be dismissed, it was held that the younger brother's refusal to join in executing the deed did not make the performance of the agreement by the plaintiff impossible within the meaning of this section.[12] The decision in this case is, it is submitted, of doubtful authority. If a certain consequence was to follow by the execution of a document by two persons merely performance by one will not be carrying out the terms of the contract. An agreement to sell a specified quantity of *dhotis* to be manufactured at a particular mill "to be taken delivery of as and when the same may be received from the mills," cannot be read as meaning "if and when," especially when a time is named for the completion of delivery; and the failure of the mills to produce the goods is no excuse. The doctrine of frustration does not extend to the case of a third person on whose work the defendant relied perferring to work for some one else during the material time.[13] Inability to pay purchase price on the due date does not make the contract impossible of performance.[14]

By an agreement between the Ruler of the erstwhile State of Kota State and a firm whereby, the firm in lieu of the grant of monopoly to win stone in the State agreed to pay to the Ruler royalty and also the firm was exempted from income tax. But when Kota became a

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8 *Marrison* v. *Bell* (1939) 2 K.B. 187.

9 *Nikoll & Knight* v. *Ashton Eldridge & Co.* (1901) 2 K.B. 126—sale of cotton seeds frustrated as the ship to carry it got stranded in January and so unable to carry the cotton seed in January. *Tsakiroglou* v. *Noblee Throl* (1962) A.C. 93—Closure of the Suez did not frustrate contract for sale of groundnuts to be delivered in Hamburg both parties expected the nuts to be shipped via the Suez Canal but the contract did not so provide nor could any such term be implied, the route being immaterial to the buyer. *Blackburn Bobbin Co. Ltd.* v. *T.W. Allen & Sons Ltd.* (1918) 2 K.B. 467—A contract to supply timber not frustrated on account of supply of timber from abroad not possible due to the war. For ought the Buyer knew the supply might have been from stock kept in the country. See *Boothalinga Agencies* v. *Poriaswami* (1969) A.SC. 110 (where sale had become illegal at the time of the performance by change of law).

10 *Reilly* v. *R.*, 1934 A.C. 176.

11 *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1896) 21 Bom, 23.

12 *Rangaswami* v. *Trisa Maistry* (1907) 17 Mad. L.J. 37.

13 *Harnandrai Fulchand* v. *Pragdas Budhsen* (1922) 50 I.A. 9; 47 Bom. 344; 72 I.C. 485; 1923 A.P.C. 54; see also *Bhailal* v. *Kalyanrai* (1921) 23 Bom. L.R. 547; 45 Bom. 1222; 63 I.C. 952; and cases collected in *Ezekiel Abraham* v. *Ramjusrav* (1921) 33 Cal. L.J. 151; 63 I.C. 267; 50 I.A. 9, was followed in *Ganga Saran* v. *Firm Ram Charan,* 1952 A.S.C. 9 (apart from the construction of the contract it was found that in fact the defendant could have delivered the goods); *Ranchoddas* v. *Nathmal Hirachand & Co.* (1949) 51 Bom. L.R. 491, 1949 A.B. 356; 50 I.A 9 was distinguished on the facts in *Bisseswarlal* v. *Jaidayal* (1945) 1 Cal. 391; 1949 A.Cal. 407.

14 *Universal Corporation* v. *Five Ways Properties Ltd.* (1979) All E.R. 552.

part of a Part 'B' State and the Indian Finance Act became applicable to it and income tax was imposed, the agreement between the Ruler and the firm although it was binding on the newly formed State under Art. 295 (2) of the Constitution became void because the income tax portion could not be separated from the rest.[15]

Frustration and Sale of Land.—The doctrine of frustration in English law does not apply to cases of contracts for the sale of land because in English law a contract of sale constitutes the vendee-to-be the beneficial owner of land, the owner only having the legal estate.[16] But in Indian law it is applicable to contracts for sale of land as they create no interest in the land to be sold.[17]

In a case[18] between a vendor and a purchaser in England there was a contract of sale of a land. Two days after the contract of sale the property was listed for preservation on grounds of architectural or historic interest. The question whether the contract was avoided by mistake or frustration was decided by the Court of Appeal and it was held that it could not be avoided for a mutual mistake on the ground that the listing of the properties was not prior to the contract but after it. On the question of frustration the Court distinguished the statement of Law by Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council* (1956) A.C. 696, 728, where it was said that "Perhaps it would be simpler so to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract..... 'but even so it is not a hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well as such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for'."

The contract was not frustrated because it could be carried to completion according to its terms and the property is nonetheless the same by reason that listing imposed a fetter upon its use. The case, therefore, did not fall within the rule laid down by Lord Radcliffe. Further because the completion would not render that performance a thing radically different from that which was undertaken by the contract. On the other hand the completion would be exactly what the purchasers promised to do, and of course the vendors.

A piece of agricultural land with a bungalow on it was agreed to be sold by *R* to *A* and an application for permission was made to the proper Revenue Officer who refused it for the want of a certificate from the Collector. The requisite certificate was obtained from the Collector and the Revenue Officer sanctioned the sale but the seller tried to repudiate the contract on the ground that it had become impossible of performance on the first refusal of the Revenue Officer and the certificate of the Collector was not legal. The Supreme Court held[19] that the contract had not become impossible on the order of refusal of the Revenue Officer as it was neither conclusive nor passed on merits but only on a technical point nor did it put a fetter on *A*'s right to apply to the Collector. Therefore no change of circumstances intervened to make the agreement impossible of performance factually or legally.

Frustration and Leases.—In an earlier English case it was held that an estate created by a lease is not determined when the military authorities requisition it. It is not an eviction by title paramount and the requisition does not frustrate the lease.[20] Similarly the destruction of a house by a bomb does not by itself determine the tenancy of the land on which it stands.[21] A

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15 *State of Rajasthan* v. *Associated Stone Industries Kota Ltd.* (1971) A.Raj. 128, 133.

16 *Satyabrata* v. *Mugneeram* (1954) S.C.R. 310, 324-5; (1954) A.S.C. 44, 49; *Hillingdon Estate Co.* v. *Stonefield Estates Ltd.* (1952) Ch. 627; (1952) 1 All E.R. 853.

17 *Satyabrata* v. *Mugneeram* (1954) S.C.R. 310, 325; (1954) A.S.C. 44, 49.

18 *Amalgamated Investment & Property Co. Ltd.* v. *John Walker & Sons Ltd.* (1977) 1 W.L.R. 164.

19 *Govindbhai Girdharbhai* v. *Gulam Abbas* (1977) A.SC. 1019, 1025, 1026.

20 *Whitehall Court Ltd.* v. *Ettlinger* (1920) 1 K.B. 229; (1918-19) All E.R. Rep. 229; followed in *Abdul Hashem* v. *Balahari Mondal* (1952) A.Cal. 380 (a case of requisitioning of land); *Tarabai* v. *Padamchand* (1950) A.N. 89 (a case of requisitioning a flat); *The Minister of State for the Army* v. *Dalziel*, 68 C.L.R. 261 (no frustration of a lease if lessee deprived of the benefits, e.g. where the property is destroyed by fire or flood or occupied by the king's enemies or demolished as a dangerous structure or where he is disposessed under a Statute subsequently passed). But see *Firth* v. *Halloran* (1926) 38 C.L.R. 261.

21 *Simper* v. *Combs* (1948) 1 All E.R. 306.

contract of tenancy in English law is not terminated under the doctrine of frustration which has no application to a demise of real property.[22] In the House of Lords, there has been difference of opinion as to the application of the doctrine of frustration to leases. Lord Russell and Lord Goddard were of the view that the doctrine of frustration does not apply to put an end to a lease and the respective liabilities of landlord and tenant thereunder. The lease is much more than a contract. It creates and vests in the lessee an estate or interest in land.[23] But Lord Wright with whom Viscount Simon agreed held that the doctrine could apply to leases. No opinion was expressed by Lord Porter.

Said Lord Wright[24]:

"The doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not therefore prepared to state as a universal principle that it can in no circumstances be applied to a lease."

In *Commissioner for Railways* v. *Avrom Investments Ptg. Ltd.*[25] the question whether frustration can ever apply to a lease was left open. There is a similar difference of opinion in the Australian High Court, in *Minister of State for the Army* v. *Dalziel.*[26]

"The decision of the House of Lords in *Matthey* v. *Curling*[27] has established that covenants by a lessee which are absolute in terms are not discharged where the lessee is deprived of the benefits conferred upon him by the lessee, as, for instance, where the property is destroyed by fire or flood or occupied by the king's enemies or demolished as a dangerous structure or where as in the present case he is dispossessed under some statute passed subsequently to the lease".

Isaacs J. in *Firth* v. *Halloran*[28] was of the opinion that the contractual obligation... created by an instrument of lease is not necessarily excluded from the doctrine of frustration because the history of frustration, its inherent meaning and the judicial determination of relevant cases and the nature of relation between landlord and tenant led to the rejection of so sweeping a rule. Does it apply to an agreement for a lease?[29]

Indian Law.—A lease in Indian law is not a mere contract, but is a transfer of an interest in land and creates a right *in rem.*[30] The Supreme Court has held that the doctrine of frustration is not applicable to leases.[31] "Where the property leased is not destroyed or substantially and permanently unfit the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him." Rights of parties do not, after the lease is

22 *Leightons Investment Trust Ltd.* v. *Cricklewood Property & Investment Trust Ltd.* (1943) 2 All E.R. 97 (Mackinon L.J.) 98; on app. (1945) A.C. 221, the Lords were divided. Lord Simon and Lord Wright held it applied, and Lord Russell and Lord Goddard took the contrary view and Lord Porter expressed no opinion; *Denman* v. *Brise* (1949) 1 K.B. 22; (1948) 2 All E.R. 141; *Cusac* v. *London Corporation* (1956) 1 W.L.R. 1368, 1373; *Eyre* v. *Johnson* (1946) K.B. 461; (1946) 1 All E.R. 719.

23 *Cricklewood Property & Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.* (1945) A.C. 221, 232, (1945) 1 All E.R. 252; *see London & N. Estates Co.* v. *Schlesinger* (1916) 1 K.B. 20, 24; appd. in *Whitehall Court Ltd.* v. *Etllinger* (1920) 1 K.B. 680, 687 which was approved in *Matthey* v. *Curling* (1922) 2 A.C. 180, 237.

24 *Cricklewood Property & Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.* (1945) A.C. 221, 241.

25 *Commissioner for Railways* v. *Avrom Investments Ltd.* (1959) 1 W.L.R. 389, 400.

26 (1944) 68 C.L.R. 261, 302, per Williams J.

27 (1922) 2 A.C. 180 reld. on.

28 (1926) 38 C.L.R. 261, 269.

29 See Derham & Da Costa: Absolute Liability 1 New Zealand Universities L. Rev. 37, 41-48.

30 S. 105, Transfer of Property Act: Mulla's Transfer of Property Act, p. 640; *Raghoonathdas* v. *Morarji,* 16 Bom. 568; *Kandasami* v. *Ramaswami* (1919) 42 Mad. 203; see also *Girdhari Singh* v. *Megh Lal Pandey* (1918) 44 I.A. 246, 250; 45 Cal. 87, 93; *H.V. Rajan* v. *C.N. Gopal* (1975) A.S.C. 261, 265; *Smt. Sushila Devi* v. *Hari Singh* (1971) A.SC. 1756, 1758.

31 *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024; 1027; overruling *Gurdarshan Singh* v. *Bishen Singh* (1962) Punj. 5; (1963) A. Pun. 49 (F.B.) and affirming (1961) A. Punj. 148; (*Raja Dhruv Dev Chand's* case); *Abdul Hashem* v. *Balahari* (1952) A.Cal. 380 (requisitioning of land); *Tarabai* v. *Padam Chand* (1950) A.B. 84 (requisitioning of a flat); *Surpat Singh* v. *Sheoprasad* (1945) 27 Pat. 197; (1945) A.P. 300 (Patni lease); *Sushila Devi* v. *Hari Singh,* (1971) A.S.C. 1756; and *Rajendranath* v. *Ramdhin* (1971) A.Asm. 160; and *Rahim Bux* v. *Mohammad Shafi,* (1971) A.A. 16 (Demolition under municipal order, the lease not impossible); *Rajendra Nath Sarma* v. *Ramadin* (1971) A. Asm, 160, 162; *Smt. Shyam Kumari* v. *Ejaz Ahmad Ansari* (1977) A.A. 376. *Thomas* v. *Moranmar Baselious Origen* (1979) A. Ker. 156; 159 (a lease of a building which was destroyed not frustrated).

granted, rest in contract. ...Section 4 of the Transfer of Property Act does not enact that the provisions of the Contract Act are to be read into the Transfer of Property Act.[32] There is a clear distinction between a completed conveyance and an executory contract and events which discharge a contract do not invalidate a concluded transfer.[32] Said Shah J. in the *Dada Siba case*.[32]

"By its express terms s. 56 of the Contract Act does not apply to cases in which there is a completed transfer. The second paragraph of s. 56.... has a limited application to covenants under a lease. A covenant under a lease to do an act, which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent unlawful, becomes void when the act becomes impossible or unlawful. But on that account the transfer of property resulting from the lease granted by the lessor to the lessee is not declared void."

The Calcutta High Court in *Inder Pershad Singh* v. *Campbell*[33] and in *Kshitish Chandra Mondal* v. *Shiba Rani Debi*[34] applied the doctrine of frustration to leases. In the former case,[33] a lease for a number of years of agricultural land for cultivation of indigo was ended and lessee ejected because the superior landlord resumed possession for non-payment of rent. But between the parties to the litigation there was no relationship of landlord and tenant and therefore the case does not support the applicability of frustration to leases.[32] and in the latter[34] a thatched hut let out to the lessee as a monthly tenancy was burnt down and the lessee raised another structure in spite of the objection of the landlord. The lessee did not suspend payment of rent nor given up possession. *Inder Pershad Singh's case*[33] was erroneously considered to be an agreement to lease.

Doctrine applies to executory contracts.—The doctrine of frustration can only apply to executory contracts and not to transactions which have created a demise *in praesenti.* Therefore a lease executed in favour of a party can be specifically enforced and he is entitled to mesne profits as he is entitled to possession from the date of the beginning of the lease.[35]

Frustration of a concluded lease.—However, in England, the House of Lords applied the doctrine in a case of a lease. There a warehouse was leased to the appellant for ten years but after some time the approach to the warehouse was closed because a building on the only approach street because dangerous and had to be demolished and rebuilt which would take 2 years. The House of Lords held that the doctrine of frustration applied to leases and the lease even though executed was frustrated so as to bring the lease to an end because the lessee was deprived of substantial use of the warehouse.

2. Furthermore there was no class of lease of land to which the doctrine was inherently inapplicable. However the circumstances in which the doctrine applied to a lease of land were exceedingly rare.

3. Although the closure of the approach would affect the lessee business for 2 out of ten years, there was no defence to payment because they would have a further 3 years of user.[36]

Sub-lease.—The Mysore High Court[37] has applied the Mysore House Rent Control Act as an intervening event striking at the root of an agreement and thus determining a lease entered into with a second lessee when the first lessee was in possession as a statutory tenant. The Madras High Court[38] has held the doctrine inapplicable to a lease of a *shandy dope* which was hit by two cyclones and for some periods the lessee could not get any income. There was no supervening event making the contract impossible of performance or illegal.

Agricultural Leases.—The doctrine of frustration does not apply to agricultural leases.[39]

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32 *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024.

33 7 Cal. 474, held by the Supreme Court not to be a case of frustration of a lease as no relationship between the parties of landlord & tenant.

34 (1950) A.Cal. 441.

35 *H.V. Rajan* v. *C.N. Gopal* (1975) A.SC. 261, 265.

36 *National Carriers Ltd.* v. *Panalpine (Northern) Ltd.* (1981) All E.R. 161, 169-70; *Bricklewood Property & Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.* (1945) 1 All E.R. 252 considered.

37 *H.V. Rajan* v. *C.N. Gopal* (1961) A.My. 29.

38 *Ramananda* v. *T.S.A. Hamid* (1963) A.M. 94.

39 *Satyabrata Ghosh* v. *Mugneeram,* 1954 S.C. 44, 1954 S.C.R. 310, 325 (dealing with a contract of sale of land); *Raja Dhruv Dev Chand* v. *Raja Haramohinder Singh* (1968) A.S.C. 1024; *Abdul Hashem* v. *Balahari Mondal* (1952) A.Cal. 380; *Tarabai* v. *Lala Padam Chand* (1950) A.B. 89; *Ramananda*

But in the Punjab the doctrine of frustration was held applicable to agricultural leases—in *Gurdarshan Singh* v. *Bishan Singh*.[40] But this case must, it is submitted, be held to apply to its own peculiar facts and it has not been approved by the Supreme Court. According to the Travancore-Cochin High Court the doctrine applies to leases if the crops are wholly destroyed.[41] The Madras High Court held that a lease of a coffee garden is not an agricultural lease and therefore the destruction of coffee plants by fire would fall under s. 108(e) and rent would not be recoverable.[42]

In a Bombay case,[43]

the defendant, who was a stone contractor, agreed to pay to the plaintiff Rs. 329 per month for one year for permission to the defendant to blast stones and carry on the work of quarrying on plaintiff's land. It was also agreed that the defendant should obtain at his own expense the necessary license for blasting stones. At the time of the agreement the defendant had a license from the authorities, but it expired during the term of the agreement, and the authorities refused to renew it; the defendant thereupon declined to pay the rent for the unexpired period of the agreement.

In a suit by the plaintiff for the rent it was held that the question was one of construction, and that, looking at the nature of the contract, it must be taken to have been the intention of the parties that the monthly payment should only be payable so long as quarrying was permitted by the authorities. The present section was considered to have nothing to do with the case.[44] Obviously the performance did not become impossible, as there was no agreement to blast any stone at all.

Without the promisor's default.—Partition as a frustrating event.—In *Rama Nand* v. *Gokal Chand*[45].

the parties, both of Amristar, had entered into a contract to refer all disputes to two European merchants at Karachi. Thereafter came partition, which left Amristar in India, and Karachi in Pakistan. It was found as a fact that the effect of partition was to make it dangerous for Hindus to travel into Pakistan, nor could they do so without permits from the Pakistan authorities.

It was held that the agreement to refer to arbitration was frustrated, on the ground that it was necessary for the parties to be present in Karachi. But in a subsequent case, a Full Bench of the same Court decided that if it was not necessary for the parties to be present in Karachi during the arbitration proceedings, there was no frustration of the agreement to refer to arbitration.[46] This, it is submitted is contrary to Arbitration Law that arbitrative proceedings should not be held when the parties are prevented from being present at the hearing.

The Punjab High Court in a later case held that as a result of the partition of India, a contract for monopoly procurement operative for one year, between March 1947 and March 1948, became impossible of performance under s. 56 of the Contract Act and therefore discharged by frustration.[47] Communication with Dacca becoming dangerous does not frustrate a contract of guarantee given in respect of deposit in a bank which before the partition was in what is West Bengal with its head office at Dacca and which stopped payment in its Indian branches after the partition.[48] Even after the enactment of Bihar Land Reforms Act the

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Nainar v. *T.S.A. Hamid* (1963) A.M. 94 appd.; *Sree Amuruvi Perumal Devasthanam* v. *Sabhapathi Pillai* (1962) A.M. 132, 141; *Inder Pershad Singh* v. *Campell*, 7 Cal. 474 dist.; *Gurdarshan Singh* v. *Bishen Singh* (1962) Punj. 5; (1963) A.Punj. 49 (F.B.) not appd.

40 (1963) A.Punjab 49 (F.B.) by a majority overruling; *Court of Wards Dada Siba* v. *Raja Dharam Dev Chand*, 1961 A. Punj. 148 (contra) affd. on appeal by Supreme Court (1968) A.S.C. 1024; *Gurdarshan Singh's* case was not appd.

41 *Puthuppally Vatiapally* v. *Chacko Thumman*, (1956) A.T.C. 59.

42 *Kunhayen Haji* v. *Mayan*, 17 Mad. 98.

43 *Goculdas Madavji* v. *Narsu Yenkuji* (1889) 13 Bom. 630.

44 *Ibid*, at p. 635, Sargent C.J. *arg*.

45 1951 A.Sim. 189. This decision is contrary to later Supreme Court decision as to the exhaustive nature of s. 56. In *Dawood Tar Mahomed Bros.* v. *Queensland Insurance Co. Ltd.* (1945) 1 Cal. 638, 1949 A.Cal. 390, *P* sued on a fire insurance policy on his house in Burma. There was a stipulation that any claim should be settled in Rangoon, which was in enemy occupation as was the house site at the date of the suit. It was held that the entire contract was frustrated.

46 *P.D. Mehra & Sons* v. *Firm Ram Chand Om Parkash*, 1952 A. Punj. 34 (F.B.).

47 *Okara Grain Buyers Syndicate* v. *United Commercial Bank Ltd.* (1961) A.Punj. 66; on appeal (1968) A.SC. 1115; *Satyabrata* v. *Mugneeram*, 1954 S.C.R. 310 reld. on in H.Ct.

48 *Suresh Narain* v. *Akhawri*, 1957 A.P. 256; *Parmeshridas* v. *F. Ram Chand* (1952) A.Punj. 34 F.B. folld.; *Ramanand* v. *Gokal Chand* (1951) A.Simla 189 not fold.

contracts under the Ghatwali tenures cannot be deemed to be impossible or impracticable and therefore s. 56 does not apply.[49] A case[50] of an unregistered lease of land in the Pakistan portion of the prepartition Punjab was held frustrated by the partition.

The appointment for 5 years of an Advocate as Government Advocate for the State of Bikaner to conduct its cases in the High Court of the State was continued after the State merged into and formed part of the United State of Rajasthan and the Court at Bikaner was abolished on the establishment of the High Court of Rajasthan. He continued for a few days more after the State of Rajasthan was constituted into a B Class State and then his services were terminated.

This contract was held to be frustrated.[51] A surety bond for appearance in a criminal case does not get discharged by the transfer of the case from one Court into another.[52] On a company going into liquidation a contract appointing a Managing Director does not become frustrated and "void" but he must be deemed to have been dismissed;[53] hence entitled to compensation in absence of misconduct.

Auction sale of property during a suit for specific performance—Frustration.—During the pendency of a suit for specific performance the property was sold in execution of a decree and the sale was confirmed. The sale was held to be void under the principle of *lis pendens.*[54] To such a sale the doctrine of frustration does not apply as there is no change in the identity of the property.[55]

Application limited.—The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligation *ex facie* binding are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule (of frustration) and consequently the decision whether in a particular case those circumstances exist are necessarily a question of law. The requirement that parties must have made the contract on a particular footing should be given full weight.[56] Frustration is not to be lightly invoked as a dissolvent of a contract.[57] It is useful within its proper limits[58] and not lightly to be held to have occurred.[56]

Self-induced.—Another principle is that a state of facts brought about by the act of a party cannot be used as an excuse for failure to perform a contractual obligation.[59] The doctrine of frustration under Indian law does not apply to cases of non-performance of the contract due to events happening because of the default of the contracting party himself.[60] Clearly the doctrine of frustration cannot avail a defendant when the non-performance is attributable to

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49 *Badri Narain* v. *Kamdeo Prasad* (1961) A.P. 41.
50 *Smt. Sushila Devi* v. *Hari Singh* (1971) A.SC. 1756, 1759.
51 *State of Rajasthan* v. *Madan Swarup,* 1960 A. Raj. 138.
52 *Inder Singh* v. *State* (1960) A.A. 419.
53 *Jwala Prasad* v. *Jwala Bank Ltd.* (1957) A.A. 143 (by majority).
54 *Suraj Bhan* v. *Gaj Raj Singh* (1981) A.A. 149, 150, 151; *Surendra Nath Sinha* v. *Krishna Kumar Nag* (1967) A.SC. 1440, folld.
55 *Suraj Bhan* v. *Gaj Raj Singh* (1981) A.A. 149, 151; *Pearey Lal* v. *Horilal* (1977) A.SC. 1226 disting.
56 *Davis Contractors Ltd.* v. *Fareham U.D.C.* (1956) 3 W.L.R. 37, 61; (1956) A.C. 696, 716; (1956) A.C. 696.
57 *Ibid; Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633 642; (1961) 2 All E.R. 179; (1962) A.C. 93 on app. from (1959) 2 W.L.R. 179, 185.
58 *Davis Contractors Ltd.* v. *Fareham U.D.C.* (1956) A.C. 696, 716; (1956) 3 W.L.R. 37, 61; *Twentesche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory* (1945) A.PC. 144.
59 *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (1935) A.C. 524, 530. (No licence taken though) fact was known to both parties); *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 67 C.L.R. 169, 186 (per Latham C.J.). (case of agreement to illuminate on a building); *Universal Cargo Carriers Corpn.,* v. *Citati* (1957) 2 W.L.R. 713, 728; *D.R. Mehta* v. *Tin Plate Dealers Association* (1965) A.M. 400; *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36, 42; *The Eugenia* (1964) 2 Q.B. 226 (where ship was taken into prohibited waters—no frustration); *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corpn.* (1942) A.C. 154; (1941) 2 All E.R. 165 (explosion on a ship but not proved who cuased it. Contract frustrated); *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.S.C. 522 (contract of purchase of Jute from Pakistan, purchaser aware of requiring a certificate).
60 *Jwala Prasad* v. *Jwala Bank Ltd.* (1957) A.A. 143, 146; *Gambhirmull* v. *Indian Bank Ltd.* (1963) A.Cal. 163; Sections 32 and 56, of Contract Act; *Benarsi Parshad* v. *Mohiuddin Ahmad,* 3, Pat. 581, 590; (1924) A.P. 586.

his own default.[61] It is the essence of frustration that the event which causes frustration must have occurred without the fault of either party.[62]

The onus of proving that the event frustrating the contract is self-imposed is on the party alleging it.[63] What constitutes self-induced frustration? Has it to be a positive act on deliberate choice or mere negligence would be insufficient in *Constantine case*[63] there was an explosion on the ship disabling it from performing her obligation. The owners pleaded frustration which was upheld in spite of cause of explosion never being found out. The degree of fault whether deliberate or merely due to negligence was not decided in that *case,*[64] But Lord Wright suggested that mere negligence will not suffice said Lord Russell of Killowen "I wish to guard against the supposition that every destruction of *corpus* for which a contractor can be said to some extent or in some cases to be responsible necessarily involves that the resultant frustration is self induced within the meaning of the phrase.[63] This was noticed with approval by the Madras High Court.[65] Thus a sentence of imprisonment on an employee is not self-induced so as to prevent frustration of his contract of employment.[66] One learned writer[67] has suggested that this doctrine should apply to all deliberate or negligent acts, whether they are actual breaches of contract or not, e.g. can a *prima donna* lose her voice by negligently catching a cold and plead frustration and make innocent party bear loss.

The High Court of Madras[68] has held that under the Indian law frustration puts an end to a contract without any further question of as to default or neglect, of the promisor. It does not follow therefrom that the principle of self-induced frustration has no application under the Indian law. Such cases will really be covered by s. 39 and the combined effect of ss. 56 and 39 is that frustration renders a contract void unless there has been conduct antecedent to frustration amounting to repudiation thereof.

Where parties entered into a contract in the unsettled conditions created by the Second World War, the agreement for the purpose of reshipment of goods should have foreseen the consequences of delay in reshipment of goods. The delay in reshipment cannot be covered up by the plea of frustration. Such would be a case of self-induced frustration.[69] There is no frustration of a contract on the basis of impossibility of performance if a control order merely prohibits removal of the article controlled from the stockyard without permission and no permission is applied for. This would be a case of self-induced events.[70]

Automatic operation.—Frustration puts an end to a contract independently of the volition of the parties at the time of the frustrating event and it may be, without either party being conscious, that what has happened has snapped their contractual bonds[71] and the aggrieved party cannot keep it alive.[72]

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61 *Ganga Saran* v. *Ram Charan Ram Gopal* (1952) S.C.R. 36, 42; (1952) A.S.C. 9, 11; see also *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.S.C. 522, 526

62 *Sri Amurvi Perumal Devasthanam* v. *Sabhapathi Pillai* (1962) A.M. 132; *Mertens* v. *Home Freeholds Co.* (1921) 2 K.B. 526; 528; *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 318; (1954) A.SC. 44.

63 *Joseph Constantine S.S. Line* v. *Imperial Smelting Corp. Ltd.* (1942) A.C. 154. But see 60 L.Q.R. 262; *Narasu* v. *P.S.V. Iyer* (1953) A.M. 300; (1953) Mad. 831; *Haroon Tar Mahammad* v. *Bengal Distilleries Co. Ltd.* (1948) 2 Cal. 11; *Union of India* v. *Charan Singh* (1955) A.Pep. 51.

64 *Joseph Constantine S.S. Line* v. *Imperial Smelting Corporation* (1942) A.C. 154, 195; (1941) 2 All E.R. 163.

65 *Narasu* v. *P.S.V. Iyer* (1953) Mad. 831, 853; (1953) A.M. 300, 308.

66 *Murphy Bros.* v. *Hare* (1974) 3 All E.R. 140.

67 Treitel: Law of Contract (5th Ed.) p. 666-668

68 *Narasu* v. *P.S.V. Iyer* (1953) Mad. 831, 853; (1953) A.M. 300, 308.

69 *Gambhirmull* v. *Indian Bank Ltd.* (1963) A.Cal. 163; *Monarch Steamship Co.* v. *Karishamns* (1949) A.C. 196; (1949) 1 All E.R. 1, refd. to; see *The Massalia* (*Societe Tunisienne D' Armement* v. *Sidmar*) (1961) 2 Q.B. 278; (1960) 2 All E.R. 529.

70 *D.R. Mehta* v. *Tin Plate Dealers Association* (1965) A.M. 400.

71 *Tsakiroglou & Co. Ltd.* v. *Noblee Thori* (1960) 2 Q.B. 318; (1959) 1 All E.R. 45; (1959) 2 W.L.R. 179, 185; appd. (1962) A.C. 93; (1961) 2 All E.R. 179 (H.L.); (1961) 2 W.L.R. 633 (H.L.); *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.* (1929) A.C. 497, 510; *Universal Cargo Corporation* v. *Citati* (1957) 2 W.L.R. 713, 725 (Devlin J.) dissolution of a commerical contract on the happening of supervening event.

72 *Ibid; Satyabrata Ghose* v. *Mugneeram & Co.* (1954) S.C.R. 310, 323, (1954) A.Sc. 44, 48; *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 527; *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.* 76 Cal. W.N. 528, 541, 544; *Ahmad Khan* v. *Shahanshah Jahan Begum* (1973) A.A. 529, 531.

Frustration and Rescission.—When there is frustration, the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract, on the ground of repudiation or breach or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. The issue has to be decided by the court *ex post facto* on the actual circumstances of the case.[73]

The essence of the doctrine of frustration is that it should not be due to the act or election of one of the parties. Reliance cannot be placed on self induced frustration.[74]

The leading authority on the point is *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[75] where the appellants chartered a trawler from the respondents. It was fitted with an otter trawl and both parties knew that under the Canadian Fisheries Act it was forbidden to use otter trawl without a licence which the appellants could not get because they had five trawlers in all they got license for only three leaving to the appellants to choose the three trawlers. They did not include the trawler of the respondents and claimed that the contract had been frustrated. The Privy Council held that they could not rely on frustration since it was their own voluntary election which prevented the respondents' Trawler being used.

The House of Lords in *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corpn.*[76] has thought that an accidental injury to a party even if due to his own negligence could not be treated as caused by default so as to preclude frustration. In *Hare* v. *Murphy Brothers Ltd.*[77] Lord Denning M.R. assumed that negligence would not amount to fault for the purpose of being self-induced.

Arbitration and frustration.—In the case of frustration of contracts their performance comes to an end but the contracts would still be in existence for purposes of resolution of disputes arising under or in connection with them. The question of frustration or impossibility of performance will still have to be decided under them and therefore under the arbitration clause which does not perish on frustration of contract.[78]

It was to be inferred in an arbitration matter from the lapse of 8 years between the appointment of the arbitration and the delivery of the party's points of claim that the parties had impliedly agreed to terminate the arbitration agreement. An arbitration agreement could be frustrated either by mutual default of both parties or repudiatory breach by one party to refer the dispute to arbitration if the delay caused by the mutual default or the conduct of one party was such that a fair arbitration was impossible.[79]

More Onerous—Narrow limits of Doctrine.—Doctrine of frustration must be applied within very narrow limits.[80] Frustration is not to be lightly held to have occurred.[81] It is useful within its proper limits.[82] Disappointed expectations do not lead to frustration.[83] A contractor who contracted to build in 8 months and could only do so in 22 months because of scarcity of labour cannot claim frustration and payment on the basis of *quantum meruit*. A contract is not frustrated because its performance has become more onerous. Disappointed expectations even of both parties to a contract do not lead to frustrated contracts.[84] A company's agree-

73 *Satyabrata Ghose* v. *Mugneeram & Co.* (1954) S.C.R. 310, 325; *Denny, Mott & Dickson Ltd.* v. - *James B. Faraser & Co. Ltd.* (1944) A.C. 265, 274; *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 806; (1960) A.SC. 588, 594 (abnormal change in prices, or currency rates no ground).

74 *Bank Line Limited* v. *Arthur Capel & Co.* (1919) A.C. 435, 452; (1918-19) All E.R. Rep. 504.

75 (1935) A.C. 520; (1935) All E.R. Rep. 84.

76 (1942) A.C. 154, 179; (1941) 2 All E.R. 165.

77 (1974) 3 All E.R. 140. But otherwise in (1940) 2 K.B. 430.

78 *Union of India* v. *Kishori Lal* (960) 1 S.C.R. 493; (9159) A.SC. 1362, 1371; *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522; *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810; *Government of Gibralter* v. *Kenney* (1956) 3 W.L.R. 466.

79 *Andre et Cie S.A.* v. *Marine Transport Ltd.* (1981) 2 All E.R. 916, 917 (C.A.).

80 *Tsakirogolou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633,642 (H.L.): (1961) 2 All E.R. 179; (1962) A.C. 93.

81 *Ibid;* (1959) 2 W.L.R. 179, 185; *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council* (1956) A.C. 696, 716.

82 *Ibid; Twenteshe Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory* (1945) A.PC. 144.

83 *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council,* 1956 A.C. 696, 715; (1956) 3 W.L.R. 37 (Increase of expense and time required to complete performance of contract).

84 *Davis Contractors* v. *Fareham Urban Distt. Council* (1956) A.C. 696, 715; (1956) 3 W.L.R. 37, 50, 64 (H.L.); *Bush* v. *Whitehaven Port and Town Trustees,* 2 Hudson Buildings Contract (4th Ed.) 122 was

ment to pay bonus to its workmen is not frustrated by its subsequently discovering that its expectations of its state of prosperity envisaged earlier had not been fulfilled.[85] An increase in expense is not a ground of frustration.[86] A contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no power of absolving from performance of the contract merely because it has become onerous on account of unforeseen circumstances.[87]

A subsequent order by Government fixing a higher price for salt which is not retroactive does not frustrate a previous contract for sale of salt wherein the price was not dependent upon variations consequent upon Governmental orders.[88] Rights created on contracts entered into in regard to *Khas* lands are not effaced or destroyed under Bihar Land Reforms Act and s. 56 is inapplicable to them in spite of extra burden saddled on the lands.[89] A wholly abnormal rise or fall in price, a sudden depreciation in currency, an expected obstacle to execution or the like do not by themselves affect the bargain made by parties.[90] A contract is not frustrated merely because the circumstances in which the contract is made—in this case by the commencement of hostilities, the 2nd World War—are altered.[90] So also where after the contract is made a notification regulating retail prices is passed but it does not make the contract impossible or illegal the contract is not discharged.[91] There is no frustration of a contract where contract is merely difficult of performance and where the position was known to the parties, e.g. in case of a lease of land for plucking *Kendu* leaves where part of the land is under tenants who have a right to pluck leaves and sell to anyone they like.[92]

Commercial impossibility.—The impossibility referred to in the second clause of this section does not include what is called commercial impossibility. A contract, therefore, to supply freight cannot be said to become impossible within the meaning of that clause merely because the freight could not be procured except at an exorbitant price.[93] So a contractor for bridge tolls has no legal claim for compensation against the District Board if a considerable part but not the whole of the traffic is prohibited by a Government ordinance,[94] or if floods make it impossible to use the bridge for a substantial part of the contract period.[95] *A* contracted to buy tapestry from *B* and stated he intended to resell it in Australia. Imports to Australia were thereafter prohibited. *A* repudiated the contract. In a suit by *B* against *A* for damages, it was contended that the contract was frustrated, but it was held not to be the foundation of the contract that *A* should be in a position to sell the goods in Australia.[96]

The word "impossible" in relation to a contract between commercial people should be

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described as an extremely puzzling case and overruled. *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 807; (1960) A.S.C., 589, 594; *supra*.

85 *Pearl Cycle Industries Ltd.* v. *A.N. Kaul* (1964) A. Punj. 482; *Davis Contractors Ltd.* v. *Fareham Urban Distt. Council* (1956) A.C. 696, 715 reld. on.

86 *Larrinaga & Co.* v. *Societe Franco-Americaine des Phosphates* (1922) 28 Com. Cas. 1; affd. H.L. (1923) 92 L.J. (K.B.) 455 refd. to *Tsakiroglou & Co.* v. *Noblee Thorl* (1961) 2 All E.R. 179, 184; (1961) 2 W.L.R. 633; 681; (1962) A.C. 93 Cf. *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (1935) A.C. 524, 528.

87 *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 528; *Alopi Parshad & Sons* v. *Union of India* (1960) 2 S.C.R. 793, 808; (1960) A.SC. 588, 594; *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310; *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1962) A.C. 93, 116; (1961) 2 W.L.R. 639; (1961) 2 All E.R. 179; *The Ocean Tankers Corpn.* v. *V/o Sovfracht-The Eugenia (1964) 2 W.L.R. 114, 122; (1964) 1 All E.R. 161; Societe Franco Tunisienne* v. *Sidermar—The Massalia* (1961) 2 Q.B. 278 overruled; *State of Orissa* v. *Mohammad Khan* (1961) A.Or. 75; *Suramma* v. *Sitaramswamy* (1957) A.AP. 71 (more burdensome or expensive); *Sree Amuruvi* v. *Sabhapathi Pillai* (1962) A.M. 132 (unprofitable).

88 *Johrilal* v. *B.S. Co-operative Bank* (1959) A.P. 477; but see *Boothalinga Agencies* v. *Poriaswami Nadar* (1969) A.SC. 110 (case of order prohibiting sale subsequent to the contract which made it void).

89 *Brijnandan Singh* v. *Jamuna Prasad* (1958) A.P. 589.

90 *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793; 806; (1960) A.SC. 588, 594.

91 *Sarada Prasad* v. *Bhut Nath* (1941) 2 Cal. 78; 45 C.W.N. 660; (1942) A. Cal. 291.

92 *State of Orissa* v. *Mohammad Khan* (1961) A.Or. 75; *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310 reld. on.

93 *Karl Ettlinger* v. *Chagandas* (1916) 40 Bom. 301, 310-311; 33 I.C. 205.

94 *D.B. South Kanara* v. *Santhappa Naick* (1924) 86 I.C. 362.

95 *Sankaran* v. *District Board, Malabar,* 1934 A.M. 85; 66 Mad L.J. 108; 147 I.C. 964. Cf. *Gurdit Singh* v. *Secretary of State,* 1931 A.L. 347, 130 I.C. 772. See also *Sahas Karan* v. *Nath Mal,* 1951 A.Ajm. 65.

96 *Samuel Fitz & Co.* v. *Standard Cotton Co.* 1946 Mad. 192, 1945 A.M. 291.

understood in commercial sense.[97] Non-issuance of permits by Nizam Government for export of cotton seeds frustrated a contract as it created a fundamentally different situation bringing about a change of circumstances, which upset the foundation of the contract.[98] Price paid was held recoverable. Where the commercial or practical purpose of the contract is defeated by restrictions placed by orders of Government from exporting foodgrains outside the State the contract is frustrated. Uncertainties of future were there when the contract was made, but when they became realities the commercial venture frustrated.[99] A contract containing monopoly is frustrated as a result of Article 19 (1) (g) of the Constitution.[1] The question whether an embargo by Government on importation of jute from Pakistan would relieve the buyer from obtaining a licence would depend[2] on whether the buyer undertook to use his best endeavour to get a licence[3] or whether the undertaking was absolute.[4] In the former case, law will not imply an absolute obligation to do that which the law forbids and in the latter case the Courts have observed that there is nothing improper or illegal for a party to take upon himself an absolute obligation and if he takes the risk he is bound by it.

Customary and usual at the time of performance.—Where a contract requires its performance to be carried out in a customary manner the performance must be carried out in a manner which is customary at the time when the performance is called for.[5] It is not the date of the contract but the date of performance that determines what is customary and usual,[6] when the relevant alleged event happens, that is upon probabilities not upon a certainty arrived at after the event.[7] In most cases the time when the new situation emerges is clear; there has been some particular event which makes all the difference. It may be that frustration can be the result of a gradual change, but if so it will have to be determined when the frustration occurred or contract came to an end.[8]

C.I.F. Contract and Contract of Affreightment.—A c.i.f. contract is not frustrated *ipso facto* if the *usual and customary* route is rendered impossible, but there may be cases when it may be frustrated, e.g. by closure of the Dardenelles in respect of goods to be shipped from Black Sea to the Mediterranean.[9] The House of Lords drew a distinction between a c.i.f. contract and a contract of affreightment in regard to the applicability of the customary and usual route of shipment.[10] The position is not analogous to the case of contract for the sale of goods.[11]

Cases of closure of Suez.—By the closure of the Suez there was no frustration of the contract as the blockage did not bring about so fundamentally different a situation as to frustrate

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97 *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.* 76 Cal. W.N. 528, 541, 548.

98 *Ramayya* v. *Gulfarosh Mohiud Deen* (1958) A.AP. 576; *Satyabrata* v. *Mugneeram* (1954) S.C.R. 310 appld.

99 *Bachhraj* v. *Nandlal* (1966) A.MP. 145.

1 *Hamara Radio & General Industries* v. *State of Rajasthan* (1964) A.Raj. 205.

2 *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.SC. 522, 528.

3 *Anglo-Russian Merchants Traders* v. *John Balt & Co.* (1971) 2 K.B. 679—no reason why law should imply an absolute obligation to do that which the law forbids; *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 528.

4 *Pratabmull* v.*K.C. Sethia* (1951) 2 All E.R. 352 and *Peter Cassidy Seed Co.* v. *Osuustukkuk* (1957) 1 W.L.R 273 (party can take an absolute responsibility); *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 528.

5 *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1958) 3 W.L.R. 390; (1958) 3 All E.R. 115, 119; (1959) 1 Q.B. 131, 145; *see Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633; 641; (1961) 2 All E.R. 179, 184; (1962) A.C. 93; *Upjohn* v. *Hitchens* (1918) 1 K.B. 171, 179; (1918) 2 K.B. 48 (C.A.).

6 *Tsakirogolou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633, 641 (per Viscount Simonds); (1961) 2 All E.R. 179; *Reardon Smith Lines Ltd.* v. *Black Sea & Baltic General Insurance Ltd.* (1939) All E.R. 444; (1939) A.C. 562.

7 *Court Line Ltd.* v. *Dant & Russell Inc.* (1939) 3 All E.R. 314; *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 63 C.L.R. 169, 184.

8 *Davis Contractors Ltd.* v. *Fareham U.D. Council* (1956) 3 W.L.R. 37, 56; (1956) A.C. 690; (1956) 2 All E.R. 145.

9 *Albert D. Gaon Co.* v. *Societe Interprofessionelle* (1959) 3 W.L.R. 622; 627; (1959) 2 All E.R. 693; 698; on appeal (1960) 2 W.L.R. 869; (1960) 2 All E.R. 160.

10 *Tsakirogolou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633, 641; (1961) 2 All E.R. 179, 184; (1962) A.C. 93; see also *Albert D. Gaon Co.* v. *Societe Interprofessionelle* (1959) 3 W.L.R. 622; (1959) 2 All E.R. 693; 698; on app. (1960) 2 W.L.R. 869; (1960) 2 All E.R. 160.

11 *Societe Franco Tunisienne D'Armement* v. *Sidermar S.P.A. (The Massalia)* (1960) 3 W.L.R. 701; overruled in the Eugenia (1964) 2 Q.B. 226; (1964) 1 All E.R. 161.

the venture. The vovage round the Cape only took longer and was more expensive.[12] In the *Massalia*[13]

by a charterparty, the Massalia was chartered in October for the carriage of Iron Ore from an Indian Port to Genoa, and owing to blocking of the Suez Canal the voyage was made round Cape of Good Hope.

Pearson J. held that the route via the Cape was so different from the usual route that it made the voyage fundamentally different from that contemplated by the contract.[13]

In *the Eugenia or Ocean Tankers Corpn.* v. *V/O Sovfracht,*[14]

by a charterparty, the owners of a ship hired her through charterers for a trip to India via Black Sea. During the negotiations, both parties realised that there was a risk of the closure of the Suez Canal but they did not make any provision for it in the charterparty which was a time charter. The charterers had to pay hire at fixed rate per month from the time of the vessel's delivery until her return. The vessel entered the Canal and proceeded southward when she was trapped because of the blocking of the Canal. The charterers claimed frustration of the contract. The cargo was iron and steel goods which would not have been adversely affected by the voyage by the Cape of Good Hope.

It was held that the charterparty was not frustrated because no such fundamentally different situation had emerged as made it just and reasonable to relieve the parties of their obligation.

Where a shipowner permits the cargo to be loaded knowing that the usual and customary route is not available, he is not estopped from alleging frustration because there is no representation of fact which at common law estops him.[15]

In a contract,

the sellers agreed to sell cotton-seed cake for shipment from Port Sudan c.i.f. Belfast. At the date of contract the *usual and customary* route for the shipment was via Suez Canal. But at the date of performance the Suez Canal was closed to traffic.

It was held that the continued availability of the Suez route was a fundamental assumption at the time when contract was made and to impose on the sellers the obligation of shipping via the Cape of Good Hope would be to impose a fundamentally different obligation and accordingly the contract was frustrated.[16] Ashworth J. in *Albert D. Gaon & Co.* v. *Societe Inter-professionelle*[17] in almost similar circumstances held that the difference in expense, distance and character of a voyage round the Cape of Good Hope was not such as to render performance by that route a thing radically different from that which was undertaken by the contract nor was there such a change involved as would call the principle of frustration into play. Nor were the contracts made on the basis that if Suez Canal was no longer available the sales would be off.

The sellers in *Tsakiroglou case*[18]

agreed to sell to buyers c.i.f. Hamburg Sudanese groundnuts from Port Sudan. At the time of the contract the usual and normal route of shipment from Port Sudan to Hamburg was via the Suez and the

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12 *Ocean Tankers Corpn.* v. *V/O Sovfracht—The Eugenia* (1964) 2 W.L.R. 114; (1964) 2 Q.B. 226; *Societe Franco Tunisienne D'Armement* v. *Sidermar— Massalia* (1961) 2 Q.B. 278 overruled (there the contract imposed an obligation of using the Suez Canal); see also *Carapanayoti & Co Ltd.* v. *E.T. Green Ltd.* (1958) 3 W.L.R. 390, 400 overruled in *Tsakiroglou* v. *Thori* (1961) 2 W.L.R. 633; and *Albert D. Gaon & Co.* v. *Societe Inter Professionelle* (1959) 3 W.L.R. 622; (1959) 2 All E.R. 693; on app. (1960) 2 All E.R. 160.

13 *Societe Franco Tunisienne D'Armement* v. *Sidermar* (1961) 2 Q.B. 278; (1960) 2 All E.R. 529 overruled in *The Eugenia—Ocean Tankers Corpn.* v. *V/O Sovfracht* (1964) 1 All E.R. 161; (1964) 2 Q.B. 226.

14 (1964) 2 Q.B. 226; (1964) 1 All E.R. 161.

15 *Societe Franco Tunisienne D'Armement* v. *Sidermar S.P.A.* (1960) 3 W.L.R. 701 at p. 703; (1960) 2 All E.R. 529 overruled in *The Eugenia (Ocean Tankers Corporation* v. *V/O Sovfracht)* (1964) 2 Q.B. 226; (1964) 1 All E.R. 161.

16 *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1958) 3 W.L.R. 390, 400 overruled in *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633, 641 (H.L.); (1961) 2 All E.R. 179; (1962) A.C. 93.

17 (1959) 3 W.L.R. 622; (1962) 2 All E.R. 693. On appeal (1960) 2 W.L.R. 869, 877. (Observations of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham U.D.C.,* 1956 A.C. 727 appd.); contra *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1958) 3 W.L.R. 390 (overruled in *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633; (1961) 2 All E.R. 179; 1962) A.C. 93.

18 *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633 (H.L.); (1961) 2 All E.R. 179; affd. on appeal (1962) A.C. 93.

route via the Cape of Good Hope would have been rare and unusual. But soon after the Suez Canal was blocked and the goods could be booked via the Cape. The seller failed to make the shipment and when the buyer claimed damages, the seller peaded frustration

but Diplock J. held there was no frustration.

The Court of Appeal held that there was no frustration because the shipment by the Cape of Good Hope would not be a performance radically different from that undertaken by the contract; despite the long distance and increase in freight, the nature of the undertaking will not change.[19] The House of Lords on appeal affirmed the judgment of the Court of Appeal and held

(1) that a term that shipment should be via the Suez Canal or by the usual and customary route at the date of the contract should not be implied into the contract;
(2) that since the Suez Canal was blocked during the relevant period, the sellers had to ship the goods by a reasonable and practical route if available;
(3) that although the route via the Cape involved a change in the method of performance from that taken under the contract, yet it was not such a fundamental change from the undertaking in the contract as to entitle the seller to say that the contract was frustrated.[20]

Commercially or Fundamentally or Radically different.—The words "not commercially or fundamentally different" cannot be intended to mean that it was neither commercially different nor different fundamentally. It must mean that performance was not fundamentally different in a commercial sense. The ultimate question is whether the new method of performance is fundamentally different and that is a question of law. The inference to be drawn from all the facts must be a question of law—was there or was there not frustration.[21] The term "fundamentally altered"[22] and "radically different"[23] used in connection with the doctrine of frustration mean the same thing as perhaps to do other adverbs which have been used in this context.[24]

It does not automatically follow that because one term of a contract, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow because as a matter of construction a term cannot be implied, the contract may not be frustrated. And therefore the impossibility of the route via the Suez if that was an implied contractual obligation would not necessarily spell the frustration of the contract.[25]

A port becomes an impossible port when loading thereat will subject the ship to such delay as will frustrate the commercial object of the venture so that the voyage when performed will be something different from that contracted for.[26] Charterers cannot succeed in their defence in an action for damages for repudiation of a charter-party unless the delay in making a vessel seaworthy was or appeared likely at the date of repudiation to be so great as to frustrate the commercial purpose of the charter. For this purpose, there can be no real difference between "reasonable time" yardstick and the "frustrating time" yardstick.[27]

Delay in fulfilling a contract when frustration.—Proper test to apply to decide whether

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19 *Ibid;* 877, 881 (C.A.); (1962) A.C. 93 (H.L.); *Albert D. Gaon & Co.* v. *Societe Interprofessionelle Des Oleagineux Fluides Alimentaries* (1960) 2 W.L.R. 869, 877, 881. Opinion of McNair J. in *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1958) 3 W.L.R. 390; (1959) 1 Q.B. 131 not approved.

20 *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1962) A.C. 93; (1961) 2 W.L.R. 633 (H.L.); (1961) 2 All E.R. 179; *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1959) 1 Q.B. 131; (1958) 3 W.L.R. 390 overruled.

21 *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl* (1961) 2 W.L.R. 633, 645 per Lord Reid; (1962) A.C. 93; (1961) 2 All E.R. 179.

22 *British Movietonews Ltd.* v. *London Cinemas Ltd.* (1952) A.C. 166, 185; (1951) 2 All E.R. 617, 625 (per Viscount Simon); *Davis Contractors Ltd.* v. *Fareham U.D.C.* (1956) A.C. 696, 723; (1956) 2 All E.R. 145, 155; per Lord Reid.

23 *Davis Contractors* (1956) A.C. 696, 729; (1956) 2 All E.R. 145, 160.

24 *Tsakiroglu & Co. Ltd.* v. *Noblee Thorl* (1961) 2 All E.R. 179, 184; (1962) A.C. 93.

25 *Tsakiroglu & Co.* v. *Noblee Thorl* (1961) 2 All E.R. 179, 182; (1961) 2 W.L.R. 633, 639 (H.L.) (per Viscount Simonds).

26 *Reardon Smith Line Ltd.* v. *Ministry of Agriculture and Food* (1961) 3 W.L.R. 110, 155 (Wilmer L.J.).

27 *Hongkong Fir Shipping Co..Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* (1961) 2 W.L.R. 716, 726; *Universal Cargo Carriers Corp.* v. *Citati* (1957) 2 Q.B. 401, 434; (1957) 2 W.L.R. 713.

delay in fulfilling an agreement was so grave as to entitle the aggrieved party to rescind, is whether that delay is such as to frustrate the commercial purpose of the venture. Reasonable time can only be accepted as a test where the period regarded as reasonable time is the same as the period necessary to frustrate.[28] Delay in the supply of cargo will not frustrate a charter party because the delay in loading for a variety of reasons was contemplated by its terms and because the consequence of such delay would purely be financial for one side or the other.[29]

Test of Frustration.—The simple test of frustration is that a situation must arise which renders performance of the contract "a thing radically different from that which was undertaken by the contract" per Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham U.D.C.*[30]

"Becomes unlawful."—By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiff's ship. The pilgrims arrived in Bombay, but the defendants refused to receive them on board their steamer on the ground that during the voyage of the plaintiffs' ship to Bombay there had been an outbreak of small-pox on board, and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had under the circumstances become unlawful, having regard to the provisions of s. 269 of the Indian Penal Code, 1860. That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment. It was held that the carrying of the pilgrims in the defendants' steamer would not have been in contravention of any law or regulation having the force of law, nor would it have been a negligent act on their part to do so, and that s. 269, therefore, did not apply, and that the defendants were bound to perform the contract.[31] Where a truck owner agreed to carry bales of cotton, but both the owner's trucks were requisitioned by the military authorities and user thereafter would have been punishable, the contract was held to have been frustrated from the time of the notice of requisition.[32]

A contract made in England for supply of Portuguese turpentine to a port in Eastern Germany is frustrated if seller's application for export, without which no export was allowed to take place, is refused.[33] Any subsequent change in the law rendering the performance of a contract illegal would frustrate the contract automatically.[34] A contract for cutting trees becomes frustrated by a subsequent law prohibiting the cutting of trees except under a licence which was refused to the party. Each party is then bound to restore the benefit received from the contract.[35] A contract between the executive of a temple and devadasis to dance before the deity becomes frustrated because of subsequent legislation making it illegal and an offence.[36] Where a permit is being challenged in the High Court its renewal is subject to the implied condition that the renewal will stand cancelled if the High Court negatives the legality of the original permit and sets it aside. The renewed permit therefore becomes void in the latter event.[37] Where the basis of the contract was that the defendant would export diesel to Finland but the export was prohibited by Government and therefore the very foundation of the contract was destroyed, it was held[38] that such a contract was automatically dissolved under s. 56, Contract Act.

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28 *Universal Cargo Carriers Corp.* v. *Citati* (1957) 2 W.L.R. 713; Scrutton on Charterparties (16 Ed.) 350; *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183; *Inverskip S.S. Ltd.* v. *Bunge* (1917) 2 K.B. 193, 201 (Scrutton L.J.); *supra* n. 90.

29 *The Angelia Trade and Transport Inc.* v. *Lino Kaiun Kaisha Ltd.* (1973) 2 All E.R. 144, 152.

30 (1956) A.C. 696, 729; (1956) 3 W.L.R. 148 (H.L.); (1956) 2 All E.R. 145.

31 *Bombay and Persia Steam Navigation Co.* v. *Rubattino Co.* (1889) 14 Bom. 147.

32 *Noorbux Mohmood Bux* v. *Kalyandas Jugaldas* (1945) Nag. 475, 1945 A.N. 192. See also *Kisanlal* v. *Vithal,* 1951 A.N. 320 (Forward contracts forbidden).

33 *A.V. Pound & Co. Ltd.* v. *M.W. Hardy & Co. Inc.* (1956) 2 W.L.R. 683.

34 *Dominion of India* v. *Bhikraj Jaipuria* (1957) A.P. 586, 597—(subsequent change in the law) affd. on appeal (1962) 2 S.C.R. 880 on another ground; *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, referred to.

35 *Man Singh* v. *Khazan Singh* (1961) A.Raj. 277; *Lakshmanan* v. *Kamrajendra* (1955) A.M. 606 folld.

36 *Shree Madana Gopalaswamy* v. *Saride Manikyam* (1957) A.AP. 643.

37 *V.C.K. Bus Service Ltd.* v. *Regional Transport Authority* (1957) S.C.R. 663; 675; *F.A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Co.* (1916) 2 A.C. 397, 422, appd.

38 *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.* 76 C.W.N. 528.

The repealed Specific Relief Act of 1877 (s. 13) provided that notwithstanding s. 56 of the Contract Act a contract is not wholly impossible of performance if a portion of the subject-matter has ceased to exist. S. 12 (4) and Explanation to s. 12 of the Act of 1963 provide that in divisible contracts specific performance can and ought to be ordered of that part which can and ought to be specifically performed; and that for purposes of s. 12 of the Act a party shall be deemed to be unable to perform the whole of his part if a portion of its subject-matter has ceased to exist at the time of performance. The Transfer of Property Act, 1882, s. 108, provides as to property let on lease, that if by fire, tempest, or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

I. Illegality affecting part of contract.—

(a) Illegality affecting only part of the contract gives rise to two problems:

(1) Does it frustrate the contract? This would depend on whether it affects the main object of the contract or only some subsidiary provision, e.g. *Denny Mott & Dickson* v. *James Fraser & Co. Ltd.*[39] (an option of purchase of timber yard was frustrated by the order prohibiting further dealings in timber since its main object, viz. trading in timber had become illegal). But see *Cricklewood Property Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.,*[40] where a 99 years' building lease was not frustrated as the main object of the lease was not destroyed by wartime restrictions which in the circumstances was not of long duration.

(2) The second question is whether illegality which does not frustrate the contract but affects subsidiary obligation excuses non-performance of that obligation. On principle it should. An example of this is not calling at one of the ten ports which becomes an enemy port.[41]

Events foreseen or provided for.—A contract should not be frustrated by an event expressly provided for in the contract[42] nor by an event which was or could be foreseen by the parties.[43] Two cases are instances of his. In *Budgett & Co.* v. *Binnington & Co.*[44]

a bill of lading provided ten days for unloading and after that demurage was payable. A strike prevented unloading.

In such a case, it was held, the merchant takes the risk. In *Larringa & Co.* v. *Societe Franco-Americaine de Phosphates de Medulla*[45]

a contract was made in 1913 to carry six cargoes of phosphates between March 1918 and November 1920. The contract was not frustrated on account of the First World War because the contract was essentially speculative.

The argument of altered shipping conditions was rejected by the House of Lords. Where an express provision is made against a supervening event frustrating the contract there can be circumstances which will bring about frustration, e.g. supervening illegality; true construction of the contract and incompleteness of the provision.[46]

(a) Supervening Illegality.—But a supervening illegality will frustrate a contract in spite of a provision to the contrary. A contract to deliver copper to a German Company from 1911

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39 (1944) A.C. 265; (1944) 1 All E.R. 678.

40 (1945) A.C. 221; (1945) 1 All E.R. 252.

41 Treittel: The Law of Contracts (5th Ed.) pp. 652-653. But in *Eyre* v. *Johnson* (1946) K.B. 481—Tenant held liable for damages for non-repair although wartime regulations made it illegal for him to do any repairs. Could he have been called upon to do an illegal act ?

42 *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corpn. Ltd.* (1942) A.C. 154, 163. But see *Tatem (W.J.) Ltd.* v. *Gamboa* (1939) 1 K.B. 132, 138.

43 *Krell* v. *Henry* (1903) 2 K.B. 740, 752; see *Naihati Jute Mills* v. *Khyaliram* (1968) A.SC. 522, 527; *Satyabrata Ghose* v. *Mugneeram* (1954) S.C.R. 310, 323; (1954) A.SC. 44, 48; *Alopi Parshad & Co.* v. *Union of India* (1960) 2 S.C.R. 793; (1960) A.SC. 588.

44 (1891) 1 Q.B. 35, 41.

45 (1923) 92 L.J.K.B. 455 (H.L.).

46 Treittel: Law of Contract (5th Ed.) pp. 660-661.

to 1919 was frustrated in spite of specifically providing for suspension during the war. This was on the ground of public policy (Lord Sumner).[47] So also in the case of war breaking out with Germany in summer 1939.

An agreement of sale of urban land became impossible of performance on account of s. 4 of the A.P. Prohibition of Alienation of Urban Lands Act of 1972 which prohibited alienation of such lands.[48]

Supervening illegality under a foreign law.[49]—It has been held that where a contract governed by English law is to be performed in a foreign country and that performance is or becomes illegal by the law of that country (*lex loci solutionis*) the contract will not be enforced in England.[50] This applies where the change in the *lex loci solutionis* occurs after the contract but before its performance. Hence the English Courts will not enforce a contract governed by English Law for payment of freight in Spain under a charter party exceeding the maximum amount fixed by Spanish Law after the contract was made.[51] It is for the party relying on frustration to show that the illegality covered the whole of the period during which performance was to be made. If the performance was illegal during a part of the period of the contract the exporter will be liable for failure to perform during that period.[52]

But a contract governed by English Law is not frustrated without making it illegal, (the *lex loci solutionis)* merely excusing a party from performing in full.[53] An English contract is not frustrated if a party contravenes the law of the place where he is residing or of which he is a national, if that law is neither the *lex loci solutionis* nor the proper law. It is submitted this will also be the position of law in India.

(b) Narrow construction—True construction of the clause.—On a true construction a clause wide enough to cover the event may frustrate a contract. In *Metropolitan Water Board* v. *Dick, Kerr & Co.* [54]

contractors agreed to construct in 6 years and extension of time was provided for in the event of delays "however occasioned". The contractors during the war were required to stop work and to sell the plant.

The contract was held to have frustrated because the interruption was of a vital character and could not have been in the contemplation of parties when made.

(c) Incomplete provision.—A provision may have been made but the provision may be incomplete. In *Bank Line Ltd.* v. *Arthur Capel & Co.*[55] an owner pleaded frustration of the charterparty because of the ship being commandeered. The House of Lords held the contract frustrated but Lord Sumner said that there is no frustration in cases of "full and complete" provision but not so where "a contingency may be provided for ... only for the purpose of dealing with one of its effects and not with all".

Cases of frustration.—An agreement to construct and instal illumination on the building on a monthly rental for 5 years, payable whether the sign was used or not, was not frustrated by an order prohibiting illumination during the day or night due to the war and the lessor could recover payment due under the contract.[56] So also in *Leiston Gas Co.* v. *Leiston-cum-*

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47 *Erter Bieber & Co.* v. *Rio Tinto Co. Ltd.* 1918 A.C. 260.
48 *C. Ramaniah* v. *Mohamad-unnissa Begum* (1981) A.AP. 34; *Satyabrata Ghose* v. *Mugneeram* (1954) A.SC. 44 folld.
49 Chitty: On Contracts (24th Ed.) 1424.
50 *Ralli Bros* v. *Compania Naviera Sota Y. Aznar* (1920) 2 K.B. 287.
51 *Ralli Bros* v. *Compania Naviera Sota Y Aznar* (1920) 2 K.B. 287; *Pound (A.V.) & Co. Ltd.* v. *M.W. Hardy & Co.* (1956) A.C. 588 (refusal by foreign Government to grant export licence).
52 *Smyth (Ross T) & Co. (Liverpool) Ltd.* v. *W.N. Lindsay (Leith) Ltd.* (1953) 1 W.L.R. 1280; (1953) 2 All E.R. 1045.
53 Chitty: On Contracts (24th Ed.) 1424.
54 (1918) A.C. 119, 126 reld. in *Narasu* v. *P.S.V. Iyer* (1953) Mad. 381; (1953) A.M. 300.
55 (1919) A.C. 435, 455-6; *Jackson* v. *Union Marine Insurance Co.* (1874) 10 C.P. 125 (the ship was damaged and was not ready for service for 8 months).
56 *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 63 C.L.R. 169; *In re Badische Co. Ltd.* (1921) 2 Ch. 331 appd.

Sizewell Urban Distt. Council[57] illumination was interfered with by a military order prohibiting lighting but the contract was not frustrated. A continuing contract is not discharged by a prohibitive regulation which may be determined or varied during the war leaving a substantial part of the contract capable of execution.

The B.N. Railway sold by auction slack coal to the plaintiff but the coal could not be allowed to be transported outside because of the order of the Coal Commissioner. The Railway thus agreed to cancel the auction and agreed to refund the purchase price, but later refused to pay back the money claiming that the Railway Administration was not liable to refund. In the meanwhile most of the coal was lost. The contract had got frustrated because of the orders of the Coal Commissioner and the contract was void as it was contrary to s. 175, Government of India Act, 1935, and therefore the plaintiff was entitled to refund.[58]

Where a portion of the property agreed to be reconveyed to the original vendor had been sold under the Evacuee Interest (Separation) Act, the contract of reconveyance became impossible of performance by supervening event.[59]

The municipality sold the collection of pig dung to a contractor but the pig owners themselves collected the dung and there was nothing left for the contractor. The Court held the contract had become impossible of performance as the future unascertained goods sold did not come into existence and therefore the contractor was not liable to pay to the municipality.[60]

Where according to the terms of the contract the sale of certain items of trust property makes the passing of the property dependent on tender of balance of price by the successful bidder and taking delivery of the goods upon such payment and in the meanwhile the Court by an injunction restrains the trustees from finalising the sale and after vacating the injunction the High Court orders restoration of *status quo* ante before any of such bidders pays the balance of the price stipulated, the sale of the trust property must be deemed to have frustrated.[61]

Change in specifications.—A contract cannot be frustrated when the speculations are changed during the carrying out of the contract under a specific term to that effect in the contract which provided that such alterations shall not invalidate the contract. The contractor in a case had not only carried out the additional work on account of change in the specifications but also was paid for the same. In such a case it cannot be said that the contract had become impossible of performance or unlawful and therefore frustrated.[62]

Foreseen events.—by one party.—There is no frustration in cases where a frustrating event was or it should have been foreseen by one party though not by the other party, e.g. right of displaying advertising signs on the roof of a hotel which was compulsorily acquired and demolished. The contract was not frustrated because the defendants knew of the compulsory acquisition and the plaintiffs did not and no provision was made for the event. The defendant was held liable for damages.[63] Similarly contracts made in the summer of 1939 could be frustrated because of the war with Germany, an event which was foreseeable; the cause of frustration being supervening illegality.[64]

57 (1916) 2 K.B. 428 (C.A.); *Egan & Staines Electricity Co.* v. *Egham Urban Distt. Council* (1942) 2 All E.R. 154—a similar case to *Leiston Gas* case: *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (1931) 1 Ch. 145; on app. (1931) 1 Ch. 274—case of a contract for the placing of electricity illuminated advertisements upon the roof of the hotel. The hotel was taken possession of by local authority and the electric signs removed and the building demolished. No frustration. Defendants knew and the plaintiff did not of the risk of compulsory acquisition; *Scanlans New Neon Ltd.* v. *Tooheys Ltd.* (1942-3) 63 C.L.R. 169; applying *In re Badische Co. Ltd.* (1921) 2 Ch. 331.

58 *Har Prasad Choubey* v. *Union of India* (1973) A.SC. 2350, 2354.

59 *Ahmad Khan* v. *Shahanshah Jehan Begum* (1973) A.A. 529, 531.

60 *Markapur Municipality* v. *Dodda Ramireddy* (1972) A.AP. 299, 300; *Satyabrata Ghosh* v. *Mugneeram Bangur & Co.* (1954) S.C.R. 310; (1954) A.SC. 44.

61 In the matter of H.E.H. The Nizam's Jewellery Trust *M/s Shanti Vijay & Co.* v. *Princess Fatima Fouzia* (1980) A.SC. 17, 28.

62 *State of Rajasthan* v. *Motiram* (1973) A. Raj. 223, 231.

63 *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (1931) 1 Ch. 274, 282; see also *Alopi Parshad & Co.* v. *Union of India* (1960) 2 S.C.R. 793; (1960) A.SC. 588; 593-4.

64 Treittel: The Law of Contract (5th Ed.). pp. 663-664.

Where both parties should have foreseen.—What, then, is the position where both parties did foresee or should have foreseen the event? It appears that frustration will be possible in that event. In *W.J. Tatem Ltd.* v. *Gamboa,*[65] a ship chartered for evacuation of civil population was captured by Spanish Nationalists and was detained till September 11. The owners had been paid upto the end of July and they claimed for the rest of the period. Goddard J. remarked (*obiter*) that even though the risk could have been foreseen, the contract would be frustrated and it could be prevented by an express provision to the contrary. Similarly there are observations of Lord Denning M.R. in the *Eugenia*[66] which also suggests frustration. He said: "It has often been said that the doctrine of frustration only applies where the new situation is 'unforeseen' 'unexpected', or 'uncontemplated', as if that were an essential feature but that is not so. The only thing that is essential is that the parties should have no provision for it in the contract". But in *Bank Line Ltd.* v. *Arthur Capel & Co.*[67] the charterparty was frustrated although the parties foresaw that the ship might be requisitioned and actually provided for the event.

Refund.—Where a contract, after it is made, becomes impossible, the party who has received any advantage under it is bound to restore it to the other party under s. 65 below. *A* buys freight from *B* for 2,500 bales of cotton on a ship belonging to *B* to be carried from Bombay to Genoa. The freight is paid in advance and the goods are put on board the ship. While the ship is still lying in the harbour, the export of cotton to Genoa is prohibited by orders of the Government, and the voyage is abandoned. *A* is entitled under s. 65 to recover from *B* the freight paid in advance. This right is not affected even if *B* is a common carrier.[68] Similarly, where a contract becomes unlawful owing to the outbreak of war, either party is entitled under s. 65 to recover from the other any deposit made by him as a security for the due performance of the contract.[69]

Effect of Frustration—Rights before frustration.—In *Chandler* v. *Webster*[70] it was held that money already paid as rent under the contract which was frustrated was not recoverable and the balance due could also be recovered in spite of frustration because the rent was payable a day in advance.[70] But this rule was remedied in *Fibrosa Spolka Akeyjna* v. *Fairburn etc. Ltd.*[71] which held that amount already paid could on frustration be recovered, where the consideration had wholly failed. Consequently the amount yet due would cease to be recoverable.

Consideration—meaning of.—It was also held that the money paid was recoverable in *quasi* contract. Lord Simon distinguished the meaning of consideration as used in *quasi*-contractual sense from that given in contract. He said:

> "The money was paid to secure performance and if performance fails, the inducement which brought about the payment is not fulfilled."[72]

Chandler v. *Webster*[73] was held to be devoid of authority. Lord Wright was of the opinion that the claim to repayment did not arise under the contract and was not a claim for further performance of the contract or damages but was a claim outside the contract for money

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65 (1939) 1 K.B. 132, 135, 138..

66 *Ocean Tramp Tankers Corpn.* v. *V/O Sovfracht* (*the Eugenia*) (1964) 2 Q.B. 226, 239; (1964) 1 All E.R. 161.

67 (1919) A.C. 435; (1918-19) All E.R. Rep. 504.

68 *Boggiano & Co.* v. *The Arab Steamers Co. Ltd.* (1916) 40 Bom. 529; 33 I.C. 536; followed, *Gandha Korliah* v. *Janoo Hassan* (1925) 49 Mad. 200; 91 I.C. 780; 1926 A.M. 175.

69 *Textile Manfg. Co. Ltd.* v. *Solomon Brothers* (1916) 40 Bom. 570; 33 I.C. 353; *Babulal Agarwala* v. *Firm Vijaya Stores,* 1955 or 49.

70 (1904) 1 K.B. 493 not accepted in India. See *Boggiano & Co.* v. *The Arab Steamers Co. Ltd.* (1916) 40 Bom. 529; 33 I.C. 536; *Gandha Horliah* v. *Janoo Hassan* (1925) 49 Mad. 200; 91 I.C. 780; 1926 A.M. 175; *Shivanadian Chettiar* v. *Batchu Surayya* (1925) A.M. 727.

71 (1943) A.C. 32; (1942) 2 All E.R. 122. The Indian law is wider than English law on the question of remedy by way of refund.

72 *Fibrosa Spolka Akeyjna* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122, 129.

73 (1904) 1 K.B. 493. (The hire of the room to view the king's procession has held not recoverable even though the contract was discharged and the hirer was held liable to pay the unpaid balance).

had and received.[74] This rule is equally unsatisfactory as it would not apply to cases where there is partial failure of consideration, e.g. *Whincup* v. *Hughes*[75] where an apprentice had paid £25 as premium for a 5 years' apprenticeship to a watchmaker who died after one year.

(2) The right to recover advance payment may cause injustice to the other side who may have expended the advance to finance the initial stages of the contract.[76] In English law this has been remedied by the Law Reform (Frustrated Contracts) Act, 1943, s. 1(2).

Rights not yet accrued.—At common law rights not yet accrued remained unenforceable.[77] In *Appleby* v. *Myers*[78] a contract to erect machinery in defendant's premises and to keep it in repairs for 2 years was held frustrated because both the premises and the machinery were destroyed by accidental fire, neither side being at fault, the plaintiff's claim for payment for work done was rejected on the construction of the contract as payment was to be made at the completion of the work, although contract was frustrated. In severable contracts where payments are to be made from time to time after a particular portion of the contract is performed, the rule was that whatever was due or had accrued for payment at the time of frustration was recoverable.[79]

English common law, before it was altered by the Law Reform (Frustrated Contracts) Act, 1943, required a total failure of consideration before a refund was possible.[80] Indian law is not so restricted.[81]

Dealings with Enemies.—Since 1914 the question has often arisen whether a contract lawfully made before the war comes within this seciton on the ground that performance or complete performance would involve dealing[82] with enemies and therefore would be unlawful under s. 23.

The governing principle was laid down in a case arising out of the Crimean War by Mr. Justice Willes:

"As to the mode of operation of war upon contracts of affreightment made before, but which remain unexpected at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it".[83]

In practice we have to ascertain whether the further execution of a given contract has become unlawful as involving dealing with enemies, or otherwise, or in a judicial sense im-

74 *Fibrosa* v. *Fairburn etc. Ltd.* (1943) 32, 65, 69.

75 (1871) 6 C.P. 78.

76 Treitel on Law of Contract (5th Ed.) p. 674, (2nd Ed.), p. 631; Cheshire & Fifoot: Law of Contract (6th Ed.) 493; see also *Fibrosa Spolka* v. *Fairburn Lawson C.B. Ltd.* 1943 A.C. 32, 49; (1942) (9th Ed.) p. 562; 2 All E.R. 122, 129.

77 *Cutter* v. *Powell* (1975) 6 T.R. 320 (Seaman's wages who died on sea not recoverable); *Appleby* v. *Myers* (1867) 2 C.P. 651 (Contract for erection of machinery which when only part had been erected caught fire. Nothing was recoverable).

78 (1867) 2 C.P. 651, 661; (1861-73) All E.R. Rep. 452, 454; *Taylor* v. *Caldwell* (1863) 122 E.R. 309 reld. on; *Cutter* v. *Powell,* 101 E.R. 573 (a seaman who was to be paid at the end of the voyage died during it; his executrix recovered nothing for service rendered); *Hesse* v. *Roy,* 149 E.R. 1101; see also *Parsons Bros. Ltd.* v. *Shea* (1965) 53 D.L.R. (2d) 86; In English law these cases have been remedied by s. 1(3) of Law Reform (Frustrated Contracts) Act of 1943.

79 *Stubbs* v. *Holywell Ry* (1867) 2 Ex. 311.

80 The Fibrosa case (1943) (*supra* n. 25) (*infra* p. 429). For the Indian action based on a total failure of consideration, see commentary to s. 65 under sub-head "Duties of Restitution".

81 In *Manasseh Film Co.* v. *Gemini* (1944) Mad. 124; 1944 A.M. 239 there was a total failure of consideration. In *Parshotam Das* v. *Batala M.C.,* 1949 A.E.P. 301, it was assumed that the case was analogous to the *Fibrosa Case.* This would be so only if the Court construed the contract as one to provide fee paying tonga drivers to use the stands, rather than as a contract to provide tonga slands. If the judgment is to be so interpreted, the money was recoverable in English law as on a total failure of consideration, independently of the question of frustration. The English writers, who object to the decision in *Krell* v. *Henry* on the ground that there was no frustration, are prepared to support it as one of total failure of consideration, regarding it as a purchase of a view of the coronation procession rather than a mere licence to use a house for a few hours: 4 MOD. L.R. 249.

82 "Trading" is too narrow: "a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country": judgment of Ex. Ch. per Willes J., *Esposito* v. *Bowden* (1857) 7 E. & B. at p. 779; 110 R.R. at p. 823.

83 *Esposito* v. *Bowden,* 7 E. & B. at p. 783; 110 R.R. at p. 825; *A. F. Ferguson & Co.* v. *Lalit Mohan,* 1954 A.P. 596, 606.

possible; and this is not always easy. Declaration of war is regularly accompanied by a Royal Proclamation against trading with the enemy. This appears to be only in affirmance of the common law, it may, however, and commonly does contain relaxations and dispensations. After a declaration of war a contract may stand dissolved on the ground now under consideration although both parties are British subjects.

One British firm contracted with another to sell goods, deliverable to the buyer or assigns in Hamburg c.i.f.[84] for payment at Liverpool in exchange for shipping documents. The goods were shipped in June, 1914, for Hamburg in a German ship; the bill of lading provided that questions arising under it were to be decided there by German law. On 5th August, the day following the declaration of war, the ship having put in, it was stated, at a neutral port, the sellers tendered the documents and the buyers refused them.

It was held, that delivery according to the contract would have been against the King's proclamation, as being delivery to residents in enemy country, and therefore the refusal was good.[85]

This authority has been followed in Indian cases where the facts were varied by the goods being despatched, or intended so to be, not to Germany but from Germany to India. We have the simple case of a cargo shipped from Hamburg to India, bill of lading tendered after British proclamation, refusal of tender justified,[86] the goods having become enemy property at the outbreak of war. Another straightforward example is that of a consignment sold by the Madras agent of an enemy firm: the buyer accepted a draft for the price, and demanded first the documents and then the goods on arrival at Madras: the agency was held to have been determined by the declaration of war, so that no contract was ever formed.[87]

A less simple question is

"whether when, before the outbreak of war, goods have been sold by one English firm to another on a c.i.f. contract and shipped on a German ship to a neutral port, the seller after the outbreak of the war is entitled to tender, in one case the German bill of lading, in the other case the German bill of lading and the German policy of insurance, and claim the price?"[88]

The exact legal point as stated in the Court of Appeal is

"upon whom the loss is to fall where documents which were originally valid have become invalid before they were tendered".[89]

It was decided in England that the documents the buyer is bound to accept are effective shipping documents, and not such as are only evidence of a contract now dissolved by one party having become an alien enemy. Special terms might throw this risk on the buyer, but the usual terms of a c.i.f. contract do not. This ruling has been followed in India. In *Marshall & Co.* v. *Naginchand*[90]

goods were shipped to Bombay under a c.i.f. contract from a German port and on board a German ship before the declaration of war: the vendor, a Glasgow firm, drew a bill of exchange upon the purchaser on 9th November, 1914, which was accepted in Bombay.[91] The bill became payable on 12th January, 1915, and the vendor sued for the amount.

He was held not entitled to recover, as the bill of lading had ceased to be an operative legal document before it was tendered and the consideration for the acceptance of the bill of exchange had, therefore, failed.

Where, on the other hand, a German seller's draft on the buyer at 30 days' sight was

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84 That is, the contract price included cost, insurance and freight. For a statement of the nature of c.i.f. contracts, see per Hamilton J. (afterwards Lord Sumner) in *Bidell* v. *E. Clemens Horst* (1911) 1 K.B. 214, at p. 220.

85 *Duncan Fox & Co.* v. *Schrempft & Bonke* (1915) 1 K.B. 365 Cf. Russel J.'s judgment in the *Badische Co.'s Case* (1921) 2 Ch. 331, 373, sqq.

86 *Nissim Issac* v. *Haji Sultanali* (1916) 40 Bom. 11; 28 I.C. 433.

87 *Soorthingje* v. *Mahomed* (1917) 32 Mad. L.J. 146; 40 I.C. 526.

88 Scrutton J., *Schneider & Co.* v. *Burgett & Newson* (1915) 2 K.B. 384 at p. 385.

89 Swinfen Eady L.J. *Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1916) 1 K.B. 495, 504.

90 (1916) 42 Bom. 473; 37 I.C. 644.

91 It is not clear from the report whether the bill of lading was tendered to the purchaser at the time of acceptance or subsequently, nor whether he ever got the bill of lading.

drawn, purchased by British subjects in London, and presented and accepted at Bombay before the war, the buyer was held bound to pay.[92] The case was complicated by the defendants' contention that the acceptance was qualified by the condition that the plaintiffs, when tendering the documents to the defendants, should put them in a position to get delivery of the goods,[93] and that this could not be lawfully performed. Now in point of fact the ship carrying the goods reached Bombay just before the outbreak of war, left Bombay to avoid capture and took shelter in the neutral port of Marmagoa, where she was lying at the date of suit brought, and under a proclamation of December, 1914, British consignees were free to take delivery of goods from enemy ships in neutral ports. Thus both branches of the defence failed: actual payment of the bill, from one British subject to another, at the due date and after declaration of war, was of course in no way unlawful.

In *Abdul Razac* v. *Khandi Row*[94]

a contract was made in August, 1914, after the outbreak of war, between merchants at Ambur and importers of German dyes whereby the latter (defendants) agreed to sell and deliver to the former (plaintiffs) certain casks of dye already shipped from Germany. As the defendants could not lawfully take up and pay for the goods, they could not lawfully agree to sell and deliver them to the plaintiffs.[95]

The case has another aspect, perhaps of more interest. The German S.S. *Barenfels* carrying the dyes in question was captured in October, 1914, and taken into Alexandria for condemnation and subsequently condemned as prize of war in September, 1915.[96] In the meantime the defendants got the goods released on payment of double the invoice value, agreeing to treat it as their sale price in case of their eventual condemnation. It was held[97] that the condemnation by the Prize Court related back to the date of seizure and divested the ownership of the goods as from that date. The goods, therefore, came to the defendants as purchasers from the Crown and they were not bound to deliver them to the plaintiffs.

In *Madhoram* v. *Sett*[98] we have a rather peculiar state of facts.

The contract was between two Calcutta firms for sale of steel bars "c.i.f., i.e., free Hoogly", by shipments in June, July, August, 1914. Goods were shipped under this contract[99] from Antwerp per S.S. *Steinturm,* a German ship which was at sea when war was declared; she carried a general cargo for Madras, Calcutta and Chittagong. The ship was captured by a British cruiser and taken to Colombo for adjudication. The Prize Court condemned the vessel but released the cargo, and the goods were brought to Calcutta, the place where the goods were to be delivered under the original contract by the *Steinturm,* under an order of the Prize Court made by arrangement with the Government of Ceylon, which provided for delivery to consignees on payment of further freight and expenses.

The purchasers were held not entitled to delivery of the goods from the vendors. The voyage from Colombo to Calcutta was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment which was dissolved by the outbreak of the war; the voyage was broken up by capture so as to cause a complete defeasance of the undertaking. "The original bills of lading would be of no avail whatever unless the consignee complied with the conditions imposed by the Prize Court".[1] Thus there was a new voyage under new condi-

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92 *Motishaw & Co.* v. *The Mercantile Bank of India* (1917) 41 Bom. 566; 37 I.C. 258.

93 It is difficult to see how this could be maintained; but, as pointed out by Scott C.J., that question would have been governed by the Negotiable Instruments Act.

94 (1918) 41 Mad. 225; 40 I.C. 851.

95 *Karberg & Co.* v. *Blythe, Green, Jourdian & Co.* (1916) 1 K.B. 495. It was unsuccessfully contended that there was an absolute contract for the delivery of goods answering the description even if no such goods arrived by a ship named (the report is not too clear as to this argument).

96 The Prize Court in Egypt held in the same case, that where a German firm consigned goods to a British firm at Colombo, drew on that firm for the price, and discounted the draft with a British bank, all this before the war, acceptance of the draft after the war by the buyers was an act of trading with the enemy; see Campbell on the Law of War and Contract, 175, 187. We agree with Mr. Campbell that this goes too far.

97 Following *The Odessa* (1916) A.C. 153.

98 (1918) 45 Cal. 28; 28 I.C. 383.

99 The terms were, not payment against documents, but 45 days' credit after delivery of the goods; this variation did not alter the nature of the contract; apparently the only real difference between the parties related to payment of various charges.

1 Per Mookerjee J., 45 Cal. 28, at p. 58.

tions, and delivery of the goods according to the original contract had become impossible, and the plaintiffs' suit failed, although the goods had been delivered in the Hoogly from the same ship in which they were despatched, and were in the defendants' control.

Illegality—Dealing with the enemy.—Discharge by illegality occurs if it is made illegal by legislation or if it is to be performed in a country which becomes enemy country consequent upon a war breaking out or because of the movement of or occupation by enemy forces it becomes enemy territory.[2]

A foreign firm in Geneva was declared an enemy firm by the former British Indian Government. It was also an enemy firm qua Jaipur Government under the Defence of India Rules as adapted by the erstwhile Jaipur State. A contract between a Jaipur subject and the firm therefore was frustrated under s. 56, Contract Act, as it became void and incapable of performance. The doctrine underlying s. 56 applies to all intercourse with the enemy or what tends to assist the enemy.[3]

Occupation of a country.—Does the occupation of a country by enemy forces frustrate a contract of purchase of machinery by a buyer in that country, the seller being in a country which also declared war on the enemy country and thereby is the buyer entitled to the refund of the money paid with the order? The House of Lords has held that the contract is frustrated and the buyer is entitled to the return of the amount pre-paid.[4] The express term in the contract for a reasonable extension if dispatch was hindered by any cause beyond the vendor's reasonable control including war was held to apply to temporary impossibility of performance and had no reference to prolonged period occasioned by the Second World War.[5] Further a British subject could possibly not make arrangements to deliver c.i.f. Gdynia (in enemy occupied Poland) and therefore the contract could not be further performed because of supervening illegality.[6] In a case under the Law Reform (Frustrated Contracts) Act, it was said that whether frustration occurs or not depends on the nature of the contract and on the events which have occurred[7] and the doctrine of frustration may apply to a contract for ascertained goods.[7]

In the *Uganda Sugar case*[7]

T. Co. contracted to supply steel rails Krupp Section to U. Company. The contract did not specify the source of the goods. On failure to supply the rails a suit for damages was brought by the buyer. The defence was frustration because to the knowledge and intuition of both parties the goods were to come from Germany and as this had become illegal and impossible because of the War the contract was frustrated or the contract had ceased to bind as the common basis on which by mutual understanding it was based had failed.

The Privy Council referred with approval to two English cases dealing with frustration[8]

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2 *The Teutonia* (1871) 3 A. & E. 394; *Fibroska Spolka* v. *Fairbairn Lawson Courbe* (1943) A.C. 32; (1942) 2 All E.R. 122; *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* (1918) A.C. 200; see *Carapanayoti & Co. Ltd.* v. *E.T. Green Ltd.* (1959) 1 Q.B. 131; overruled in *Tsakiroglou* v. *Noblee Thorl* (1962) A.C. 92; (1961) 2 All E.R. 179; and *The Massalia* (1961) 2 Q.B. 278, overruled in *The Eugenia* (1964) 2 Q.B. 226.

3 *Trilokidas* v *Firm Ram Narain Damodar* (1971) A. Raj. 88, 93. Pollock's Principles of Contract (12th Ed.) 292 appld.

4 *Fibrosa Spolka Akevjna* v. *Fairburn Lanson Combe Barbour Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122; *Chandler* v. *Webster* (1904) 1 K.B. 493 (regarding return of money held wrong).

5 *Ibid;* 125 (All E.R.): *Bank Line Ltd.* v. *Capel & Co.* (1919) A.C. 435; *Tatem Ltd.* v. *Gamboa* (1939) 1 K.B. 132; (1938) 3 All E.R. 135; observations of Lush J. in *Geipel* v. *Smith* (1872) 7 Q.B. 404, 414; see observations of McKinnon L.J. *re Jackson* v. *Union Marine Insurance* (1874) 10 C.P. 125.

6 *Fibrosa Spolka* v. *Fairburn etc. Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122, 125; referring to *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* (1918) A.C. 260. (English company agreed to supply copper wire to a German company from 1911 to 1919. This contract was frustrated by the war of 1914 although it provided for suspension of contract in the event of war. This was on the ground of public policy).

7 *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.* (1945) A.P.C. 144, 145 (a case under Law Reforms (Frustrated Contracts) Act, 1943).

8 *Fibrosa Spolka* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122 (H.L.); *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corpn.* (1942) A.C. 154; (1941) 2 All E.R. 165.

and held that the contract was not frustrated as shipment from Germany was no part of the contract nor basis or foundation of the contract.[9]

The third paragraph of s. 56 seems to provide a just solution for the situation in *McRae* v. *Commonwealth Disposals Commission,*[10] where the High Court of Australia held the defendants liable to the plaintiff for his expenses in preparing to salvage a vessel, which the defendants had sold to the plaintiff, although they should have known it did not exist.

Marriage & Frustration.—An agreement to pay a separation allowance to a wife under a separation agreement is not frustrated by subsequent divorce obtained by the wife[11] or by the husband[12] nor by a decree of nullity on the ground of wife's incapacity.[13] The Court of Appeal has left the question open whether the doctrine could ever apply to the status of marriage. It is submitted that marriage amongst Hindus is not a contract and amongst Muhammadans and Christians it is under special laws governing them and not a common law contract. It creates a status which cannot be affected by the common law doctrine of frustration or s. 56.

Mistake and frustration.—The operation of mistake is narrower than that of frustration.[14] There is a distinction between the doctrine of frustration and mistake. They are different juristic concepts.[15] The latter relates to the formation and the former to the discharge of the contract. Mistake and frustration are different juristic concepts the former relates to formation and the latter to discharge of contracts.[16] Section 56 comes under Chapter IV of the Act and deals not with the formation of contracts but with performance and "it seems to their Lordships reasonable to construe s. 56 as applying only to agreements which apart from questions of performance are enforceable agreements."[17] Therefore, a matter based on mutual mistake even though it falls within the language of the first paragraph of s. 56 is not governed by that section.[18]

Service Contracts & Frustration.—A contract to give a musical performance on a particular day may be frustrated by the performer's illness.[19] A long term employment contract may be frustrated if the illness is so serious as to make it unlikely that the performance can be resumed for a substantial part of the contract period.[20] A less serious illness may give an employee an excuse for non performance and he is not in breach[21] and may entitle the employer to terminate,[22] but there is no automatic discharge under the doctrine of frustration.[23] Except in case of serious illness and incapacity of the employee, he is bound to go back to work when illness is over and in the meantime the employer is to pay his wage.[24]

Hart's Case[25] was this:—The appellant was a permanent employee of the respondents

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9 *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.* (1945) A.PC. 144, 146. *In re Badische Co. Ltd.* (1921) 2 Ch. 331.

10 (1950) 84 C.L.R. 377; (1951) Argus L.R. 771. See *supra.*

11 *May* v. *May* (1929) 2 K.B. 386.

12 *Adams* v. *Adams* (1941) 1 K.B. 484; (1941) 1 All E.R. 334.

13 *Kenward* v. *Kenward* (1951) P. 124; (1950) 2 All E.R. 297.

14 Anson: Law of Contract (22nd Ed.) 467; (24th Ed.) p. 491; Mcturnan: (1963) 41 Canadian Bar Rev. 1, 26; see *Sheikh Bros.* v. *Ochsner* (1957) A.C. 136; (1957) 2 W.L.R. 254, for facts of this case, see under s. 20.

15 *Joseph Constantine S.S. Co. Ltd.* v. *Imperial Smelting Corporation Ltd.* (1942) A.C. 154, 186; (1941) 2 All E.R. 165; *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161, 237 *Fibrosa Spolka* v. *Fairbairn Lawson C.B. Ltd.* (1943) A.C. 32, 77; (1942) 2 All E.R. 122; see *Sheikh Bros.* v. *Ochsner* (1957) A.C. 136 (P.C); (1957) 2 W.L.R. 254.

16 *Ibid.*

17 *Sheikh Brothers Ltd.* v. *Ochsner* (1957) 2 W.L.R. 254,261 (P.C.); (1957) A.C. 136.

18 *Ibid;* see also *Krell* v. *Henry* (1903) 2 K.B. 740—(a contract frustrated because the procession was postponed): *Griffith* v. *Brymer* (1903) 19 T.L.R. 434 (contract held void for mistake when the procession had been cancelled when contract made).

19 *Robinson* v. *Devison* (1871) 1 Q.B.D. 410.

20 *Condor* v. *The Baron Knight* (1966) 1 W.L.B. 87; *Marshall* v. *Horland & Wolff Ltd.* (1972) All E.R. 71; *Hart* v. *A.R. Marshall & Sons Ltd.* (1978) 2 All E.R. 413.

21 Treitel: Outlines of the Law of Contract (2nd Ed.) pp 282 & 311.

22 *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410.

23 Treitel: Outlines of the Law of Contract (2nd Ed.) 311.

24 *Marrison* v. *Bell* (1939) 2 K.B. 189.

25 *Hart* v. *A.R. Marshall & Sons (Bulwell) Ltd.* (1978) 2 All E.R. 413; see *Condor* v. *The Baron Knight Ltd.* (1966) 1 W.L.R. 87; *Marshall* v. *Horland & Wolf Ltd.* (1972) 2 All E.R. 715.

and was one of the key workers as a night service fitter without whom the respondents could not carry on business for any lengthy period. In April 1974 the appellant due to illness was off work. From April until August, the employers managed to keep the night service going but found that they could continue no longer and so they took 'T' into their employment on a permanent basis to perform the work previously performed by the appellant. In January 1976 the appellant was declared fit by the doctor. He then asked for his previous employment. After some time the employers told him that there was no work to be given to him. The Industrial Tribunal held on his complaint of unfair dismissal that his dismissal was not unfair and that his contract of employment had come to an end by frustration. The employee appealed. It was held that the Court would be reluctant to declare that the employment had been frustrated when the employer himself had taken no steps to dismiss him. However, it was not conclusive. The proper test in such cases was to determine whether the period of absence was such that the employer could not reasonably be expected to wait for the employee's return any longer, and that is what had happened. Accordingly his contract of employment had come to an end by operation of law.

If during the tenure of office of an office holder with a term of appointment the office is abolished by statute, the contract is discharged.[26] Similarly a service agreement would be discharged by the employee joining the Royal Flying Corps, four days later he would, under the law, have been compelled to join the force;[27] so also in the case of a Solicitor's retainer agreement with a Gas Company which is frustrated on the Gas Company being nationalised.[28]

Consideration in quasi-contractual sense.—Viscount Simon surmounted the difficulty of the decision in the case of *Chandler* v. *Webster*[29] in *Fibrosa Spolka* v. *Fairbrain Lawson C.B. Ltd.*[30] by distinguishing the meaning of consideration as applicable in quasi-contractual sense, i.e. money is paid to secure performance and if that fails the inducement for payment is not fulfilled.

Liabilities of Coal mines previous to taking over of management of mines.—The Calcutta High Court has held in its latest decision that the doctrine of frustration is based on the impossibility of performance by the intrusion or occurrence of an unexpected event or by the change in circumstances beyond the contemplation of parties. The taking over of the Coal mines (Taking Over the Management) Act 1973 or the Coal Mines Nationalisation Act were not such events. According to S 7 (i) of the latter Act every liability of the owner of mines etc. before the appointed day i.e. May 1, 1973 was to be the liability of the company or its owners or management and not of the Central Government or the Government Coal company. Therefore the taking over of the management of the Coal mines did not affect the legal relationship of the owners of the mines with their creditors, in the instance case the respondent Bank. Further all advances by the Bank were to be employed in the ordinary course of business of the company and all monies realised during the course of business was to be credited in that account. There was therefore no frustration and the liability of the coal company to the Bank for advances to the company remained unaffected.[31]

Reciprocal promise to do things legal, and also other things illegal.

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

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26 *Reilly* v. *R* (1936) A.C. 176.
27 *Marshall* v. *Glanvill* (1917) 2 K.B. 87.
28 *Studholme* v. *South Western Gas Board* (1954) 1 W.L.R. 313; (1954) 1 All E.R. 462.
29 (1904) 1 K.B. 493.
30 (1943) A.C. 32; (1942) 2 All E.R. 122, 129.
31 *Ratras Jheria Coal Co. Ltd.* v. *Mercantile Bank Ltd.* 1981 Ca. 418, 421.

Illustration

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Scope of the section.—It is not easy to see what this and the following section really add to s. 24 (see the commentary thereon for explanation of the principle), or why they are inserted here; but they are plain enough.

This section applies to cases where the two sets of promises are distinct. When the void part of an agreement can be properly separated from the rest, the latter does not become invalid; but when the parties themselves treat transactions, void as well as valid, as an integral whole, the Court also will regard them as inseparable, and wholly void.[32]

Compare s. 16 of the 1877 Specific Relief Act (below) s. 12(4) of 1963 Act, which declares the application of a similar but more extensive principle to specific performance.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Quaere whether, under the terms of this section, in case *B*, has offered and *A*, has accepted smuggled opium as in performance of the agreement. *A* can still have an action against *B* for failure to deliver rice. It would seem that *A*, being *in pari delicto*, cannot sue; for he could not make out his case without showing an illegal transaction to which he was a party.[33] The point does not seem likely to arise in practice.

Appropriation of Payments

Application of payment where debt to be discharged is indicated.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes *B* no other debt of that amount. On the 1st June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

Appropriation of Payments.—In England "it has been considered a general rule since *Clayton's case*[34] that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly".[35]

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32 *Davlatsing* v. *Pandu* (1884) 9 Bom. 176. See also *Poonoo Bibee* v. *Fyez Buksh* (1874) 15 B.L.R. App. 5, and *Meherally* v. *Sakerhanoobai* (1905) 7 Bom.L.R. 602, at p. 606.

33 See *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309, 314.

34 (1816) 1 Mer. 572, at p. 608; 15 R.R. 161, at p. 166.

35 Per Blackburn J., *City Discount Co.* v. *McLean* (1874) L.R. 9 C.P. 692, 700.

Debt.—Where money is paid by a debtor to his creditor with express intimation that the payment is to be applied to his discharge of some particular debt, and it is received and appropriated on that account, it is not in the power of the creditor, without the assent of the debtor (not merely of one out of several who pays on behalf of all),[36] to vary the effect of the transaction by altering the appropriation in which both the debtor and the creditor originally concurred. The same rule applies to payment of Government revenue.[37] But where there is no appropriation by consent, the question has arisen whether the provisions of ss. 59-61, relating to the appropriation of payments, which apply to the case of debts, apply to arrears of revenue payable to Government. Maclean C.J. expressed the opinion that ss. 59-61 of this Act do apply to transactions in relation to the realisation of land revenue.[38] The point has been before the Privy Council, but it was not decided, as the case was one of appropriation by mutual consent, their Lordships simply observing that the sections *might perhaps have had a bearing upon the case,* if the parties had not by their own actions placed the matter beyond doubt.[39] As to road-cess payable under the Public Demands Recovery Act,[40] it has been held to be a debt within the meaning of this section, so that the collector has no authority to appropriate payments made in liquidation of *specific* arrears of road-cess towards previous arrears.[41] The right of appropriation of payments to be exercised at the time of payment under s. 55 of the Bengal Tenancy Act and under ss. 59 and 60 of Contract Act is the same.[42]

Export Duty.—Export duty required to be deposited is appropriated when the duty becomes leviable and the property in the money does not pass to the Government unless the export takes place.[43] Arrears of rent is a debt within s. 59. Any pecuniary liability, which has been quantified or is capable of being quantified, on the basis of a contract or on principles of law is a debt.[44]

If money is received by the creditor without his knowing the conditions on which the debtor pays the money, the creditor cannot be deprived of his right of appropriation under s. 59 of the Contract Act.[45] Monthly salary payable to a servant is a distinct debt arising every month and payments made can be appropriated by the servant to his past salary.[46]

Several distinct debts.—This section deals only with the case of several distinct debts, and does not apply where there is only one debt, though payable by instalments. Thus, where the amount of a decree was by consent made payable by five annual instalments, it was held that the decree-holder was not bound to appropriate the payments to the specific instalments names by the judgment-debtor.[47] Payments made towards an instalment decree are to be

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36 The creditor, if he accepts a payment so made with a direction as to its application, must follow the direction at once; he is not free to suspend action and they vary the application by an agreement with that joint debtor alone: *Foster* v. *Chetty* (1924) 2 Rang. 204; 82 I.C. 658. It is hard to see how the contrary can have been seriously argued.

37 *Mahomed Jan* v. *Ganga Bishun Singh* (1910) 38 I.A. 80; 38 Cal. 537, in reversing S.C. 33 Cal. 1193.

38 *Jogendra Mohan Sen* v. *Uma Nath Guha* (1908) 35 Cal. 636.

39 *Mohomed Jan* v. *Ganga Bishun Singh* (1910) 38 I.A. 80, 84; 38 Cal. 537, 541. See further *Dasharathi Ghose* v. *Khondkar Abdul Hannan* (1927) 55 Cal. 624; 105 I.C. 15; 1928 A.Cal. 68, decided on another point.

40 Beng. Act I of 1895; see now Beng. Act III of 1913.

41 *Nandan Missir* v. *Lala Harakh Narain* (1910) 14 C.W.N. 607.

42 *Prabirendra Mohan Tagore* v. *Anil Chattopadhya* (1956) A.Cal. 570.

43 *Union of India* v. *Bhagwan Industries Ltd.* (1957) A.A. 799.

44 *Paras Nath* v. *Kishan Lal* (1965) A.A. 189.

45 *D. John Piardo* v. *G. Pinto* (1962) A. My. 190; *Rama Shah* v. *Lal Chand* (1940) Lah. 470; 67 I.A. 160; (1940) A.PC. 63.

46 *Banambar Das* v. *Udaynath Pattanaik* (1961) A. Or. 148.

47 *Fazal Hussain* v. *Jiwan Ali* (1906) All W.N. 135 followed, *Harkisondas* v. *Hariman* (1927) 104 I.C. 673; 1927 A.B. 479; *Govindrao* v. *Narayan* (1945) Nag. 885; 222 I.C. 350; 1945 A.N. 277 (the Court cannot appropriate towards any particular instalments). See also *Munno Bibi* v. *Income-tax Commissioner* (1952) A.A. 514.

presumed to be payments towards the instalments as they fall due.[48] In the case of an instalment decree with a default clause payment made by the debtor must be appropriated as directed by the debtor unless the default clause has become operative.[49] The amount declared to be due for principal, interest and costs in a mortgage suit under 0. 34, r. 4, constitutes but one debt; it cannot be regarded as consisting of two debts, one on account of principal and interest and the other on account of costs.[50] Where crops were charged with a debt, the sale proceeds of the crops paid by the buyer to the creditor have to be appropriated to the hypothecation debt. Appropriation to other bonds could only be made with the consent of the debtor.[51]

Application of payment where debt to be discharged is not indicated.

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it, at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Creditor's right to appropriate.—It is essential that the appropriation by the debtor should be communicated to the creditor either expressly or it may be implied by so that the creditor knows that his right of appropriation does not arise.[52] But the debtor may not specify his appropriation expressly, his intention may be implied shown by other circumstances indicating that his intention at the time of payment was to appropriate to a specific debtor or account.[53] "If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor," and he may exercise that right until the very last moment, and need not declare his intention in express terms;[54] he may indeed, exercise that right even when he is being examined at the trial of the case.[55] Where neither the debtor nor the creditor have made appropriations in regard to different debts, the court has, in any litigation, to apply the payments in discharge of the debts in order of time and if the debts are of equal standing then proportionately. But the creditor's right continues to exist right up to the pronouncement of the judgment.[56] This is, no doubt, the rule of English law, and it was assumed to be the law under the Contract Act by the High Courts of Calcutta, Bombay, Madras, Lahore, and Patna.[57] A decision of the High Court of Allahabad[58] that an appropriation of payment by the creditor must be made at the time of receiving the money was over-ruled by a later decision of a Full Bench of the same Court, which held that the ap-

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48 *Badri Narayan Singh* v. *Kalyan Prasad Shroff* (1956) A.P. 522.

49 *Kedar Nath* v. *Chajju Ram* (1962) A.A. 586.

50 *Jagannath* v. *Jhunia* (1914) 12 All W.N. 645; *Jia Ram* v. *Sulakhan Mal* (1941) Lah. 740; 196 I.C. 625; 1941 A. Lah. 386; *K.G. Jacob* v. *Ittyavira George,* 1951 A.T.C. 80; *Wasudeo* v. *Namdeo,* (1951) A.N. 155.

51 *Ouseph Lukka* v. *Ananthanarayana* (1959) A.Ker. 233.

52 *Leeson* v. *Leeson* (1936) 2 K.B. 156, 161; *Stepney Corporation* v. *Osofsky* (1937) 3 All E.R. 289.

53 Chitty: On Contracts (24th Ed.) Para 1301.

54 Lord Macnaghten in *Cory Bros. & Co.* v. *Owners of the "Mecca"* (1897) A.C. 286, 293; followed in *Manisty* v. *Jameson* (1925) 5 Pat. 326; 94 I.C. 273; 1926 A.P. 330.

55 *Seymour* v. *Pickett* (1905) 1 K.B. 715. See also *Smith* v. *Betty* (1903) 2 K.B. 317. The head note in *Jiban Ram* v. *Sagarmal,* 1933 A.P. 267, wrongly credits the Court with saying that the creditor can appropriate "even to the last moment, before bringing the suit". The Court only said "to the last moment." *Commissioner of Income-tax* v. *Maharajadhiraj of Darbhanga* (1933) 60 I.A. 157; (1933) A.PC. 108, 115.

56 *Uthup* v. *Kurian,* 1960 A.Ker. 90; *Gajram Singh* v. *Kalyan Mal,* 58 All. 791; (1937) A.A. 791, reld. on. *Commissioner of Income-tax* v. *Maharaja of Darbhanga* (1933) 609 A. 1579 (1933) A.PC. 108, 115.

57 *Amerchand & Co.* v. *Ramdas* (1914) 38 Bom. 255, 264-265; 21 I.C. 343 (the case was taken in appeal to the Privy Council (43 I.A. 164; 40 Bom. 630; 35 I.C. 954), but the judgment of the High Court on this point was not challenged in argument; *Munisami Mudali* v. *Perumal Mudali* (1919) 37 Mad. L.J. 367; 52 I.C. 950, 1919 A.M. 534; *Bishun Perkash* v. *Siddique* (1916) 1 Pat.L.J. 474; 35 I.C. 375; *Relu Mal* v. *Ahmad* (1926) 7 Lah. 17; 1926 A.L. 183; 92 I.C. 947; *Kunjamohan* v. *Karunakanta* (1933) 60 Cal. 1265; 149 I.C. 262; 1934 A.Cal. 40.

58 *Kundan Lal* v. *Jaganath* (1915) 37 All. 649 ; 30 I.C. 92.

propriation could be made at any time up to judgment.[59] The matter has now been concluded by a decision of the Privy Council[60] in which after referring to the provisions of s. 60 their Lordships said:

"This is the same rule as that laid down as English law by the House of Lords in *Cory Brothers & Co.* v. *Owners of Turkish Steamship, Mecca,*[61] and under it the creditor has a right to appropriate a payment by the debtor to the principal or to the interest of the same debt. There is no obligation upon the creditor to make the appropriation at once, though when once he has made an appropriation and communicated it to the debtor he would have no right to appropriate it otherwise (cf. per Lord Herschell in *Cory's* case). Lord Macnaghten's language in that case is equally applicable under ss. 60 and 61 of the Indian Contract Act: 'Where the election is with the creditor, it is always his intention express or implied or presumed, and not any rigid rule of law that governs the application of the money".[62]

If money is paid by the debtor to the decree-holder towards the decretal debt without specifying whether it is towards interest or principal, the decree-holder is entitled to credit it to interest first and then to principal. This is the general rule.[63]

But where the debtor specifies the money to be payable towards principal and then to interest and the decree holder withdraws the money, he cannot then make the appropriation. He would have to get the money returned to the judgment debtor if he was not agreeable to the appropriation.[64] Payment is to be appropriated to interest and the balance to principal.[65]

Where debtor paying towards decree saying they were towards principal, the payment shall be credited to Principal. In such cases creditor not aware or informed of the stipulation—payment was held towards interest.[66]

A debt can be discharged in more ways than one. It may be by actual payment or adjustment or any other means agreed to between the debtor and the creditor.[67] Payment made from time to time against deliveries are to be appropriated according to the provisions of ss. 60 and 61 of the Contract Act.[68]

It is impossible to define the circumstances which may be held to indicate a special intention.[69] Where the earlier in date of two debts is of a different kind and specially secured, it will not be presumed that a payment made without express directions was intended to be on account of the earlier one.[70]

When a debtor passed two mortgage bonds to his creditor, one of which carried interest payable with rests, and the other carried simple interest, and the creditor appropriated payments made by the debtor to interest on the bond carrying simple interest, it was held that the creditor was entitled to apply the payments to either of the debts, and that the mere reluctance of the debtor to pay compound interest before he executed the mortgage bond at such interest was no indication of the debtor's intention that his payments should be applied to that

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59 *Gajram Singh* v. *Kalyan Mal* (1935) 58 All. 791; 166 I.C. 423; 1937 A.A. 1(F.B.) (but not thereafter, even if the case goes to appeal); the earlier case does not, curiously enough, seem to have been referred to either in the argument or in the judgment.

60 *Rama Singh* v. *Lal Chand* (1940) 67 I.A. 160, at p. 174; (1940) Lah. 470; 187 I.C. 233; 1940 A.P.C. 63; *Income-tax Commissioner* v. *Maharajadhiraja of Darbhanga* (1933) 60 I.A. 146; 12 Pat. 318; 142 I.C. 437; 1933 A.P.C. 108.

61 (1897) A.C. 286; (1895-99) All E.R. Rep. 933.

62 Ibid, at p. 294.

63 *Life Insurance Corporation of India* v. *Gadadhar De* (1978) A.Cal. 419; *Meghraj* v. *Bayabai* (1970) A.SC. 161 reld. on; *Mst. Rulia Devi* v. *Raghunath Prasad,* (1979) A.P. 115; *Harishchandra* v. *Kailashchandra* (1975) A. Raj. 14, 20.

64 *Life Insurance Corporation of India* v. *Samarendra Nath Roy* (1979) A.Cal. 243; *Meghraj* v. *Bayabai* (1970) A.SC. 161; *Life Insurance Corporation of India* v. *Gadadhar De* (1978) A. Cal. 419, disting.

65 *Parrs Banking Co.* v. *Yates* (1898) Q.B.D. 460 referred to in 1979 A.P. 115, 117 (*Mst. Rullia Devi* v. *Raghunath Prosad*).

66 *Life Insurance Corporation of India* v. *Gadadhar De* (1978) A.Cal. 419.

67 *Life Insurance Corpn.* v. *Subramanyam* (1963) A.My. 64.

68 *Muhammad Sultan Rowther & Co.* v. *Manickam* (1961) A.M. 388.

69 See *Bansi Dhar* v. *Akhya Ram* (1890) All. W.N. 62, where the terms of the mortgage bond, the circumstances in which it was executed, the relations of the parties and the fact that the very thing which was to be handed over to the creditor was to be given as part security for the debt, were held to constitute "circumstances" within the meaning of this section. See also *Shyam Lal* v. *Raghunath Marwari,* 1937 A.P. 432; 170 I.C. 480; *Muni Lal* v. *Gulab Singh,* 1933 A.L. 126; 145 I.C. 144.

70 *City Discount Co.* v. *McLean* (1874) L.R. 9 C.P. 692. 700.

bond.[71] But where by a mortgage bond the debtor agreed to repay the loan made to him by the creditor in kind by delivery of certain species of grain, or at his option in cash at a specified rate of interest, and the creditor applied several payments in grain made by the debtor to other antecedent debts, it was held that the creditor was not entitled to do so, as the stipulation to repay the loan by delivery of grain, combined with the absence of evidence to show that the previous debts were to be liquidated by payments of grain, was a circumstance indicating that the payment was to be applied to the debt secured by the mortgage bond.[72]

Contract of Guarantee.—A surety is bound by the creditor's appropriation.[73]

Principal and interest.—Where there is a debt carrying interest, money paid and received without any definite appropriation is to be first applied in payment of interest.[74] If the debtor appropriates a payment to principal, the creditor need not accept payment on those terms, but if he does not he must return money; if he does accept he is bound by the appropriation.[75] The same rule applies to judgment debts. Thus when a sum is realised on account of a decree, that amount is to be deducted from the interest and not from the principal.[76] The rule is the same even if the decree be an instalment decree. Thus if a decree is passed for Rs. 1,500 with interest at five per cent per annum payable by three yearly instalments of Rs. 500 each, and the judgment-debtor pays Rs. 500 at the end of each of the three years without appropriating the payments to principal, the decree-holder is entitled to appropriate Rs. 75 for the interest due and the balance of Rs. 425 of principal.[77] Creditor's right to appropriate amounts paid to interest under s. 60 of the Contract Act is not curtailed by s. 8 by Madras Agricultural Relief Act.[78]

Compositions.—Where a payment is made by way of dividend or composition for the benefit of creditors generally, the payments must, by the nature of the transaction, be rateably apportioned among the several debts; and in any question arising with third parties, as, for example, sureties for any portion of the debts, every payment is deemed to be specifically appropriated "as so much in each and every pound of the whole amount of the debt".[79] See further, as to the result of this, notes on ss. 128, 140 below.

Debt barred by the law of limitation.—Where no appropriation is made by the debtor, the creditor may apply the payment to any lawful debt, though barred by the law of limitation. When a debtor makes a payment without any direction as to its appropriation, the creditor has the right to appropriate it towards a barred debt.[80] This frequently happens where there is a running account extending over several years. The creditor may in such a case appropriate the payments to the earliest items barred by limitation and may sue for such of the

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71 *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (1898) 26 Cal. 39.

72 *Sungut Lal* v.*Baijnath Roy* (1886) 13 Cal. 164.

73 *Messrs. Kukreja Ltd.* v. *Said Alam* (1941) Lah. 323; 193 I.C. 206; 1941 A.L. 16.

74 *Venkatadri Appa Row* v. *Parthasarathi Appa Row* (1921) L.R. 48 I.A. 150, 153; 44 Mad. 570, 573; 61 I.C. 31, stated as an old settled rule; *Jia Ram* v. *Sulakhan Mal* (1941) Lah. 740; 196 I.C. 625; 1941 A.L. 386 (F.B.); *Gaja Nand* v. *Srilal,* 1952 A.Ajm. 27; *Shanmugam Pillai* v. *Annalakshmi* (1949) F.C.R. 537, 1950 A.F.C. 38, *P.C. Lal* v. *State of Bihar,* 1952 A.P. 453; per Lord MacMillan in *Income-tax Commissioner* v. *Maharajadhiraja of Darbhanga* (1933) 60 I.A. 146; 157; 12 Pat. 318; 1933 A.PC. 108.

75 *Nemi Chand* v. *Radha Kishen* (1921) 48 Cal. 839, 841; 63 I.C. 904 (Jud. Comm. from Ajmer-Merwara). Earlier statements to the same effect are now omitted as superfluous; *Life Insurance Corporation of India* v. *Samarendra Nath* (1979) A. Cal. 243, 245.

76 *Gooroo Dos Dutt* v. *Ooma Churn Roy* (1874) 22 W.R. 525; *Chaganlal* v. *Gopilal,* 1954 A.M.B. 151; *Jia Ram* v. *Sulakhan Mal, supra,* note 4, overruling on this point *Central Bank of India* v. *Attar Chand* (1938) Lah. 403; 178 I.C. 189; 1938 A.L. 289.

77 Per Richardson J. in *Biswanath* v. *Someswar* (1917) 21 C.W.N. 1055; 41 I.C. 348 (Walmsley J., *dubitante*); *Munno Bibi* v. *Income-tax Commissioner,* 1952 A.A. 514; *Life Insurance Corporation of India* v. *Gajadhar De* (1978) A. Cal. 419; *Meghraj* v. *Bayalal* (1970) A.SC. 161 reld. on; *Harishchandra* v. *Kailash Chandra* (1975) A. Raj. 14, 20 (1973) A.M. 359.

78 *Srinivasulu* v. *Kondappa* (1960) A.AP. 174; contra *Sanyasyya* v. *Ramaraju,* 1962 A.AP. 233.

79 *Bardwell* v. *Lydall* (1831) 7 Bing. 489, 494; 33 R.R. 540, 545.

80 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1134.

balance as is not so barred.[81] Appropriation under s. 60, Contract Act, cannot be made towards an illegal debt.[82] Therefore payments made by an unlicensed dealer to a licensed dealer (licensed under the Bihar Cotton, Cloth & Yarn Dealers (Licensing & Control) Order, 1944) cannot under s. 60 be appropriated by the licensed dealer towards price of standard cloth sold by him to the unlicensed dealer, the sale being contrary to law.[82]

Application of payment where neither party appropriates.

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Scope of the section.—This section must be read continuously with s. 60. It must be carefully observed that it does not lay down a strict rule of law, but only a rule to be applied in the absence of anything to show the intention of the parties. Not only any express agreement, but the mode of dealing of the parties, must be looked to. On the other hand, the circumstances may show that accounts which it was at a party's option to treat as separate were, in fact, treated as continuous, and then payments will be appropriated to the earliest unpaid item of the combined account.[83]

The English rule had been followed in India before the enactment of the Contract Act.[84] The rule is subject to certain modifications in cases where trust funds capable of identification have been mixed with the trustee's private current account. But these belong to their own special subject.[85]

Mortgage of joint Hindu family property.—In a Full Bench case of the Allahabad High Court[86] the question before the Court was

"whether it is open to a mortgagee of a joint family property, under a mortgage deed executed by the manager of the joint family, when a portion of the mortgage debt was not raised for legal necessity, to appropriate during the pendency of the suit payments made by the mortgagor, towards the discharge of such portion of the debt as was not raised for legal necessity, when no appropriation was made either by the mortgagor or the mortgagee till the date of the suit."

The Court decided that as long as the two portions of the debt had not been definitely ascertained it was not open to the creditor to appropriate a payment towards an unknown and unspecified portion of the debt. But after the two portions were definitely ascertained in such a way as to make them constitute two distinct debts he was entitled to appropriate the payment. As, however, the creditor had not appropriated the debt in the trial Court, it was held that the payment should be rateably distributed between the two portions of the debt.

"Where neither party makes any appropriation."—See notes on s. 60, above.

Contracts which need not be performed

Effect of novation, rescission and alteration of the contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

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81 *Bishun Perkash* v. *Siddique* (1916) 1 Pat., L.J. 474; *Jiban Ram* v. *Sagarmal,* 1933 A.P. 267; 145 I.C. 611; *Kamaleshwari Prasad* v. *Gangadhar,* 1940 A.P. 52; 186 I.C. 855; *Har Sahay Mull* v. *Gokul Chand,* 1947 A.P. 273, 227 I.C. 36; *Ramavel* v. *Pandyan Automobiles (P) Ltd.*

82 *Sevasagar* v. *Satyanarain* (1960) A.P. 145.

83 *Hooper* v. *Keay* (1876) 1 Q.B.D. 178 (current account with continuing partner after dissolution of firm); *Sha Manmall* v. *Radhakrishnan,* (1972) A.M. 108.

84 *Mooneappah* v. *Vencatarayadoo* (1870) 6 M.H.C. 32; *Hirada Karibassappah* v. *Gadigi Muddappa* (1871) 6 M.H.C. 197. Cf. *Jia Ram* v. *Sulakhan Mal* (1941) Lah. 740; 196 I.C. 625; 1941 A.L. 386 (F.B.).

85 See *Re Hallett's Estate* (1880) 13 Ch.D. 696; *Re Stenning* (1895) 2 Ch. 433.

86 *Gajram Singh* v. *Kalyan Mal* (1935) 58 All. 791; 166 I.C. 423; 1937 A.A. 1 (F.B.).

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C*. 1,000 rupees, and no new contract has been entered into. (For a less simple illustration of the principle that all parties must concur, see *Venkatanarayana* v. *Lakshmibayamma,* 1929 A.M. 309; 116 I.C. 129.

Novation.—The meaning of "novation," the term used in the marginal note to the section, and now the accepted catchword for its subject-matter, has been thus defined in the House of Lords:[87] "that, there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. Novation of a contract comprises two elements: the discharge of one debt or debtor and the substitution of a new debt or debtor. The discharge is governed by the proper law of the contract.[88] A substituted contract should rescind or extinguish the previous contract. The terms of the two contracts should be so inconsistent that they cannot stand together.[89] Novation under s. 62 is brought about by (a) introduction of new parties; or (b) by alteration between the same parties by introduction of new terms. It is not consistent with the original debtors remaining liable on the old contract. Substitution of a new contract is the core of novation. Its essential feature is that a right under the original contract is relinquished or replaced by a new contract. Where these essentials are missing there is no novation.[90]

"In Wolfe's Private International Law, 2nd ed., p. 458, the following propositions are stated: "The substitution of one debtor for another is treated either as a novation, that is, an extinction of an existing debt by the creation of a new one, or as true succession into an obligation which remains in force. The first method, developed on the basis of Roman law, is to be found in English and French municipal laws; the second method prevails in German law and has been adopted in the legal systems of Austria, Switzerland and Poland. In both cases the question whether the old debtor is discharged by the entry of a new debtor depends on the proper law of the debt. But whether the entry of a new debtor has taken place must be determined by the law with which that entry is most closely connected; this may be the new debtor's personal law or the law of his place of business, unless he and the creditor have agreed on a particular legal system.

No express judicial authority was cited to us in support of Mr. Wilberforce's suggested dichotomy but in our view it is right in principle. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition upon the creditor of a substituted debtor. It follows from this that although the elements of a statutory novation may, and usually will, be comprised in one statute or decree and, for practical purposes, operate simultaneously, each has nevertheless a separate and distinct legal identity."[91]

The appellants purchased some goods from the respondents but the bills were not honoured. Thereafter a fresh agreement was made between the parties. The appellants agreed to pay an ascertained sum of moneys by instalments with interest and a surety guaranteed the payment and certain shares and debentures were pledged. The repondents brought a money suit against the surety and the original buyers. It was held that the second contract was a novation of the previous contract by which the prior rights of the parties were extinguished and with that the arbitration clause in the prior agreement perished. The subsequent arrangement was not a modification of the old agreement but was altogether a new contract.[92]

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87 *Scarf* v. *Jardine* (1882) 7 App.Cas. 345, 351; (1881-5) All E.R. Rep. 651.

88 *In re United Railways of Havana & Regla Warehouses* (1959) 2 W.L.R. 251, 268; (1959) 1 All E.R. 214; (1960) Ch. 62 (C.A.); *Scarf* v. *Jardine* (1882) 7 App. Cas. 345, 351; *Chatsworth (Investors) Ltd.* v. *Cussins (Contractors) Ltd.* (1969) 1 All E.R. 143; (1969) 1 W.L.R. 1. According to Anson — A novation can only take place by agreement between the parties and novation cannot be compulsory. Law of Contract (20th Ed.), p. 263; (22nd Ed.), p. 386 referred to by Jenkins L.J. at p. 229 of (1959) 1 All E.R. 214; *Srinivasa* v. *Muthayya* (1956) A.M. 364.

89 *Gilbert* v. *Hall* (1831) 1 L.J.Ch. 15; *Vishram Arjun* v. *Shankariah* (1957) A.AP. 784. See Wolfe's Private International Law (2nd Ed.)., p. 458; quoted in *In re United Railways of the Havana & Regla Warehouses Ltd.* (1959) 2 W.L.R. 251, 266-67; (1959) 1 All E.R. 214, 229.

90 *Bhagabat Charan Mohanty* v. *Rao & Sons* (1971) Cut. 1268, 1279.

91 *In re United Railways of the Havana and Regla Warehouses Ltd.* (1959) 2 W.L.R. 251, 266-67; (1959) 1 All E.R. 214, 229.

92 *Dadri Cement Co. Ltd.* v. *Bird & Co. (P) Ltd.* (1974) Deh. 606, 612, 614; *Payana Reena Saminathan* v. *Pana Lana Paliniappa* (1914) A.C. 618 (P.C.) applied; *Union of India* v. *Kishori Lal Gupta* (1960) 1 S.C.R. 493; (1959) A.SC. 1362 relied on.

It is well settled that the parties to an original contract can by mutual agreement enter into a new contract in substitution of the old one.[93] A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes (*sic*) a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and the other hand, that they promise to pay him for that consideration".[94] Novation does not involve the transfer of property at all for it involves the annulment of one debt and the creation of another; but a contractual right to receive payment of a debt being an item of property is a chose in action, which can be transferred to a third party but the validity of its transfer necessarily depends on the proper law of contract.[95] Moreover in a novation a creditor may be vitally prejudiced whereas it is immaterial to a debtor to whom he pays his debt provided he gets a good discharge for it.

For the case of a novation on a change in the constitution of a firm it is declared in England by s. 17, sub-s. 3, of the Partnership Act, 1980, that 'a retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted' (s. 32(2) of Indian Partnership Act, 1932). This adds nothing to the law as already settled.[96]

It has to be considered in every case not only whether a new debtor has consented to assume liability, but whether the creditor has agreed to accept his liability in substitution of the original debtor's. In some circumstances the creditor may be entitled to sue the retiring or the incoming partner in a firm at his option; mere continuing to deal with the firm as reconstituted will not preclude him from suing his original debtor.[97] Novation is not consistent with the original debtor remaining liable in any form;[98] it requires as an essential element that the right against the original contractor shall be relinquished, and the liability of the new contracting party accepted in his place.[99]

A owed money to *B* under a contract. *B* at the instance of *A* agreed to and did realise part of the debt from *C* & *D*.

This is not novation as there was no debt contracted by *C* & *D* in favour of *A* in substitution of the debt due from *A*.[1] Under Indian law one of the requisites of such novation is the agreement of all the parties to the new contract.[2] A motor-car insurance policy cannot be

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93 *The Union of India* v. *Kishorilal Gupta & Bros.* (1960) 1 S.C.R. 493; (1960) A.SC. 1362; *Payana Reena Saminathan* v. *Pana Lana Palaniappa* (1914) A.C. 618; *Norris* v. *Baron and Company* (1918) A.C. 1 and *British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspaper Ltd.* (1933) 2 K.B. 616, referred to; *Srinivasa* v. *Muthayya* (1956) A.M. 364; *Gyarsilal* v. *Sitacharan* (1963) A.M.P. 164.

94 Lord Selborne in *Scarf* v. *Jardine* (1882) 7 App. Ca. 345, at p. 351; *Kedarnath Lal* v. *Sheonarain Ram,* 1957 A.P. 408; Chitty: On Contracts (24th Ed.) para 1193.

95 *In re United Railways of the Havana & Regla Warehouses Ltd.* (1959) 2 W.L.R. 251, 269; (1959) 1 All E.R. 214, 231; *Arab Bank Ltd.* v. *Barclays Bank* (1954) 2 All E.R. 226; (1954) A.C. 495, held not applicable.

96 See Rolfe v. *Flower* (1865) L.R. 1 P.C. 27; *Bilborough* v. *Holmes* (1876) 5 Ch.D. 255.

97 *Scarf* v. *Jardine* (1882) 7 App. Ca. 345, 351. He cannot, however, sue both, and his choice when made is final.

98 See *Commercial Bank of Tasmania* v. *Jones* (1893) A.C. 313; and cf. *Perry* v. *National Prov. Bank of England* (1910) 1 Ch. 464, especially per Buckley L.J.; *State of Bihar* v. *Ram Ballabh Das* (1960) A.P. 400; *Madho Prasad* v. *Gouri Dutt* (1939) A.P. 323.

99 *Nadimulla* v. *Channappa* (1903) 5 Bom. L.R. 617; *Muhammad Shah* v. *Sarsuti* (1883) All. W.N. 254; cf. *Liladhar Nemchand* v. *Rawji Jugjiwan,* 1935 A.PC. 93; 154 I.C. 1090; 68 Mad. L.J. 530. Accordingly a formal instrument is not annulled by a mere agreement to substitute something else for it at a future date: *Angan Lal* v. *Saran Behari Lal* (1929) All L.J. 127; 121 I.C. 221; 1929 A.A. 503; *Guranditta Mal* v. *Labbu Ram,* 1936 A.L. 476; 163; I.C. 123; *Hukumatmal* v. *Jethanand* (1944) Kar. 208, 215 I.C. 42, 1944 A.S. 205, where it was argued that a delivery order by the seller on the third party made that party privy to the contract.

1 *State of Bihar* v. *Ram Ballabh Das* (1960) A.P. 400.

2 *Gyarsilal* v. *Sitacharan* (1963) A.MP. 164.

assigned so as to make of what is a contract of personal indemnity to *A*, a contract of personal indemnity to *B*. A new insured cannot be thrust upon an insurer against his will. But it can be done by novation by release of the assured and the acceptance of a new assured. But that cannot be done merely by handing over the policy on the sale of the car to the buyer.[3]

Capacity to make novation.—It is an elementary rule that trustees and others administering money of which they are not the beneficial owners are not entitled to make a novation (which is to accept one security or liability instead of another) except so far as they are authorised by the trusts under which they act.[4] The executor of a deceased partner may agree with the surviving partners to convert the partnership into a limited company and to accept fully paid up shares in the company in lieu of the testator's share. Such an agreement is valid and binding on the estate of the testator.[5] A broker in law has no authority to substitute a contract brought about through him without the authority of the principal or by ratification by the latter. Therefore, the original contract will continue to exist.[6]

Election to accept the sole liability of new or surviving partners in a firm does not need very strong proof, but merely ambiguous acts will not do.

One of two bankers in partnership died. A customer, knowing of this, drew out part of a sum standing in his name on deposit account, and took, according to the usual course, a fresh deposit note for the amount left in, signed by a cashier on behalf of the firm.

This was no proof of novation.[7]

Another customer, also with the knowledge of the former partner's death, transferred a sum of money from current to deposit account (after consulting the surviving partner about investing it) and took a receipt signed by the surviving partner on behalf of the firm.

This was a new contract with the surviving partner alone[8]

Where in consideration of the creditor not suing the debtor, the debt was taken over for payment by A & B and the creditor later brought a suit for recovery of the debt against the original debtor and the substituted debtors 'A' and 'B', it was held that this latter conduct of the creditor could not change the efficacy of substituted liability and revive the original debt.[9]

A advanced Rs. 50,000 to a firm consisting of three partners. The sum of Rs. 50,000 was made up partly of securities handed over by *A* to the firm and partly of cash. The firm passed a note to *A* promising to return the securities and repay the cash with interest at 6 per cent per annum payable every six months. Thereafter one of the partners died, and *A* accepted from the surviving partners a promissory note in the firm's name for Rs. 50,000 to be paid in cash with interest at the same rate, but not payable with six months rests.

This was a new contract with the surviving partners alone.[10]

The appellant had given a bond to serve the Mysore State after the completion of his engineering studies in U.S.A. After completion of his studies, he, with the permission of the Mysore Government, stayed on in U.S.A. for practical training. Without finishing the training he returned to India on account of serious illness of his mother who died. Again, with the permission of the State Government he returned to U.S.A. for completion of his practical training but he got employment in U.S.A. and did not return to carry out his agreement to serve the State for the stipulated period unless he was not offered employment within six months of his return. As he returned to U.S.A. at his own request with the permission of the Government, he was liable for not fulfilling his obligation of service. He could not rely on his staying in the country for six months before his return to U.S.A. to continue his practical training.[11]

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3 *Peter* v. *General Accident & Life Assurance Co.* (1937) 4 All E.R. 628; *Gyarsilal* v. *Sitacharan* (1963) A.MP. 164.
4 *Smith* v. *Patrick* (1901) A.C. 282.
5 *Jamsetji* v. *Hirjibhai* (1913) 37 Bom. 158, 167-169.
6 *Lal Chand Dharam Chand* v. *Alliance Jute Mills Co. Ltd.*, (1973) A.Cal. 243, 246.
7 *Re Head* (1893) 3 Ch. 426.
8 *Re Head (No. 2)* (1894) 2 Ch. 236, C.A.
9 *Jethmal* v. *Hiralal*, (1972) A. Raj. 220, 224.
10 *Markandrai* v. *Virendrarai* (1917) 19 Bom.L.R. 837, 843-844; 42 I.C. 815.
11 *Sham Singh* v. *State of Mysore* (1972) A.SC. 2440.

The High Court of Calcutta held the present section not to apply where the agreement to substitute a new contract for the original one is made after the breach of the original contract.

The plaintiff sued the defendant to recover a sum of Rs. 1,100 due on a bond. It was found that *after* the due date of the bond the plaintiff agreed to accept from the defendant in satisfaction of the bond Rs. 400 in cash and a fresh bond for Rs. 700 (not the mere promise to pay the Rs. 400 and to give a bond for Rs. 700). The defendant failed to pay the Rs. 400 and to pass the bond, and the plaintiff sued to recover the amount of the original bond. It was found that the plaintiff did not intend to accept the naked promise to pay Rs. 400 and to give a bond for Rs. 700. For the defendant it was contended that the subsequent agreement had made a novation.

The Court, however, held that s. 62 did not apply, as the subsequent agreement was entered into after the breach of the original contract, and that the defendant, having failed to perform the satisfaction which he had promised to give, remained liable on the original contract.[12] In Madras, Seshagiri Iyer J. has taken the same view,[13] but Kumaraswami Sastri J. expressed the opinion that the section applies even though the new agreement is made after breach of the original agreement, and his opinion has been followed by a bench of the Madras High Court.[14] The correct view, it is submitted, is that of the High Court of Calcutta. This difference of opinion was noticed by the Andhra Pradesh High Court in *Vishram Arjun* v. *Shankariah*[15] but no opinion one way or the other was given. An agreement, though made after breach, to accept what damages may be allowed by arbitrators appointed by the parties, is not within this section, and it is binding on the parties,[16] and so is an agreement to pay according to the decision of a Court in another case.[17] If a debt due to an employee from his employer is discharged and in its place a debt in favour of a Government Board is substituted there is a valid substitution of creditors, but if the liability to the employees continues in addition then a law providing for such substitution will be unconstitutional as infringing Art. 19 (1)(f).[18]

Principle of S. 62 and Arbitration Clause.—S. 62 incorporates this principle that if the entire original contract is put an end to, the arbitration clause which is a part of it also perishes. If the parties to a contract agree to substitute a new contract or to rescind or alter it, the original contract need not be performed. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration that dispute cannot be referred to the arbitration as the arbitration clause itself would perish.[19]

Arbitration Clause.—If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement.[20] An arbitration clause is a collateral term of a contract as distinguished from its substantive terms nonetheless it is an integral part of it. If the parties put an end to the original contract containing the Clause it has no legal existence. The arbitration clause also cannot operate, for alongwith the original contract, it perishes as the original contract is extinguished by the substituted one.[21]

Assignment and novation distinguished.—The assignment of a debt which operates as an effective transfer of a debt without the consent or the collaboration of the debtor is distinguishable from novation. A novation is effective if the debtor is a party. In assignment

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12 *Manohur* v. *Thakur Das* (1888) 15 Cal. 319; *Union of India* v. *Kishorilal Gupta* 1953 A. Cal. 642; *Sakarchand* v. *Ismail Hoosain,* 1931 A.R. 189; 131 I.C. 510; *New Standard Bank* v. *Probodh Chandra* (1941) 2 Cal. 237; 45 C.W.N. 830; 1942 A. Cal. 87.

13 *Ramiah* v. *Somasi* (1915) 29 Mad.L.J. 125; 29 I.C. 449.

14 *N.M. Firm* v. *Theperumal Chetty* (1922) 45 Mad. 180; 67 I.C. 905. In this case there was no evidence of breach.

15 *Vishram Arjun* v. *Shankariqh* (1962) A.AP. 784, 788.

16 *Ram Nath* v. *Mannu Lal* (1923) 45 All 472; 73 I.C. 615; 1923 A.A. 518. See *Noor Mohammed* v. *Kan Mal,* 1951 A.Ajm. 66.

17 *Jamnabai* v. *Murlidhar* (1946) Nag. 36; 225 I.C. 379; 1946 A.N. 148.

18 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1136.

19 *Damodar Valley Corporation* v. *K.K. Kar.* (1974) A.SC. 158, 161.

20 *Heyman* v. *Darwins* 1942 A.C. 356; (1942) 1 All E.R. 337 considered in *Union of India* v. *Kishorilal Gupta* (1960) 1 S.C.R. 493; (1959) A.SC. 1362.

21 *Damodar Valley Corporation* v. *K.K. Kar* (1974) A.SC. 158, 163.

there is a transfer of property and in a novation there is annulment of one debt and then the creation of a substituted debt in its place.[22] A party to a contract cannot transfer his liability thereunder without the consent of the other party and such liabilities can only be transferred by a tripartite contract which will amount to novation.[23] A contract to reconvey cannot be defeated by the vendee transferring the property to a third party.[24]

Whether or not there is a novation of a contract is in each case a question of fact, which this section does not in any way prejudge.[25] An original cause of action can be discharged by an executory agreement if the intention to that effect is clear. Therefore if a creditor accepts in satisfaction merely his debtor's promise to give consideration and not the performance of that promise, the original cause of action is discharged from that date when the agreement is made. The ascertainment of intention is essentially a question of fact.[26] Thus, in a suit,[27] by the Government of Bengal against the defendant as surety for the treasurer of a collectorate on four surety bonds executed by the defendant, the Privy Council held that the mere fact that the collector examined the accounts at the end of each year and struck the balance which he certified to be correct, and that on each occasion the defendant executed a new bond without, however, the old bonds being cancelled or given up, did not constitute a novation of the old bonds so as to preclude the Government from suing the defendant on the old bonds on subsequent discovery of embezzlement of moneys by the treasurer during each year. *A* executed a bond for a debt due by *B*. Subsequently it was agreed by *B* to pay a part of the debt in certain instalments and execute a mortgage for the balance. *B* paid some instalments but failed to carry out the agreement. It was held that *A* was absolved from liability by the subsequent agreement and that the breach of the subsequent agreement did not revive *A*'s liability[28] The following is a peculiar case: *A* owes B Rs. 330. *A* transfers the whole of this property by a registered instrument to *C*. The consideration for the transfer is Rs. 2,000 out of which *C* agrees to pay Rs. 330 to *B*. Here there is no novation, for there is no contract between *A*, *B* and *C* that *B* shall accept *C* as his debtor instead of *A*. *B* is therefore entitled to recover the debt from *A*, though he may also be entitled to recover the amount from *C* under the registered document on the principle enunciated in the notes on s. 2 that where a contract between *A* and *C* is intended to secure a benefit to *B*, *B* may sue to enforce it.[29] An attempted novation which fails to produce a new enforceable contract may put an end to the original contract if it was the intention of the parties to rescind it in any event. Such intention is a fact to be clearly proved.[30] A concluded contract cannot be cancelled unilaterally.[31]

Alteration of Contract.—In English usage the term *novation* is confined to agreements which introduce a new party. It is not applied to the substitution of a new agreement, or the variation of particular terms in a subsisting agreement, between the same parties. Practically

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22 *In re United Railways of the Havana & Regla Warehouses Ltd.* (1960) Ch. 52, 84; affd. (1961) A.C. 1007; (1960) 2 All E.R. 332 (H.L.); Cheshire & Fifoot; Law of Contract, pp. 446-7 (6th Ed.).

23 *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.* (1969) A.Cal. 238; *Khardah Co. Ltd.* v. *Raymon & Co. Ltd.* (1963) 3 S.C.R. 183; (1962) A.SC. 1810 folld.

24 *Devan Manmohan Lal* v. *Pearey Lal* (1973) A.A. 16, 20.

25 *Roushan Bibee* v. *Hurray Kristo Nath* (1882) 8 Cal. 926; the substance of the matter must be looked to if the form is equally consistent with a new agreement and with a mere giving of time to a debtor; *Kshetranath Sikdar* v. *Harasukdas Bal Kissendas* (1926) 31 C.W.N. 703; 102 I.C. 871; 1927 A. Cal. 538; *Bhabuti Prasad* v. *Parbati,* 1935 A.O. 366; 155 I.C. 534; *Nagpur Electric Co. Ltd.* v. *Anand Vishnu* (1944) Nag. 21, 213 I.C. 100, 1944 A.N. 68; *Maliksarjuna* v. *Pardhasaradhiao* (1944) Mad. 742; 215 I.C. 310; 1944 A.M. 218; *Union of India* v. *Kishorilal Gupta* (1960) 1 S.C.R. 493; (1959) A.SC. 1362, 1366; *Vishram Arjun* v. *Shankariah* (1957) A.AP. 784.

26 *Union of India* v. *Kishorilal* (1959) A.SC. 1362, 1366; (1960) 1 S.C.R. 493, 503, 504; Cheshire & Fifoot; Law of Contract (3rd Ed.). p. 453 quoted (see 6th Ed., p. 477; 9th Ed. p. 513); *British Russian Gazette & Trade Outlook Ltd.* v. *Associated Newspaper Ltd.* (1933) 2 K.B. 616, 643-4; (1933) All E.R. Rep. 320.

27 *Lala Banshidhar* v. *The Government of Bengal* (1872) 9 B.L.R. 364.

28 *Ram Singh* v. *Shop Tek Chand,* 1933 A.L. 464; 146 I.C. 562.

29 *Debnarayan Dutt* v. *Chunilal Ghose* (1914) 41 Cal. 137, 141, 144; 20 I.C. 630.

30 *Morris* v. *Baron* (1918) A.C. 1; *British and Beningtons* v. *N.W. Cachar Tea Co.* (1923) A.C. 48, 68; cp. *Ganpat* v. *Mahadeo,* 1925 A.N. 26; 85 I.C. 264.

31 *Ahmad Koya* v. *Murugesa Mudliar* (1958) A. Ker. 195.

the most important questions arising in this last connection are questions of evidence, and for this purpose the rules forbidding the admission of oral evidence to contradict or vary written agreements[32] have to be borne in mind. It must, of course, be shown, especially where it is sought to prove a variation not by an express agreement, but by a course of conduct, that the variation was intended and understood by both parties.[33] The substituted contract must be a valid and enforceable contract to be effective as a novation.[34] In case of such an agreement to substitute a new contract, that which is substituted must be a contract capable of being enforced in law; so that if by reason of any want of formality, such as registration, the document containing the contract is inadmissible in evidence, the original contract will still be operative.[35] An unregistered mortgage does not operate as a novation so as to rescind a previous contract based on an account stated.[36] A novation takes place when after setting off the cross entries in an account the parties arrive at an agreed figure and agree to be bound by it. It makes no difference if some of the items are statute-barred.[37] In *Sirdar Kuar* v. *Chandrawati*[38] accounts were stated between a creditor and his debtor, and the latter passed the former a bond for the balance found due payable by instalments, in which he hypothecated certain immovable property as collateral security. The creditor received payment of three of the instalments under bond, and then brought a suit against the debtor for the balance of the debt, basing his claim on the accounts stated. It was held that the suit would not lie, as by the execution of the bond the debt due on the account stated had come to an end. It appears from the report of this case that the bond was impounded by the revenue authorities, as it was insufficiently stamped, and this seems to be the reason for bringing the suit on the original debt instead of on the bond. This decision has been held[39] not to apply if the execution of the hypothecation bond is denied by the defendant and the bond remains on that ground unregistered. In such a case the plaintiff could not sue on the unregistered bond[40] and he would therefore be entitled to recover upon the acount stated.

"We cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts.[39]

Similarly where a mortgagee accepts a new security in lieu of the old, and the new security is held to be invalid by reason of a rule of Hindu law pleaded by the mortgagor the mortgagee is entitled to fall back upon the old security. It would not be consistent with equity or good conscience that the mortgagor, having successfully maintained that the new security is invalid should be allowed to claim the benefit of the transaction by which the new security was created as a release of the old security.[41]

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32 Laid down for India in the Evidence Act, s. 92; as to the effect of subsequent variation on the right to specific performance, see Specific Relief Act, s. 26(c) (18 (c) of 1963 Act).

33 See *Darnley* v. *L.C. & D.R. Co.* (1867) L.R. 2 H.L. 43, at p. 60, an incidental elementary dictum in a case decided on peculiar facts.

34 *Vishram Arjun* v. *Shankariah* (1957) A.AP. 784; *Mahabir Prasad* v. *Satyanarain* (1963) A.P. 131.

35 *Nundo Kishore Lall* v. *Musst Ramsookhee Kooer* (1879) 5 Cal. 215; *Raja Ram* v. *Meher Khan* (1882) Pun. Rec. No. 66; *Udho Shah* v. *Hira Shah* (1897) Punj. Rec. No. 71; *Abdul Kayam* v. *Bahadur Vithoba* (1911) 14 Bom. L.R. 26; *Kanhaiya Prasad* v. *Hamidan* (1938) All. 714 (F.B.); *Gharali Hiracharan* v. *Kehar Mansarant,* 1937 A.N. 104; *Shankarlal* v. *Ambarlal* (1946) Nag. 500; 1946 A.N. 260; *Laxman Waman* v. *Balmukand Jainarain,* 1954 A.N. 142; *Mathura Mohan Saha* v. *Ramkumar Saha* (1916) A. Cal 136, 147; 35 I.C. 305, 317 folld. in *Chhogalal* v. *Kanayalal* (1958) A. Raj. 303.

36 *Chhogalal* v. *Kanhaiyalal* (1958) A. Raj. 303.

37 *Gharabharan* v. *Sri Radha Kishan* (1958) A.A. 313.

38 (1882) 4 All. 330.

39 *Kiam-ud-din* v. *Rajoo* (1888) 11 All. 13.

40 See Indian Registration Act, 1908, s. 49.

41 *Har Chandi Lal* v. *Sheoraj Singh* (1917) L.R. 44 I.A. 60; 39 All 178; 39 I.C. 343; 1916 A.P.C. 68; *Shankarlal* v. *Ambarlal* (1946) Nag. 500; 1946 A.N. 260; *Kannalal Damrulal* v. *Bhagwandas* (1948) Nag. 913; 1949 A.N. 5; *Pannalal* v. *Labhchand,* 1955 A.M.B. 49, 56. Cp. *Ganpat* v. *Mahadeo* (1924) 85 I.C. 264; 1925 A.N. 26 Where a substituted mortgage is unenforceable for want of attestation or registration, the mortgagor may still be liable on his personal covenant: *Subbaraya* v. *Pichaipillai,* 1937 A.M. 148; 170 I.C. 840.

Where a contract for the sale of goods provides for delivery being given within a specified period, and the contract contains an arbitration clause, a mere extension of the time for giving delivery does not make it a new contract so as to put an end to the arbitration clause.[42] The Supreme Court has held that where a contract, containing an arbitration clause, is discharged by a substituted agreeement, the parties are governed by the substituted contract and the arbitration agreement in the earlier contract perishes with it.[43] Section 62 applies to arbitration agreements so that one agreement can be substituted for another.[44]

Parties to an agreement may vary some of its terms by a subsequent agreement. They may rescind the earlier agreement altogether either expressly or by implication the determining factor being intention of the parties.[45] Partial rescission does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein with or without the substitution of new rights and obligations in their place. Hence a contract may be varied (1) by way of partially rescission, without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission, with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial recission at all.[46] There is no novation where the mortgagee releases a part of the mortgaged property.[47]

No unilateral enhancement.—The Government agreed with a contractor to supply him with machinery at the inception of the contract at a fixed rate. Later the Government wanted enhanced rates for the machinery. It was held that the rates could not be enhanced unilaterally unless there was a specific provision in some rule or Code which applied to the contract.[48]

In an English case there was a separation deed between a husband & wife by which the husband covenanted to pay a certain sum of money per annum for his wife's support. As his income was insufficient to meet his obligations they agreed to vary the financial arrangements. This variation was held valid and enforceable and could be set up as a defence against an action on the original deed.[49] But a unilateral declaration by one party to another in the absence of agreement cannot constitute a variation.[50]

But in another case a financial agreement between the husband and wife by which the husband was to pay £2400 a year to be reduced to half in certain events. This was in settlement of all claims but the wife was not to apply for increase. The payment was to be during their joint lives or until the wife remarried or until further orders and this was made a part of the Court's order. The wife applied for increase. The Court of Appeal[51] held that the agreement being for indefinite payments until further orders the wife could apply despite the provision for a final and once for all order.

Unilateral variation.—Where after an auction sale of a forest area for cutting of trees the department changed the area by reservation of trees, the auction purchaser was held entitled to repudiate the contract and get back the amount of the first instalment deposited by him but cannot claim damages.[52]

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42 *Lachminarain* v. *Hoare, Miller & Co.* (1914) 41 Cal. 35; 21 I.C. 217.
43 *Union of India* v. *Kishorilal* (1959) A.SC. 1362, 1377; (1960) 1 S.C.R. 493; 513; but see Sarkar J. at p. 522; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 371 (Lord MacMillan); *Godhamal* v. *Sm. Ganga Hasso Lal* (1958) A.A. 26; *Century Spg. & Mfg. Co. Ltd.* v. *Motilal* (1966) A.MP. 313.
44 *Shori Lal* v. *Sardari Lal* (1963) A.Puni. 165.
45 *Morris* v. *Baron & Co.* (1919) A.C. 1; *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.*, 1923 A.C. 48; *Goss* v. *Nugent*, 110 E.R. 713; (1833) 5 B. & Ad. 58; *Tallerman & Co. Pty. Ltd.* v. *Nathan's Merchandise Ltd.* (1957) 98 C.L.R. 93, 112, 143.
46 *Tallerman & Co. Ltd.* v. *Nathan's Merchandise Ltd.* (1957) 98 C.L.R. 93, 143.
47 *Gobind* v. *Chhajjan* (1961) A.Punj. 202.
48 *State of Andhra Pradesh* v. *Pioneer Construction Co.* (1978) A.AP. 281, 284.
49 *Berry* v. *Berry* (1929) 2 K.B. 316.
50 *Cowey* v. *Liberian Operation Ltd.* (1966) 2 Ll. Rep. 45.
51 *Jessel* v. *Jessel* (1979) 3 All E.R. 645; *Minton* v. *Minton* (1979) 1 All E.R. 79 disting.
52 *Syed Israr Masood* v. *State of Madhya Pradesh* (1981) ASC 2010, 2014.

Power to vary.—A water company agreed in 1929 to supply at all times a certain quantity of water free and the extra quantity taken at 8 d (or 2.9 d decimal currency) per 1000 gallons. In 1975 the normal rate charged by the company was 45d (new currency). The company wrote to the hospital saying that they would charge normal rate for extra water supplied. It was held[53] that in the circumstances and in view of fall of money value, the water company was entitled to terminate the agreement after reasonable notice.

Rescission and variation of a contract

"The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.[54] Per Lord Dunedin.

Settlement contracts

"When a settlement contract is made, reselling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together. That being so, there can be a set-off as regards delivery, and there can be a set-off as regards price for everything except the difference. It seems to me to be abusing, s. 62 of the Contract Act to say that after a settlement contract the original contract is utterly discharged.[55]

Transfer of actionable claims.—As to assignment of debts and actionable claims, see the Transfer of Property Act, 1882, Chap. VIII.

Promissory note on account of pre-existing debt.—The cases referred to above must be distinguished from those where a person lends money or sells goods to another, and the debtor or buyer gives a promissory note for payment of the loan or price at a future time. In such cases the rule is that where a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may sue for the original consideration; and if from any cause the bill or note is not admissible in evidence, this will not affect the original cause of action. A loan advanced to the debtor is not discharged by the debtor issuing a cheque or giving a promissory note or because of the non-presentation of the negotiable instrument. The creditor can sue on original cause of action ignoring the cheque and the promissory note.[56] But where the original cause of action is on the note itself, and there is no cause of action independent of it, as, for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months date, there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if, for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money.[57]

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53 *Staffordshire Area Health Authority* v. *Staffordshire Water Co.* (1978) 3 All E.R. 769, 774, 776-8, *Reordon Smith Line* v. *Hansen-Tangen* (1976) 3 All E.R. at p. 574-575; *Utice City National Bank* v. *Gunn* (1918) 222 N.Y. at p. 208 applied; *Mutti Service Book Binding Ltd.* v. *Marden* (1978) 2 All E.R. 489; *Crediton Gas Co.* v. *Crediton Urban Council* (1928) Ch. 447; *Re Spenborough Urban Distt. Council Agreement* (1967) All E.R. 959 (applied).

54 *Morris* v. *Baron & Co.* (1918) A.C. 1, 25, 26, 27 (per Lord Dunedin) refd. to in *Tallerman & Co. Pty Ltd.* v. *Nathan's Merchandise Pty. Ltd.* (1957) 98 C.L.R. 93, 124.

55 Per Rankin J. in *Uttam Chand Saligram* v. *Jewa Mamooji* (1919) 46 Cal. 534, 542; 54 I.C. 285; *Karuppaswami* v. *Chottabhai,* 1945 A.M. 59.

56 *Harish Chander* v. *Ganga Singh & Sons* (1974) A. Punj. 156, 158.

57 *Sheikh Akbar* v. *Sheikh Khan* (1881) 7 Cal. 256; *Dargavarapu* v. *Rampratapu* (1902) 25 Mad. 580; *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya* (1906) 29 Mad. 111; *Rahmatulla* v. *Ganesh Das*

Negotiable Instruments.—A bill, note or a cheque in payment of a debt is presumed to be a conditional payment and may be accepted as a complete discharge or merely a conditional payment and thereby suspending the remedy during the duration of instrument.[58] On the instrument being dishonoured the creditor can fall back upon his original debt.[59] In the absence of any declared intention to that effect the mere execution and delivery of a hundi does not operate as a novation.[60] Mere debit entry in a banker's account book after a draft is issued does not necessarily amount to payment.[61] A cheque from a customer, received by a banker and the amount of the cheque credited to the customer's account, is conditional payment; if the cheque is dishonoured the bank is entitled to reverse the entry. The banker in such a case acts as a collecting agent.[62] There is no novation where the original contract stands and is reinforced by a subsequent agreement. A subsequent hand note for the money already advanced does not operate as novation for an agreement to execute a permanent lease for the same consideration[63] nor is there a novation by giving time for payment of a foreign bill which had been accepted and had already become due even if interest is to be paid for that period.[64] A second agreement for granting time for completion of sale wherein property to be sold was described as "my own possessed land within Dacca district" and further that the terms and conditions will remain unaltered is not a novation of a contract to sell property including land and *Basathari*.[65] A suit on original consideration, if a promissory note is found to be defective, lies if the two can stand apart and have separate existence.[66]

Transfer of policy risk to the transferee of the vehicle.—In the absence of a term in an insurance policy and where there is no prohibition, an insurance company may agree to transfer the risk of the policy in favour of the transferee of the car. In such a case a novation takes place. The assent of the insurance company is essential. It may be express or implied. The question whether a new contract has taken place is one of fact depending on the intention of parties.[67]

If on the facts it is held that the insurance Company has impliedly assented to the transfer of the risk in favour of the transferee and there is a novation of the contract of indemnity, then the transferee would in law and in fact become the person insured under the policy and the insurer will be liable to him.[68]

(1891) Punj. Rec. No. 82; *Baldeo* v. *Mul Chand* (1904) Punj. Rec. No. 7; *Pramatha Nath* v. *Dwarkanath* (1896) 23 Cal. 851; *Krishnaji* v. *Rajmal* (1899) 24 Bom. 360; *Subramanian* v. *Muthia* (1911) 35 Mad. 639 at p. 641; *Rahmat Ali Muhammad Faizi* v. *Dewa Singh—Man Singh* (1923) 4 Lah. 151; *Nathu Ram* v. *Dogar Mal* (1923) 4 Lah. 198; *Pandit Salig Ram* v. *Radhay Shiam,* 1931 A.A. 560; 134 I.C. 254; *Gulabgir* v. *Nathmal,* 1932 A.N. 23; 137 I.C. 33; *Kunwar Bahadur* v. *Suraj Bakhsh,* 1932 A.O. 235; 139 I.C. 298 (F.B.); *Maung Chit* v. *Roshan & Co.* (1934) 12 Rang. 500; 152 I.C. 1038; 1934 A.R. 389 (F.B.); *Ramasami Pillai* v. *Murugiah* (1935) 59 Mad. 268; 161 I.C. 273; 1936 A.M. 179; *Ananda Namdeo* v. *Pundalik,* 1936 A.N. 225; *Abdul Majid* v. *Ganesh Das Kalooram,* 1954 A. Or 124; *State of Bihar* v. *Ram Ballabh Das* (1960) A.P. 400; *Madho Prasad* v. *Gouri Dutt* (1939) A.P. 323.

58 *Ramdayal* v. *Devdiji* (1956) A. Raj. 12.

59 *Mohanlal Jogara Rice & Atta Mills* v. *F Ramlal* (1957) A. Asm. 133; *Kandaswamy Gounder* v. *Sivasubramania Iyer* (1963) A.M. 16 (rent paid by cheque).

60 *Ramdayal* v. *Devdiji* (1956) A. Raj. 12; *Harjasmal* v. *Bhagar Ram* (1934) A.L. 128 dist.

61 *Mohanlal J. Rice & Atta Mills* v. *Firm Ramlal (1957) A. Assam 133.*

62 *Kesarichand* v. *Shillong Banking Corporation* (1959) A. Assam 162; *In re Alliance Bank of Simla* (1925) A. Cal. 54.

63 *Kameshwar Prasad Singh* v. *Shahamat Mian* (1958) A.P. 162.

64 *Central Bank of India Ltd.* v. *Mahammad Islam Khan,* P.L.D. (1962) 1 S.C. 251 (Pak.).

65 *Maksud Ali* v. *Eskandar Ali,* P.L.D. (1964) 1 S.C. 381 (Pak.).

66 *Appalaraju* v. *Yedukondalu* (1958) A.AP. 713; *Lingam Narayan Das* v. *Punia Das* (1959) A. Or. 176; *Brijbhushan* v. *Ramjanam* (1932) A.P. 324; *Mohanlal Jogani Rice & Atta Mills* v. *F. Ramlal* (1957) A. Asm. 133.

67 *Smt. Gulabbai Damodar Tapse* v. *Peter K. Sunder* 77 Bom. L.R. 38; *Burnard* v. *Sully* (1931) 47 T.L.R. 557; *Gyarsi* v. *Sitacharan* (1963) A.MP 164 referred to.

68 *Smt. Gulabbai Damodar Tapse* v. *Peter K. Sunder* 77 Bom. L.R. 38; *B.I.G. Insurance Co.* v. *Itabar Singh* (1959) A.SC. 1331 referred to; *Bhoopathy* v. *Vijayalakshmi* (1966) 2 Mad. 65 overruling *Madras Motor Insurance Co.* v. *Mohd Mustapha* (1961) A.M. 208.

Excursus to S. 62: Unauthorised alteration of documents.—What if the document recording an agreement is altered without the consent of both parties? No answer to this question is given by the Contract Act, or anywhere in the Anglo-Indian Codes, but Indian practice (notwithstanding a solitary reported opinion to the contrary)[69] follows the authorities of the Common Law. The rule is that any material alteration in an instrument made by a party, or by any one while it is in the party's custody or in that of his agent, disables him from relying on it either as plaintiff or as defendant,[70] though he may sue for restitution under s. 65.[71] In its earliest form it was connected with the old manner of pleading and producing deeds, but in modern times it was deliberately extended on grounds of policy: "A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state".[72] The principle is said to be "founded on great good sense, because it tends to prevent the party in whose favour (an instrument) is made from attempting to make any alteration in it"; and it is "as applicable to one kind of instrument as to another".[73] Any alteration is material which affects either the substance of a contract expressed in the document,[74] or the identification of the document itself, at all events where identification may be important in the ordinary course of business.[75] A material alteration is one which varies the rights, liabilities or legal position of the partes ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.[76] The effect of making such an alteration without consent of the other party is exactly the same as that of cancelling the deed but the avoidance is not retrospective and does not revest the property or reconvey any estate or interest passed under it. The deed may be put in evidence to prove that such estate or interest so passed or for any other purpose than to maintain an action to enforce some agreement therein contained.[77] A scoring out of a term of contract for sale of immoveable property is a material alteration.[78] Alterations are immaterial if they merely express what was already implied in the document, or add particulars consistent with the document as it stands, though superfluous,[79] or are innocent attempts to correct clerical errors.[80] But alteration of the date of execution of the deed and certain other words by making holes in the document without the consent of the obligee by the party in whose favour it was executed was held in the particular circumstances of the case not to be material alteration.[81] An alteration in the description of the survey numbers which were in figures and which were the only ones intended by the parties to be included was held not to be

69 *Ede* v. *Kanto Nath Shaw* (1877) 3 Cal. 220, where it seems to be supposed that s. 37 of the Contract Act has abolished all defences to actions on contracts not expressly mentioned in the Act; *Anirudhan* v. *Thomco's Bank* (1963) Supp. 1 S.C.R. 63; (1963) A. SC. 746.

70 *Pattinson* v. *Luckley* (1875) L.R. 10 Ex. 330; *Suffell* v. *Bank of England* (1882) 9 Q.B.D. 555, where authorities are collected; notes to *Master* v. *Miller* in 1 Sm.L.C. 780; *Vishram Arjun* v. *Shankariah* (1967) A.AP. 784; *Anirudhan* v. *Thomco's Bank*, n. 78; *supra*.

71 *Anantha Rao* v. *Surayya* (1920) 43 Mad. 703; 55 I.C. 697.

72 *Davidson* v. *Cooper* (1844) 13 M. & W. 343, 352; 67 R.R. 638, Ex.Ch.

73 Grose J. in *Master* v. *Miller* (1791) 4 T.R. 320, 345; 2 R.R. 399, 406; 1 Sm.L.C. 780, at p. 809.

74 The alteration need not be obviously to the disadvantage of the party whose position is altered. See *Gardner* v. *Walsh* (1855) 5 E. & B. 83; 103 R.R. 377.

75 *Suffell* v. *Bank of England* (1882) 9 Q.B.D. 555. A Bank of England note with the number altered is not substantially the same note. It does not follow that in other kinds of documents commonly marked with consecutive numbers the numbers are material; but the fact that a person takes the trouble of altering a number shows that in his opinion, at any rate, it is material for some purpose.

76 *Nathulal* v. *Gomti Kuar*, 67 I.A. 318; (1940) A.PC. 160; *Ramlagan* v. *Akleshwar* (1958) A.P. 211; *Sivarama Konar* v. *Thiruvadinatha Pillai* (1957) A.TC. 180; *Anirudhan* v. *Thomco's Bank*, n. 78, *supra*.

77 *Nathu Lal* v. *Gomti Kuar*, 67 I.A. 318; (1940) A.PC. 160; *Sivarama Konar* v. *Thiruvadinatha Pillai* (1957) A.TC. 189; *Ramlagan* v. *Akleshwar* (1958) A.P. 211; *Gogun Chander Ghose* v. *Dhirandhar*, 7 Cal. 616.

78 *Kameswarrao* v. *Hemlathammarao* (1959) A.AP. 596.

79 *Lowe* v. *Fox* (1887) 12 App. Ca. 206, where the document was a form a statement required by the Lunacy Act then in force; *Anirudhan* v. *Thomco's Bank*, n. 78, *supra*.

80 Howgate and Osborn's Contract (1902) 1 Ch. 451.

81 *Nathu Lal* v. *Gomti Kaur*, 67 I.A. 318; (1940) A.P.C. 160.

a material alteration affecting the validity of the deed.[82] There may be cases of wilful fraud practised by a stranger where the rule will not be held to operate against the person who had the custody of the document.[83] It may be that some degree of negligence on his part would in such a case have to be shown before he could be deprived of his rights. An alteration made by one of the joint promisors which reduces their liability equally is not a material alteration.[84]

Indian decisions.—The Indian decisions on the subject may be divided into two classes. The first class comprises cases in which the suits were for bond debts brought upon the basis of altered documents. The second class relates to suits on documents which by the very execution thereof effect a transfer of interest in specific immovable property. As to the former class of cases, the Indian Courts have followed the principles of English law set out above, the point for decision in each case being whether the alteration was or was not material. Thus where a bond was passed to the plaintiff by one of three brothers, and the plaintiff forged the signature of the other two to the bond, and brought a suit upon it in its altered form against all the three brothers, it was held that the alteration avoided the bond.[85]In such a case the plaintiff is not entitled to a decree even against the real executant.[86] Similarly, where the date of a bond was altered from 11th September to 25th September, it is held that the alteration was material, as it extended the time within which the plaintiff was entitled to sue; it did not matter that the period of limitation, though reckoned from 11th September, had not expired at the date of the suit.[87] Where the passing of consideration and the execution of a promissory note which is subsequently altered, are found to be simultaneous acts, s. 65, Contract Act, does not apply because the instrument is unenforceable under s. 87 of the Negotiable Instruments Act and it cannot be said that the contract had become void. But if there was a debt, which existed before the execution of the promissory note, a suit would lie for its recovery.[88] If a promissory note is found to be inadmissible in evidence for want of proper stamp, the creditor can sue on the original consideration.[89] On the same principle an alteration in a document which has the effect of enabling the payee to sue on the document in a Court in which he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document.[90] Likewise, where the plaintiff altered a bill of exchange from D.P., that is, documents to be delivered against payment, into D.A., that is, documents to be delivered against acceptance, it was held that the drawer was not liable upon the altered bill.[91] But the fact that the signature of an attesting witness had been affixed after execution to a bond that does not require to be attested is not a material alteration, and does not make the bond void.[92] Nor is it a material alteration to add in a document a description of immovable property which is not within the scope of the document.[93] And where a seller of goods inserted in the document of sale a clause excepting a claim on a former account, it was held in a suit by

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82 *Sivarama Konar* v. *Thiruvadinatha Pillai* (1957) A.TC. 189.
83 Per Lord Herschell, 12 App. Ca. 206, at p. 217; *Anirudhan* v. *Thomco's Bank,* n. 93a, *contra.*
84 *Anirudhan* v. *Thomco's Bank* (1963) Supp. 1 S.C.R. 63; (1963) A.SC. 746 (Hidayatullah J.).
85 *Gogun Chunder Ghose* v. *Dhuronidhur* (1881) 7 Cal. 616; *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1906) 33 Cal. 812; *Karamali* v. *Norain Sing.* (1900) Punj. Rec. No. 91; *Rajdhar* v. *Mohan,* 1931 A.A. 325; (1931) All. L.J. 223; 131 I.C. 593.
86 *Mahila Bai Kokila Bai* v. *Ram Singh,* 1954 A.M.B. 31.
87 *Govindasami* v. *Kuppusami* (1889) 12 Mad. 239; *Mst. Gomti* v. *Meghraj,* 1933 A.A. 443; (1933) All.L.J. 907; 145 I.C. 147; *Rangaswami Reddi* v. *Doraiswami,* 1957 A.M. 715; but see *Nathu Lal* v. *Gomti Kuar,* 67 I.A. 318; (1940) A.PC. 160.
88 *Rangaswami Reddi* v. *Doraiswami Reddi* (1957) A.M. 715.
89 *Mohammad Jamal Sahib* v. *Munawar Begum* (1964) A.AP. 188.
90 *Lakshmammal* v. *Narasimharaghava* (1915) 38 Mad. 746; 21 I.C. 445.
91 *Mesha Ahronel* v. *The National Bank of India* (1903) 5 Bom L.R. 524.
92 *Kashi Nath Roy* v. *Surbanand Shaha* (1885) 12 Cal. 317; *Venkatesh* v. *Baba* (1890) 15 Bom. 44; *Ramayyer* v. *Shunmugam* (1891) 15 Mad. 70, dissenting from *Sitaram* v. *Daji* (1883) 7 Bom. 418; *Ramier* v. *Shunmugam Pillai* (1892) 2 Mad. L.J. 39; *Mangal Sen* v. *Cannon* (1885) Punj. Rec. No. 118.
93 *Abdool Hoosein* v. *Goolam Hoosein* (1906) 30 Bom. 304, 318.

him for the price of the goods that the alteration was not material so as to defeat his claim for the price.[94] Where a document is altered in good faith to make the real intention of the parties clear, it would not amount to material alteration to make the document void.[95] Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim.

A material alteration, therefore, in a written acknowledgment of debt does not render it inoperative, as the acknowledgment is merely evidence of a pre-existing liability.[96] In the last-mentioned cases, it is to be observed, the suit was not founded on the acknowledgment, but on the original loan, and the acknowledgment was relied on merely to save the plaintiff's claim from being barred, and the Court admitted in evidence for that purpose. But where a creditor bases his suit, not on the original loan, but on a bond passed by the defendant, and it is found at the hearing that the bond has been materially altered so as not to entitle him to a decree on the bond, the plaintiff will not be allowed to fall back upon the original consideration, and to rely on the altered bond as proof of the acknowledgment.[97] And the Madras High Court has held[98] that a purchaser for value of a piece of land from a person empowered to sell under a will is not precluded from relying upon the will to prove the validity of the sale, though forged attestations are added to the will after the sale. The decision is obviously right, for the purchaser never had the custody of the will, nor is a will a document to which any one, properly speaking, is party or privy; and his title was complete before the forged attestations were made. An alteration made in good faith to carry out the original intention of the parties is not material. This were the interest provided for in a mortgage bond was in terms "one rupee per mensem", and the mortgagee inserted the words "per cent" after the words "one rupee", and the case was such that anybody reading the document could not fail to read it in the sense that interest was to be paid at the rate of one rupee per mensem, it was held in a suit on the bond that the mortgagee was entitled to interest at that rate.[99] An alteration, made by the principal debtor, as the extent of a surety in a letter of guarantee, entrusted to him by the surety does not discharge the surety.[1]

We shall next consider the cases where the effect of the execution of the altered document is to create an interest in the property comprised in the document. Of the five Indian decisions on this head two relate to hypothecation bonds, and three to mortgages[2] of immovable property. The rule to be derived from these cases may be stated as follows:

A material alteration, though fraudulent, made in a mortgage or hypothecation bond does not render it void for all purposes, and the altered document may be received in evidence on behalf of the person to whom it is executed for the purpose of proving the right title or interest created by, or resulting from, the execution of the document, *provided that the suit is based on such right, and not on the altered document.*

This rule is professedly founded by Indian Courts on Engish decisions.[3]. The reason is

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94 *Govindasami Naidu* v. *Kuppusami Pillai* (1893) 3 Mad. L.J. 266.

95 *Bijay Krishna Paramanya* v. *Kali Charan Mondal* (1978) A. Cal. 153; *Ananda Mohan* v. *Ananda Chandra* 25, Cal. L.J. 155; *Kalianna Gounder* v. *Palani Gounder* (1970) A.SC. 1942; *Nandlal Agrani* v. *Jogendra Chandra Datta* (1923) A. Cal. 53 Appld.

96 *Atmaram* v. *Umedram* (1901) 25 Bom. 616 (where the date of the acknowledgement was altered); *Harendra Lal Roy* v. *Uma Charan Ghosh* (1905) 9 C.W.N. 695 (where an entry as to interest was interpolated in the acknowledgement); *Lal Saha* v. *Monmohan Gossami* (1900) 5 C.W.N. 56, where the suit was founded on the original loan, and the plaintiff relied on a promissory note alleged to have been passed by the defendant as evidence of the loan. It was found that the note was not genuine, but the plaintiff was allowed to prove the debt by other evidence, on the ground that, though the note was forged, the suit was not founded on the note. This is a case of entire *fabrication,* as distinguished from *alteration* of a document.

97 *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1906) 33 Cal. 812 (where names of parties were added.).

98 *Paramma* v. *Ramachandra* (1883) 7 Mad. 302.

99 *Ananda Mohan* v. *Ananda Chandra* (1917) 44 Cal. 154; 35 I.C. 182.

1 *Anirudhan* v. *Thomco's Bank* (1963) Supp. 1 S.C.R. 63; (1963) A.SC. 746.

2 "A mortgage" in this country is *"the transfer of an interest* in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan etc.: Transfer of Property Act, 1882, s. 58.

3 *Davidson* v. *Cooper* (1884) 13 M.&.W. 343; 67 R.R. 638; *Doe d. Beanland* v. *Hirst* (1821) 3 Stark 60; 23 R.R. 756; *Hutchins* v. *Scott* (1837) 2 M.&W. 809; 46 R.R. 770; *West* v. *Steward* (1845) 14 M.&W.

stated to be that the right title or interest created by, or resulting from, the very fact of the execution of the document does not rest on a contract or a covenant, but arises by operation of law, and a subsequent alteration, therefore, does not divest the vested right and revest the property in the mortgagor.[4]

In the earliest of these cases, known as *Ramaswamy Kon's Case*[5], the plaintiff, who held a hypothecation bond from the defendants, altered the date of the bond so as to bring the personal remedy, which, according to the true date was barred, within the period of limitation. The suit was to recover the balance of the bond debt from the defendants personally, and by sale of the hypothecated property. The Court passed a decree for the amount due against the *property*, holding that the altered document might be used as proof of the right created by or resulting from its having been executed. The exact frame of the plaint in this case is not stated in the report, and, according to later cases, the decision could only be upheld if the suit was not based on the altered document.[6] In *Ganga Ram* v. *Chandan Singh*,[7] a case similar to the above, a hypothecation bond was fraudulently altered by the plaintiff so as to comprise a larger area of land than was actually hypothecated. The suit was brought on the altered bond, and the High Court of Allahabad held on appeal that the suit was rightly dismissed by the lower Court.[8] In a subsequent Madras case[9] the plaintiff sued to recover the principal and interest due on a mortgage bond fraudulently altered by him by doubling the rate of interest and inserting a condition making the whole sum payable upon default of payment of any one instalment. The suit was brought on the altered bond, and the Full Bench confirmed the decision of the Courts below, dismissing the plaintiff's entire claim. In *Subrahmania v. Krishna*,[10] on the other hand, where also a mortgage bond was altered in a material respect, the suit was not based on the altered bond,[11] and the Court allowed the bond to be used as proof of the mortgagee's right to sell the property. In the last of the series of cases, decided by a Full Bench of the Allahabad High Court,[12]

a *puisne* mortgagee brought a suit for sale against his mortgagors, and impleaded therein as a defendant a prior mortgagee, offering to redeem the prior mortgage. The prior mortgage, when tendered in evidence by the prior mortgagee, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased.

Upon these facts it was held that such alteration did not render the instrument void *in toto*, so as to justify the Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it to the prior mortgagee. It will be seen that in this case there was no suit brought upon the altered document, nor was the prior mortgagee a plaintiff; but the decision of the majority of the Full Bench did not rest upon these narrow grounds.[13]

47; *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851) 17 Q.B. 432. See these cases collected in *Mangal Sen* v. *Shankar* (1903) 25 All. 580.

4 *Christacharlu* v. *Karibasayya* (1885) 9 Mad. 399, 412; *Subrahmania* v. *Krishna* (1899) 23 Mad. 137, 143; *Mangal Sen* v. *Shankar* (1903) 25 All. 580, 596, 604. In the last of these cases, Aikman J. said in a dissenting judgment that the view that the rule as to material alteration has no application to the case of mortgages would be premium on dishonesty, and would enable a mortgagee to try the experiment of claiming a fraudulently enhanced amount of mortgage money without the risk of losing when the fraud is discovered: pp. 611, 612.

5 (1866) 3 M.H.C. 247. The judgment in this case was pronounced in two appeals relating to the same point. *Ramasamy Kon* and others who were plaintiffs in the original suit were appellants in both appeals.

6 See *Christacharlu* v. *Karibasayya* (1885) 9 Mad. 399, 410, 420.

7 (1881) 4 All. 62.

8 Though the soundness of this decision has not been questioned, there is a passage in the judgment. "The bond now produced by the plaintiff should be discarded as evidence of the *hypothecation* of land," which is against the principles set out in the text, and is held in subsequent cases to be against the weight of authority. See *Christacharlu* v. *Karibasayya* (1885) 9 Mad. 399, 412; and *Mangal Sen* v. *Shankar* (1903) 25 All. 580, 604.

9 *Christacharlu* v. *Karibasayya, supra,* n. 13.

10 (1899) 23 Mad. 137.

11 23 Mad. 137, at p. 143. O'Farrell J. held in a dissenting judgment that the suit was based upon the altered document: p.149.

12 *Mangal Sen* v. *Shankar* (1903) 25 All. 580.

13 It has not been overlooked that Stanley C.J. in two places distinguished this case from *Gangaram* v. *Chandan Singh* (1881) 4 All. 62, *supra,* stating. "It is one thing for the Court to refuse its aid to a fraudulent plaintiff, and another thing to direct the sale of property in which a defendant (prior mor-

In both these classes of cases it has been held that where a suit is brought by a plaintiff on a document fraudulently altered by him he will not be allowed subsequently to amend the plaint so as to base his claim on the document as executed by the defendant.[14] The Courts do not appear to have decided in these cases that the defendant is not liable in some form of proceeding to repay money which he has actually received.[15]

In case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from ss. 87-89 of the Negotiable Instruments Act, 1881:—

S.87: "Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of sections 20, 49, 86 and 125."

S.88: "An acceptor or indorser of a negotiable instrument is bound by this acceptance or indorsement notwithstanding any previous alteration of the instrument."

S 89: "Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon, and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed."[16]

The framers of the Negotiable Instruments Act must have assumed that the English rule was applicable in India to other kinds of instruments; for it would be an absurd state of the law if such a rule applied to negotiable instruments alone.

The doctrine of permanence or irrevocability which attaches to the legal personality of, for instance statutory bodies either has no application to mercantile or commercial contracts or, if it applies, it is subject to a wide class of exceptions, especially where mutual trust and confidence is intended.[17]

Determination of a licence by reasonable notice— *Martin Baker's Case* was this:

A licence agreement whereby a Canadian company was authorised to manufacture, sell or exploit all the products of an English company with a provision for supply by the English company of "know-how", exchange of information with regard to improvements and training of technicians and inspection of processes of the Canadian company was held unilaterally revocable by the English company on giving reasonable notice although the agreement did not contain provision for determination. In a concessionaire agreement 12 months' notice to terminate is a reasonable notice in view of expenditure incurred. *Decro-Wall International* v. *Practitioners in Marketing Ltd.* (1971) 2 All E.R. 216, 224:

Whether a contract like this is permanent or revocable does not depend upon an implied term but depends upon the true construction of the language used.[19]

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tgagee) has an interest without compensating him for such interest, because on production of his title-deed it is found to have been tampered with." See 25 All. pp. 580, 601.

14 *Gogun Chunder Ghose* v. *Dhuronidhur* (1881) 7 Cal. 616; *Ganga Ram* v. *Chandan Singh* (1881) 4 All. 62; *Christacharlu* v. *Karibasayya* (1885) 9 Mad 399.

15 See observations of Stanley C.J. in *Mangal Sen* v. *Shankar* (1903) All. 580, at. p. 599.

16 The English Bills of Exchange Act, 1882. ss. 64 and 79 (proviso) contain similar provisions. The holder in due course of a bill materially altered, the alteration not being apparent, can enforce payment of the bill according to its original tenor, whereas the Indian Act only protects persons paying him according to the apparent tenor.

17 *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* (1955) 2 Q.B. 566; (1955) 2 All. E.R. 722.

18 *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* (1955) 2 Q.B. 566; (1955) 2 All E.R. 722; *Llanelly Railway & Cook Co.* v. *London & North Western Railway Co.* (1875) 7 H.L. 550; *Crediton Gas Co.* v. *Crediton Urban Distt. Council* (1928) Ch. 447; *Winter Gardens Theatres Ltd.* v. *Millenium Productions Ltd.* (1947) All E.R. 331 (H.L.): (1948) A.C. 173.

19 *Martin Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* (1955) 2 Q.B. 566, 578; (1955) 2 All E.R. 722, 733; *Winter Garden Theatre Ltd.* v. *Millenium Production Ltd.* (1948) A.C. 173, reld. on.

Discharge by agreement—Discharge by long period of non-user.—Where an inordinate length of time has elapsed during which neither party has attempted to perform or called upon the other to perform a contract between them it may be inferred that the contract has been abandoned—"the matter is off altogether".[20] But that is in cases of executory contracts; and where the contract has been partially performed; where the purchaser has paid more than half the purchase price, has acquired an equitable interest in the property and registered the contract, a discharge of the contract cannot be inferred.[21]

By an agreement the plaintiff was to instal television equipment for demonstration purposes in the defendant's retail store between specified dates which were by consent slightly altered. Due to industrial disturbance, at the defendant's request the plaintiff agreed to a postponement of the demonstration and the demonstrations on the dates specified were cancelled. The parties then agreed that demonstration should be held at some mutually convenient date. Attempts to fix a mutually convenient date failed and the defendant informed the plaintiff that he no longer desired to have demonstration in his store. The plaintiff thereupon sued the defendant for breach of contract to give and accept performance of the demonstration during the period specified as modified later.

The Supreme Court of New South Wales[22] held that there was no contract in existence the first having been rescinded and no subsequent agreement having come into existence. On appeal the High Court of Australia[23] held that in the situation both parties remained bound by the contract and contractual obligations undertaken by the parties were intended by them to continue in force notwithstanding that at the instance of one of them the specified day was allowed to pass. The parties were not thereby discharged from their obligation. At no time did the parties stipulate that unless they agreed upon a new date the contract should be at an end. The parties intended that the contract should go on as a binding obligation notwithstanding that performance on the named date was *pre-termitted*.

Provision for the discharge of a contract:—A contract may itself contain a provision that on the happening of an event or on its not happening the contract it forthwith to determine. The exercise of this provision may be dependent on a notice being given to the other party but in that case the notice must be unambiguous. This may happen in the case of an implied term also.[24]

Liability of insurer on trasnfer of ownership of a car:—On the transfer of ownership of a car the policy lapses unless the insurer agrees to accept the transferee as insured in relation to the vehicle transferred. Hence where on the death of an owner his wife sells the car and only informs the insurer, of the death and the transfer but no application is made by the wife or the transferee for insurance and an accident occurs, the insurer is not liable under the policy specially when there was a clause in the policy exempting the insurer from any liability after sale of the vehicle.[25]

Agreement not to sue.—An agreement not to sue or not to set up specified matters or allegations is subject to the well-known rules upon which Courts of Equity act. Relief would not be granted if the agreement were unfairly obtained or were oppressive. The satisfaction whether express or implied must be sufficient certain and not too vague and indefinite. The consideration must not be illusory or inadequate.[26]

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20 *Pearl Milk Co. Ltd.* v. *Ivy Tannery Co. Ltd.* (1919) 1 K.B. 78. See also *G.W. Fisher Ltd.* v. *Eastwoods Ltd.* (1936) 1 All E.R. 421, 426. (These were executory contracts.) Distinguished in *Fitzgerald* v. *Masters* (1956) 95 C.L.R. 420.

21 *Fitzgerald* v. *Masters* (1956) 95 C.L.R. 420, 432.

22 *Electronic Industries Ltd.* v. *Davis Jones Ltd.* (1954) S.R. (N.S.W.) 102.

23 *Electronic Industries Ltd.* v. *David Jones Ltd.* (1954) 91 C.L.R. 288, 298-9; *Mackay* v. *Dick* (1881) 6 App. Cas. 251 (in such cases each party agreed to do all that is necessary to be done on his part for the carrying out of that part) or as expressed in *Luxor (Eastbourne) Ltd.* v. *Cooper* (1941), 1 All E.R. 39 where co-operation is necessary it is implied that it is forthcoming.

24 *Chitty:* On Contracts, (24th Ed.) Paras 1389, 1390.

25 *National Insurance Co. Ltd.* v. *Tirumalai Ammal* (1982) A.M. 83,85. *Peters* v. *General Accident & Life Assurance Corporation Ltd* (1937) 4 All E.R. 628; *Mehtabsing S. Jot Singh* v. *National Fire and General Insurance Co. Ltd.* (1963) A. Punj. 103; *Bhoopathi* v. *Vijailakshmi* (1956) A.M. 244; *Oriental Fire & General Insurance Co. Ltd.* v. *Vimal Roy* (1973) A.D. 115 reld on; *Gulab Bai Damodar Tapse* v. *Peter K. Sundar* (1975) Acc. C.J. 100 (Bom) disting.

26 *McDermott* v. *Black* (1940) 63 C.L.R. 116, 188.

Promise may dispense with or remit performance of promise.

63. Every promisee may dispense with or may remit, wholly or, in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B* and *B* accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim. [27]

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount, gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a composition[28] of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

Rule of the Common Law.—This section makes a wide departure from the Common Law. In England, to quote an authoriative exposition, "it is competent for both parties to an executory contract by mutual agreement, without any satisfaction, to discharge the obligation of that contract"; in other words, as reciprocal promises are a sufficient consideration for each other, so are reciprocal discharges. "But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment where the obligation is to be performed by payment"; but, by the law merchant, the obligation of a negotiable instrument may be discharged by mere waiver.[29] Subject to that exception, "the new agreement in recession or alteration of a prior contract must in general satisfy all the requirements of an independent contract",[30] and so must an agreement to accept satisfaction for a right of action which has arisen by breach of a contract.[31] If the creditor has accepted in satisfaction merely the debtor's promise, to give consideration, and not the performance of that promise, the original cause of action is discharged from the date when the agreement is made,[32] and breach of the substituted agreement does not enable the creditor to plead that the original agreement has been revived.[33] Although the rule that the Court does not inquire into the adequacy of the consideration is applicable, and therefore anything different in kind from what is due may be a good satisfaction without regard to its apparent value, yet the Court cannot help knowing that ninteen pounds are not worth twenty pounds, and accordingly, a less sum of money cannot be good satisfaction for a greater sum already due. This last rule was confirmed in our time with great reluctance by the House of Lords.[34] But the English rules are not material in India, save so far as the knowledge of them may be useful to prevent

27 See s. 41, above.

28 Substituted for "compensation" by the Amending Act, 1891 (XII of 1891).

29 *Foster* v. *Dawber* (1851) 6 Ex. 839, see per Parke B. at p. 851; 86 R.R. 506; Bills of Exchange Act, 1882, s. 62.

30 Leake, 8th ed., 612. See *King* v. *Gillett* (1840) 7 M. & W. 55; 56 R.R. 616. The common form of pleading was that the plaintiff had discharged the defendant, but the plea could be supported only by proving an agreement.

31 Leake, 8th ed., 679.

32 *Morris* v. *Baron* (1918) A.C. 1, 35; *British & Russian Gazette Ltd.* v. *Associated Newspapers Ltd.* (1933) 2 K.B. 616, C.A.; (1933) All E.R. Rep. 320. This is also the rule in India: *Jamnabai* v. *Murlidhar* (1946) Nag. 36, 1946 A.N. 148; *Lachhmi Narain* v. *Bharat Bank,* 1951, A.P. 621; *Union of India* v. *Kishorilal Gupta,* 1953 A. Cal. 642; on app. (1960) 1 S.C.R. 493, 503, 504; (1959) A.SC. 1362, 1366; Cheshire & Fifoot: Law of Contract (3rd Ed.) 453 quoted; (see 6th Ed. p. 677).

33 1953 A. Cal. 642, 645. See n. 37.

34 *Foakes* v. *Beer* (1884) 9 App. Ca. 605; notes to *Cumber* v. *Wane* in 1 Sm. L.C. A negotiable instrument for the same or even a less sum will do; not, of course, because it is the equivalent of money, but, on the contrary, because it is not money. This is subject to the instrument being in fact given and accepted in full discharge and not merely as conditional payment of the amount due: per Fletcher Moulton L.J.; *Hirachand* v. *Temple* (1911) 2 K.B. 330, 340.

misunderstanding and misapplication of English decisions founded on or involving them. The intention of the present section to alter the rule of the Common Law is clear, and has been recognised in several Indian cases.[35]

Waiver.—Under Common law the waiver of an existing right does not require the presence of detriment in order to make it effective.[36] Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.[37] Waiver must be an intentional act with knowledge.[38] Firstly some distinct act ought to be done to constitute a waiver; next it must be intentional, and lastly it must be with knowledge.[39]

Under English Law waiver is defined thus: Where one party voluntarily accedes to the request of the other party that he should not insist on the precise mode of performance fixed by the contract the Court will hold that he has waived his right to insist that the contract be performed in this respect according to its original tenor.[40] Waiver may be oral on in writing or inferred from conduct.[41]

Waiver on the party asking for concession.[42]—A party making a request for concession cannot repudiate waiver and set up the original contract.[43] Thus where the defendant agreed with the plaintiff to buy goods worth £10 to be delivered within a specified period and then made a request to the plaintiff to hold those goods for that period and on the latter's doing so refused to accept the goods contending that the plaintiff was in breach it was held that the forbearance of the plaintiff was a waiver and not a variation.[44]

But if a seller withholds goods at the purchaser's request and waives the obligation of the purchaser to take delivery of the goods within a certain time, he will still be under an obligation to give delivery within reasonable time if so requested by the purchaser.[45]

Effect on party making the concession.—If a party makes a concession as to the date or as to the manner of a performance other than that provided in the contract, he will be bound to perform when tendered. But he is entitled, on giving reasonable notice, to fix a new time limit or to require the other party to perform in accordance with the original contract.[46]

Where an owner accepted an underpayment of hire by a charterer who paid the hire after deductions but payment was in time and then the owner withdrew the vessel, it was held[47] that this was not an unequivocal act of election of remedy against withdrawal which he could employ after reasonable time of underpayment.

Breach of condition of payment—Waiver.—In a time-charterparty there was a term in the agreement whereby the hire was to be paid in advance semi-monthly. On the last occasion the charterers paid the instalment of hire a day late but the bank on behalf of the owners received it. The owners withdrew the vessel for non-payment. The Court of Appeal held that by receiving the money by the bank the owners had waived their right of withdrawal. On Appeal, the House of Lords held[48] that on a true construction of the charter-

35 *Manohar Koyal* v. *Thakur Das Naskar* (1888) 15 Cal. 319, 326; *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398, 402; *Naoroji* v. *Kazi Sidick* (1896) 20 Bom. 636, 644.
36 *Jagadbandhu Chatterjee* v. *Smt. Nalima Rani Ghose* (1971) 1 S.C.J. 38,39 quoting Anson on Law of Contract (22nd ed.) p. 107.
37 *Waman Shriniwas Kini* v. *Ratilal Bhagwandas* (1959) Supp. 2 S.C.R. 217, 226 (Chitty on Contract, p. 381, 21st Ed., quoted at p. 226).
38 *Earl of Darnley* v. *Proprietors etc. of L.C.D. Ry.*, 2 H.L. 43,57; *Doe d. Nash* v. *Birch* (1 M. & W. 462, 406); *Perry* v. *Davis*, 3 C.B. (N.S.) 769, 777.
39 *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1920) 28 C.L.R. 305, 325; see n. 42.
40 Chitty: On Contracts (24th Ed.) Para 1381.
41 *Bruner* v. *Moore* (1904) 1 Ch. 305.
42 Chitty: On Contracts (24th Ed.) Para 1383, 1384.
43 *Ogle* v. *Earl Vane* (1868) 3 Q.B. 272; *Hickman* v. *Haynes* (1875) 10 C.P. 598.
44 *Levey & Co.* v. *Goldberg* (1922) 1 K.B. 688.
45 *Tyers* v. *Rosedale & Ferryhill Iron Co.* (1875) 10 Ex. 105.
46 Chitty: On Contracts (24th Ed.) Para 1385.
47 *China Foreign Trade Corporation* v. *Evalogia Shipping Co. S.A.* (1979) 2 All E.R. 1044; (1979) 1 All E.R. 657 revd.
48 *Mardorf Peach Co. Ltd.* v. *Attica Sea Carriers Corpn.*—The Laconia (1977) 1 All E.R. 545, 560, 561-2 (H.L.); (1976) 2 All E.R. 249 Revd. *Langford (owners)* v. *Canadian Forwarding & Export Co.*

party the owners right to withdraw arose on the failure of the charterers to comply with the obligation of paying punctually the semi-monthly instalment in advance. The default could not be cured by a late payment or tender, since the payment was not made in advance in accordance with the obligation; and further the breach had not been waived as it had to be shown clearly that the owners had accepted the late payment as if it had been made punctually. The bank although agents of the owners under the terms of the charter had no authority to accept late payment and their acceptance was provisional only depending on the owners decision.

In a contract for the sale of leasehold there was a condition that there should be no adverse entry. The plaintiffs came to know of an adverse entry but still proceeded with negotiations with the freeholders for the purchase of the freehold. When that failed they repudiated the contract and brought an action for declaration that they were entitled to do so because of the breach of the condition. It was held[49] that the plaintiffs had waived the right to repudiate and were not entitled to do so when the negotiations with the freeholders fell through.

Right of Pre-emption—waiver of.—A cosharer can waive his right of pre-emption under section 26-F Bengal Tenancy Act. Such waiver need not be founded on contract or agreement. Under Indian law neither consideration nor agreement is necessary. It is nothing more than intention not to insist on the right of pre-emption. Acquiescence in the sale by a positive act amounting to relinquishment of a pre-emptive right would be waiver.[50]

Under the Kerala Land Acquisition Act the State on acquiring land on which a portion of a building stands the rest standing on the owner's unacquired portion of the land, the State if asked by the owner is required to acquire the entire building and then have it demolished and have the two portions of the land acquired and unacquired—cleared of the building material. But where the owner after getting compensation for the building agrees that only the building on acquired portion should be demolished, he is entitled to have the obligation discharged by the State in a manner other than the obligation of demolishing the whole of the building and clearing the site of the building on the analogy of s.63, a Contract Act, although the matter is one of Land Acquisition. The minority held that s.63 had no application and the owner cannot insist on not demolishing and not clearing the whole land acquired and unacquired.[51]

A tenant governed by the Bihar Buildings (Lease Rent and Eviction) Control Act gave notice to the landlord of his intention to adjust excess rent paid by him in case the same was not refunded to him but went on paying the rent without adjustment. He would be deemed to have waived his right of getting the excess rent adjusted. Therefore when he stopped paying rent and a suit for arrears of rent was brought against him, he would not be entitled to raise the defence of adjustment in the suit without anything more. Even though a tenant has the right to have the rent of future months adjusted to the last, the intention to adjust had to be communicated to the landlord or it should be capable of being inferred from surrounding circumstances before the tenant becomes defaulter.[52]

Where the Government of East Punjab had decided to recover only 40% of dues owed by erstwhile agents selling grain in undivided Punjab and no more the Government must be taken to have decided to remit the rest under s.63; a promisee can remit a promise in part. It is not necessary that this remission should be supported by consideration.[53]

The Railway sent a cheque for a smaller sum than the claim of the plaintiff in Court in full and final settlement of the claim. The plaintiff encashed the cheque but continued his suit for the balance. The Court held that the plaintiff had not accepted the cheque in full and final settlement as he continued the suit. This judgment it is submitted requires a re-examination.[54]

(1907) 96 L.T. 559 disapproved. (1976) 2 All E.R. 249, Revd; *Empresa Cubana de Fletes* v. *Lagonist Shipping Co. Ltd.* (1971) 1 All E.R. 193 overruled.

49 *Aquis Estates Ltd.* v. *Minton & Another* (1975) 3 All E.R. 1043.

50 *Jagadbandhu Chatterjee* v. *Smt. Nalina Rani Ghosh* (1971) 1 S.C.J. 38.

51 *Rajalakshmy* v. *Kerala* (1980) A. Ker. 68,73 & 75.

52 *Bishwanath Balkrishna* v. *Smt. Ram Piari Devi* (1979) A.P. 159, 163.

53 *Harichand Madangopal* v. *State of Punjab* (1973) 2 S.C.R. 582; (1973) A.SC. 381,389.

54 *Union of India* v. *Gangaram Bhagwandas* (1977) A.M.P. 215.

Waiver and estoppel.—The word waiver was confined to its own legal connotation, i.e. waiver is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions. It is a conclusion of law when the necesary facts are established.[55] A person to be estopped may be under a mistake himself and may not have acted with an intention to mislead or deceive.[56]

In *Charles Rickards Ltd.* v. *Oppenheim* the defendant commissioned the plaintiffs to build a car body for him by March 20, 1948. But it had not by then been completed. The defendant continued to press for delivery. On June 10, 1948, the defendant wrote to the plaintiffs that he will not accept delivery after July 25. The body was still not completed. The Court of Appeal held it to be an agreed variation of the original contract and impliedly waived the original stipulation and a reasonable notice of the new stipulation. On the question of waiver Denning L.J. said: "Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance it does not matter. It is a kind of estoppel. He in fact promised not to insist on his strict legal rights. That promise was intended to be acted on and was in fact acted on. He cannot afterwards go back on it".[57] This principle has not been universally accepted.[58]

Election.—Whenever a party has suffered detriment at the election of the representor, the election is irrevocable and may be used at the instance of the representee to preclude the elector from resiling from his course of action. But whenever the representee knowing of the choice has not moved to his detriment the elector will not be finally precluded from resiling from his choice unless he has in the meantime taken a benefit inconsistent with the revised decision unless he renounces the benefit.[59]

Estoppel and Election.—It is not necessary in order to prove detriment sufficient to support an estoppel to show that the representee had paid out money or done some positive act but he had suffered measureable financial loss. In the case of election the cases reveal that if the representee has taken no positive step involving him in financial loss, he cannot rely on election by the other party.[60]

Estoppel—Taking part in proceedings after irregularity.—Whenever a party continues to take part in the proceedings after full knowledge of any irregularity he will be taken to have waived the irregularity and will be precluded from raising in the same litigation the objection which he is deemed to have abandoned.[61] The same is the result if he participates in arbitration proceedings after expiry of stipulated period of time.[62]

Scope of the section.—The present section and s. 62 must be construed so as not to overlap each other. This would be done by holding that agreements referred to in s.62 are agreements which more or less affect the rights of both parties under the contract discharged by such agreements; whilst those referred to in s.63 are such as affect the right of only one of the parties. The former case necessarily implies consideration, which may be either the mutual renunciation of right, or, in addition to this, the mutual undertaking of fresh obligations, or the renunciation of some right on the one side and the undertaking of some obligation on the other. It is only when the agreement to discharge affects the right of only one party that consideration might be found wanting, and there alone the Indian law departs from the English law by making provision for every such possible case in s.63.[63]

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55 *Ibid,* p. 327; on app. (1922) 2 A.C. 541; 31 C.L.R. 27 (P.C.); per James L.J. in *Pilcher* v. *Rawlins* (7 Ch. App. 259, 268).
56 *Sarat Chander Dey* v. *Gopal Chander Laha,* 19 I.A. 203; 20 Cal. 296 (Lord Shand).
57 (1950) 1 K.B. 616, 623; (1950) 1 All E.R. 420.
58 Chitty: On Contracts (24th Ed.) Para 1387 Note 42.
59 Spencer Bower: Estoppel by Representation (1977 Ed.) 359.
60 Spencer Bower:Estoppel by Representation (1977) Ed. p. 359. See *Grundt* v. *Great Bouwer Pty. Goldmines Ltd.* (1938) 59 CLR 641.
61 Spencer Bower:Estoppel by Representation (1977 Ed.) 337., *Treherne* v. *Dale* (1884) 27 Ch. D. 66 (C.A.); *Tozier* v. *Howkins* (1885) 15 Q.B.D. 650.
62 Spencer Bower:Estoppel by Representation (1977) Ed. pp 339-340.
63 Per Cur in *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398.

A waiver is distinguishable from the variation of a contract in that there is no consideration for the concession or forbearance moving from the party to whom it is shown.[64]

Under Indian Law the general principle of waiver is to be found in s.63. Under that law it is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit. Under Indian Law neither a consideration nor an agreeement will be necessary.[65]

Accord and satisfaction.—Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. The consideration may be executory.[66] As accord is an agreement there must be two minds *ad idem*. The real emphasis is not on the acceptance of a smaller sum but on the debtor's condition that if the tendered money be at all accepted it must be in discharge of the entire debt. The creditor cannot then claim his entire debt.[67] An accord and satisfaction is only a method of discharge of a contract. It does not annihilate the contract but only makes the obligation arising from it unenforceable. Per Sarkar J.[68] Accord and satisfaction are a question of fact. They imply an agreement to take the money in satisfaction of the claim in respect of which it is sent.[69] Acceptance under protest in full satisfaction does not operate as accord. *Amar Nath Chand Prakash* v. *Bharat Heavy Electricals* (1972) A.A. 176; *Kapurchand* v. *Himayat Ali Khan* (1963) A.SC. 250 Disting; *Union of India* v. *Kishore Chand Gupta* (1969) A.SC. 1362 refd. to.

In respect of certain work, disputes arose over the way the work was done. After paying £125 out of £259 the agreed amount, the defendant sent a cheque for £75 and wrote a letter protesting against the non-compliance with his complaints and stating "I am therefore further enclosing my further cheque for £75 in respect of this work". On the back of the cheque he typed the words "in full and final settlement of account. Signed.....dated....." and sent it to the plaintiff company's London Head Office although the contract was with the Birmingham office. The cheque was signed and dated by the plaintiff company's Secretary. In a claim for the balance defendant pleaded accord and satisfaction which was not accepted on the ground of being unreasonable.[70]

If there is a concluded bargain between parties, it can only be got rid of by either

(a) a mutual agreement to call off the contract; or

(b) an agreement for a variation of the terms of the original contract.

The mere fact that there have been abortive negotiations which do not result in an enforceable agreement does not destroy the original contract.[71]

Damages, accord and satisfaction.—If a claimant for a larger amount as damages accepts and cashes a cheque for a lesser sum which was sent on the express condition that it would be in

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64 *W.J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.* (1972) 2 Q.B. 189,213; (1972) 2 All E.R. 127; (1972) 2 W.L.R. 800; *Birmingham & District Land Co.* v. *London & N.W.Ry.* (1888) to Ch.D. 268,286.

65 *Jagad Bandhu Chatterjee* v. *Smt. Nilima Rani Ghosh* (1971) 1 S.C.J. 38,39; *Waman Sriniwas Kini* v. *Ratilal Bhagwandas & Co.* (1959) Supp. 2 S.C.R. 217,226; *Dawson Bank Ltd.* v. *Nippon Menkwa,* 62 I.A. 100 refd. to.

66 *British Russian Gazette & Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (1933) 2 K.B. 616, 643-4; quoted in *Union of India* v. *Kishorilal* (1959) A.SC. 1362, 1366, 1373; (1960) 1 S.C.R. 493, 503, 520; *Elton Cop Dyeing Co.* v. *Broadbent & Son Ltd.* (1919) 89 L.J.K.B. 186; cf. *Cartwright* v. *Cook* (1832) 3 B. & Ad. 701; *Crowther* v. *Farrer* (1850) 15 Q.B. 677.

67 *Dipchand* v. *Abhechand & Co.* (1962) A.Cal. 166, 167; *British Russian Gazette & Trade Outlook Ltd.* v. *Associated Newspaper Ltd.* (1933) 2 K.B. 616; *Digambar Narain* v. *Harendra,* 14 C.W.N. 617, 625, relying on *Bowen* v. *Owen* (1841) 11 Q.B. 130; *Beharilal* v. *Nassimannessa Bibi* (1923) A.Cal. 527 refd. to. This definition is from Salmond & Winfield on Contracts.

68 *Union of India* v. *Kishori Lal Gupta & Bros.* (1960) 1 S.C.R. 493, 520; (1959) A.SC. 1362, 1373; Cheshire & Fifoot on Contracts, p. 453 (3rd Ed.) refd. to; *British Russian Gazette & Trade Outlook Ltd.* v. *Associated Newspaper Ltd.* (1933) 2 K.B. 616, 643-4.

69 *Day* v. *McLea* (1889) 22 Q.B.D. 610, 613 (Bowen L.J.); *Neuchatel Asphalte Co. Ltd.* v. *Barnett* (1957) 1 W.L.R. 356, 362.

70 *Neuchatel Asphalte Co. Ltd.* v. *Barnett* (1957) 1 W.L.R. 356.

71 *Davies* v. *Sweet* (1962) 2 W.L.R. 525, 529; *Perry* v. *Suffields Ltd.* (1916) 2 Ch. 187 (C.A.).

satisfaction of the claim, it can only be evidence of "accord" and whether it is taken in satisfaction or not depends upon the circumstances of the case.[72]

Accord and satisfaction—Printed forms, construction of.—It is a well settled rule of construction that if one party puts forward a printed form of words for signature by the other and it is afterwards found that these words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, the court will limit or reject the printed words so as to insure that the main object of the transaction is achieved. The courts "will not allow printed forms to be made a trap for the unwary.[73]

Remission of performance.—In 1903 the High Court of Bombay held[74] that a dispensation or remission under this section involves a promise as defined by s.2(b) or, what is the same thing, an agreement within s.2(e), so that "there must be a proposal of the dispensation or remission, which is accepted": in technical terms, that the effect of the section is only to allow an accord to be good without satisfaction. The Privy Council has now overruled this opinion (against which the learned authors of this work had continuously protested) in few and decisive words: "The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines.[75] A mortgagee can unilaterally relinquish a part of the security without the consent of the mortgagor even after the mortgage debt becomes due. Such remission under s.63 is not an agreement between two parties.[76] For a release under s.63 no consideration at all is necessary. It is a unilateral act of the promisee discharging at his will the obligation of another.[77]

Thus the words of the section are construed according to their natural meaning, and a promisee can discharge the promise not only without consideration but without a new agreement. The learned authors repeated part of their original protest in the sixth edition of this work, though they themselves admitted that it was no longer necessary. There is nothing in the words of the section (they said) about promise, proposal, or acceptance, and it was difficult to see why any such matter should be imported, except on the assumption that the intention was to alter the English law of accord and satisfaction only by abrogating the requirement of consideration. But if consideration is no longer required, why should agreement be required? It is hoped that Indian courts have at least shaken off the unfortunate and erroneous presumption that a codifying Act is to be read as saving every existing rule, however, peculiar, which it does not repeal in literal terms.

It is open to a buyer to waive under s.63 of the Contract Act the performance of the contract and he is not confined to the exercise of powers conferred by s.60 of the Sale of Goods Act.[78] A claim foregone by a promisee under s.63 of the Contract Act cannot be claimed even though the act of foregoing was without any consideration.[79] But this case must be confined, it is submitted, to its own facts.

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72 *Union of India* v. *Narayan Lall* (1963) A.P. 152; *Day* v. *McLea* (1889) 22 Q.B.D. 610 refd. to: but see *Shyamnagar Tin Factory* v. *Snowhite Food Products* (1965) A.Cal. 541.

73 *Neuchatel Asphalte Co. Ltd.* v. *Barnett* (1957) 1 W.L.R. 356, 360; *Glynn* v. *Margetson & Co.* (1893) A.C. 351 (case of oranges sent from Spain to Liverpool with printed clauses allowing ship liberty to proceed & stay at any Mediterranean Port "in print")

74 *Abaji Sitaram* v. *Trimbak Municipality* (1903) 28 Bom. 66: in *Phoenix Mills Ltd.* v. *M.H. Dinshaw & Co.* (1946) 48 Bom. L.R. 313, 226 I.C. 503, (1946) A.B. 469, it is pointed out that observations to the contrary in *Dawson's Bank* v. *Nippon Menkwa* (1935) 62 I.A. 100, 13 Rang. 256, 1935 A.P.C. must be considered *obiter*.

75 *Chunna Mul-Ram Nath* v. *Mool Chand-Ram Bhagat* (1928) 55 I.A. 160; 108 I.C. 678; 1928 A.P.C. 99; a affirming the judgment of the High Court of Lahore; followed in *Kalumal Devandas* v. *Kessumal*, 1929 A.S. 153; 114 I.C. 97; *Sabaldas* v. *Sobkokhan* (1947) Kar. 182, 1948 A.S. 91; *Hari Krishna* v. *K.C. Gupta*, 1949 A.A. 440; *Venkatasami* v. *Panchakshara* 1947 A.M. 414. This appears to overrule the opinion (in any case difficult to understand) of the Rangoon High Court that if the remission is in the form of an agreement it requires a new consideration: *Maung Pu* v. *Maung Poa Thant* (1928) 6 Rang. 191; 110 I.C. 612; 1928 A.R. 144. See *Jitendra Chandra* v. *S.N. Banerjee*, 1943 A.Cal. 181.

76 *Chhunnamal Ram Nath* v. *Moolchand Ram Bhagat*, 9 Lah. 510 (P.C.); (1928) A.PC. 99; 55 I.A. 154; *Kedarnath Lal* v. *Sheonarain Ram*, 1957 A.P. 408.

77 *Chhunamal-Ramnath* v. *Moolchand Ram Bhagat*, 55 I.A. 154; 9 Lah. 510; (1928) A.PC. 99, followed in *Kedarnath Lal Sheonarain Ram*, 1957 A.P. 408.

78 *B.N. Kataruka & Sons* v. *Chaulhai Nayak* (1960) A.P. 259; *Chunna Mal Ram Nath* v. *Moolchand Ram Bhagat*, 55 I.A. 154; (1928) A.PC. 99.

79 *Jwala Prasad* v. *Jwala Bank Ltd.* (1957) A.A. 143.

Except so far as in the case of a corporation a dispensation from performance must satisfy the conditions required for its corporate acts in general, it does not seem that a formal obligation need be formally remitted.

Conceivable but not probable cases in which a promisor would be prejudiced by not being allowed to complete the performance of his promise, though he had received the consideration in full, may be left aside until they arise. It seems that, if they can be treated as exceptional, it must be by virtue of some special term implied in the particular contract.

Where a promisee remits a part of the debt, and gives a discharge for the whole debt on receiving the reduced amount, such discharge is valid, even though the remission was in pursuance of an oral agreement, which is inadmissible under s.92(4) of the Evidence Act, 1872. Thus where a lessor, to whom rent is due under a registered lease, accepts a smaller amount of rent from the lessee in pursuance of subsequent oral agreement to reduce the rent, and passes a receipt in full discharge of the rent due, the discharge will take effect independently of the prior oral agreement, which certainly is not illegal, though it cannot be proved under the Evidence Act.[80] A payment of rent minus certain deductions, made by a tenant in full satisfaction of the landlord's claim for rent if accepted by the landlord is full payment of rent disentitling the landlord from treating the tenant as a defaulter.[81] Similarly, where any sum has become payable under a mortgage deed, payment may be partly remitted by the mortgagee.[82] Where a promisee remits a part of the debt and gives a discharge for the whole debt on receiving the reduced amount, the discharge is valid. The section is intended not only to enable a promisee to release a debt at the instance of a third party but also to enable the promisor whose debt has been released at the instance of a third party to take advantage of the release.[83] A creditor accepting payment on a condition cannot accept the payment and repudiate the condition.[84]

A prince owed a large sum of money to a jeweller. The Accountant-General of the State paid a lesser sum in full satisfaction of the claim which was accepted by the creditor, who thereafter sued the prince for the balance.

The claim was disallowed under s.41 as also under s.63 of the Contract Act.[85]

An agreement to remit *in futuro* clearly requires consideration, if it is to be a binding contract.[86] But this must be distinguished from a remission or dispensation which is made contingent on the happening of a future event. In such a case the remission is *in praesenti,* though it is suspended until the event occurs. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim "if the...lodge building which has been burnt down is resuscitated." He cannot sue on his note after the lodge is rebuilt.[87] It would be monstrous if he could.[88] S. 63 applies where there is actual remission, i.e. *in praesenti* and not *in futuro,* i.e. not a mere promise to remit. In the latter case there has to be consideration.[89]

Promissory Estoppel.—The principle of promissory estoppel prevents a party from enforcing his strict legal rights when it will be unjust to allow him to do so in view of the dealings which

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80 *Karampalli* v. *Thekku Vittil* (1902) 26 Mad. 195. The cashing of a cheque offered in full satisfaction of a smaller amount does not of itself operate as a receipt or discharge in full: *Basdeo Ram Sarup* v. *Dilsukh Rai Sewak Ram* (1922) 44 All. 718; 68 I.C. 783; 1922 A.A. 461.

81 *Sundarlal* v. *Ram Kishan* (1960) A.A. 544.

82 *Vaidyanatha Rao* v. *Kandappa Chetti* (1931) 54 Mad. 889, 132 I.C. 292; 1931 A.M. 636; *Kedarnath Lal* v. *Sheonarain Rai* (1957) A.P. 408; *Chhunnamal Ramnath* v. *Moolchand Ram Bhagat,* 55 I.A. 154; 9 Lah. 510 (P.C.); (1928) A.PC. 99.

83 *In re Industrial Bank of Western India,* 1931 A.B. 123; 32 Bom. L.R. 1656; 129 I.C. 890.

84 *Kapur Chand Godha* v. *Mir Nawab Himayatali Khan* (1963) 2 S.C.R. 168, 179; (1963) A.SC. 250; *Union of India* v. *Narayan Lal* (1963) A.P. 152 (a case of cashing a cheque by the claimant. Court held satisfaction will depend on circumstances); *Day* v. *McLea* (1889) 22 Q.B.D. 610 refd. to.

85 *Kapur Chand Godha* v. *Mir Nawab Himayatali Khan Azamjah* (1963) 2 S.C.R. 168; (1963) A.SC. 250.

86 See *Ramaswami* v. *Rudrappa,* 1939 A.M. 688, following *Balasundara Naicker* v. *Ranganatha Iyer* (1929) 53 Mad. 127; 122 I.C. 641; 1929 A.M. 794.

87 *Abraham* v. *The Lodge "Good Will"* (1910) 34 Mad. 156, where other no less futile points were also disposed of by the Court. The argument is not reported. Some unexplained formal irregularities are not relevant here.

88 The whole paragraph was cited with approval in *Shanmugasundara* v. *Sivalinga,* 1952 A.M. 675, 677.

89 *Subbaraidu* v. *Mahadeva Rao* (1965) A.AP. 171. See n. 63, *supra.*

have taken place between them. The principles of *Foakes* v. *Beer*[90] that an agreement to receive a smaller sum in payment of a judgement-debt was not binding on the creditor in the absence of any consideration remained unaffected until a means of evading it was suggested by Denning J. in *Central London Property Trust* v. *High Tree House Ltd.*[91] commonly called the *High Trees Case*.

The principle of s.63 is that a creditor may accept a smaller sum from his debtor and give him a discharge. Such accord and satisfaction implies an agreement between the parties and is a question of fact.[92]

Smaller sum for a bigger sum.—Denning J. in *High Trees case* [93] formulated the following principle:

"A logical consequence no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration."

Promissory estoppel or quasi or equitable estoppel.—The doctrine of forbearance is a common law doctrine but it will be remembered that equity also is prepared to intervene in similar circumstances.[94] A new estoppel called "promissory estoppel" or "equitable estoppel" has developed in recent years. It was applied in 1947 though its origin was in 1877 and its scope and effect may be taken to be substantially accepted though after much controversy.[95]

Thus *the principle of quasi-estoppel* or *"promissory estoppel"* more aptly called is that when one party to a contract in the absence of a fresh consideration agrees not to enforce his rights, an equity will be raised in favour of the other party but subject to the qualifications that—

(1) The other party has changed his position.

(2) The promisor can resile from his promise on giving reasonable notice—may not be formal—giving the promisee a reasonable opportunity of resuming his position.

(3) The promise only becomes final and irrevocable if the promisee cannot resume his position....[96]

American View.—In the American Restatement of the Law of Contract in Art. 90 it is stated—

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise."[97]

Distinction between Common Law and Promissory Estoppel.—The essence of common law estoppel is representation of an existing fact and not as to the future[98] which has been termed promissory estoppel.[99] The distinction between the two has been set out by Spencer

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90 (1884) 9 App. Cas. 605; (1881-5) All E.R. Rep. 106 reaffirming *Pinnel's Case* (1602) 5 Co. Rep. 117a.

91 (1947) K.B. 130; (1956) 1 All E.R. 256.

92 *Orissa Khadi & Village Industries* v. *Orissa Saw Mills* (1974) Cut. 283, 286; *Day* v. *McLea* (1898) 22 Q.B.D. 610 applied; *Kapur Chand* v. *Mir Nawab Himayatali Khan* (1963) A.SC. 250 referred to.

93 *Ibid*, p. 134 (K.B.).

94 Per Bowen L.J. in *Birmingham & District Land Co.* v. *L.N.W. Ry.* (1880) 40 Ch. D. 268, 286; *Hughes* v. *Metropolitan Ry.* (1877) 2 App. Cas. 439, 448.

95 *Hughes* v. *Metropolitan Railway* (1877) 2 App. Cas. 439; *Robertson* v. *Minister of Pensions* (1949) 1 K.B. 227; *Charles Rickards* v. *Oppenheim* (1950) 1 K.B. 616; (1950) 1 All E.R. 420; *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657; (1955) 1 W.L.R. 761; *Lyle Meller* v. *A. Lewis & Co.* (1956) 1 W.L.R. 29; see statement in *Combe* v. *Combe* (1951) 2 K.B. 215, 220 doubted by Lord Simonds in *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 660 as being too widely stated.

96 *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.* (1964) 1 W.L.R. 1326 (P.C.) 1330; *Birmingham and District Land Co.* v. *L. & N.W. Ry. Co.* (1888) 40 Ch. D. 268, 286 (per Bowen L.J.) affirmed by the House of Lords in *Tool Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (1955) 1 W.L.R. 761; (1955) 2 All E.R. 657 (H.L.) where authorities were reviewed and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration.

97 *M/s Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of U.P.* (1979) A.SC. 621, 636, 637: (1979) 2 SCR 641; See also *Alleghany College* v. *National Chautagus County Bank*, 57; 57 A.L.R. 980; *Drennan* v. *Star Paving Co.* (1958) 31 Cal. (2d) 409.

98 *Jorden* v. *Morney* (1854) 5 H.L. Cas. 185; *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1922) 2 A.C. 541; 31 C.L.R. 27 (P.C.).

99 *Central London Properties Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130; (1956) 1 All E.R.

Bower: Estoppel by Representation (1977 ed.) p. 375 which has been approved by the Privy Council.[1] The distinction is set out below:[2]

The principle only prevents a party from insisting on his strict legal right when it would be unjust to allow him to do so having regard to the dealings which have taken place between the parties. This is how it was first stated in 1877 in *Hughes* v. *Metropolitian Ry. Co.*[3] and enlarged in *Birmingham & District Land Co.* v. *London & North Western Rly. Co.* [4] There Bowen L.J. said:[5]

"If persons who have contractual rights against others induce by their conduct those against whom they have such rights will either not be enforced or will be kept in suspense or abeyance for some considerable time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

"The party who has promised the forbearance will be estopped from going back on his promise, at any rate without giving fair and adequate notice to the promisee".

Relying on this statement Denning J. in *High Trees*[6] case formulated the following principle:

"...a promise intended to be binding, intended to be acted on and in fact acted on should be binding.... A logical consequence no doubt is that a promise to accept a smaller sum in discharge of a larger sum if acted upon is binding notwithstanding the absence of consideration."

In *High Trees case,*[7]

the plaintiff had leased a block of flats to the defendants on £2,500 yearly rent. During the war the plaintiff agreed to reduce the rent to £1,250 a year because due to war-time conditions only a few flats were let. After the war by the beginning of 1945 all the flats were let but the defendant continued to pay the same rent. The plaintiff claimed the full rent and sued for the last two quarters of 1945 which was decreed.

But Denning J. held that had the plaintiffs sued for the whole rent for the full period from 1940 to 1945 they would not have succeeded because of the agreement which the defendants could have relied upon.[7] They would have been estopped from asserting their strict legal right. Thus this case suggested a means of evading the rule in *Foakes* v. *Beer*[8] that the receipt of a smaller sum in payment of a judgment debt to be binding required consideration, in the absence of which it was not binding on the creditor.

High Trees Case was applied by the Court in a recent case which was as follows:

A landlord before entering into a sale of lease for 99 years of the flats in possession of the tenants made an oral representation to the tenants individually that he would not ask for contribution for cost of repairs to the roofs but this was not incorporated in the leases. On the contrary there was a stipulation for contribution by the tenants. The tenants refused to contribute when asked to do so. One of the tenants, the first defendant, admitted that she would have bought the lease even without the assurance. The landlord brought an action for contribution which was dismissed. The Court of Appeal held that the landlord was estopped. As to the first defendant the Court held the situation hypothetical which never occurred and therefore was irrelevant.[9]

256, 258. See also *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1922) 2 A.C. 541; 31 C.L.R. 27 (P.C.); *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 567.

1 *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 567 *(infra).*

2 *Infra.*

3 (1877) 2 App. Cas. 439.

4 (1888) 40 Ch. D. 268.

5 *Ibid.,* 286. Quoted by Viscount Simonds in *Metal Tool Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 660.

6 *Central London Property Trust Ltd.* v. *High Trees House Ltd.* 1947 K.B. 130, 134; (1956) 1 All E.R. 256, 258, applied in *Lyle Meller* v. *A. Lewis & Co. (Westminster) Ltd.* (1956) 1 All E.R. 247, 256(n). (The new estoppel applies to representations as to the future and to representations about legal relations.)

7 *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130; (1956) 1 All E.R. 256; applied to *Brikom Industries Ltd.* v. *Carr* (1979) 2 All E.R. 753 (Post).

8 (1884) 9 App. Cas. 605; (1881-5) All E.R. Rep. 106; reaffirming *Pinnel's case* (1602) 5 Co. Rep. 117 a.

9 *Brikom Investment Ltd.* v. *Carr* (1979) All E.R. 753, 756, 758-60; (C.A.); *Central London Property Trust Ltd.* v. *High Trees Housing Ltd.* (1947) K.B. 130; (1956) 1 All E.R. 256 appld.

In *Crabb* v. *Arun District Council,* it was observed that in a given case where justice and fairness demand, a person will be prevented from insisting on his strict legal rights even where they arise not under any contract but under his own title deeds or under a statute.[10]

In *Combe* v. *Combe*[11] Denning L.J. again referred to the principle of *High Trees case* and said that it should not be stretched too far lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to endorse them having regard to the dealings which have taken place between the parties. In *Combe's case*[12]

A husband on divorce by the wife, promised to allow his wife £100 as yearly maintenance free of income-tax. After the decree absolute the husband did not pay the wife the agreed payments and the wife did not apply to the court for permanent maintenance. The wife later brought an action against the husband claiming arrears of maintenance under the husband's promise.

This was held to be without consideration as (1) there was no request from the husband expressly or implied to forbear from applying; and (2) even if there had been such forbearance there would have been no consideration for the promise as the wife would not be precluded from applying to the court. In *Combe's case* Denning L.J. stated the principle thus.[13]

"The principle is that where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then once the other party has taken him on his word and acted upon it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations, subject to the qualification, which he himself has so introduced,[13] even though it is not supported in point of law by any consideration, but only his word."

Combe v. *Combe* was relied on in a Canadian case where the facts were:

Where the plaintiff in a series of communications from the defendant was told that he would be paid termination allowances, it was held that these statements constituted a promise that he would be paid if he continued in the defendant's employment. In such a case although there was no verbal or written acceptance by the plaintiff, by staying in the employment until he was discharged, he did fulfil the terms of the defendant's offer and serve them until discharged and it is this that must be relied on as consideration.

In this case the plaintiff was employed by the Union Oil and that Company was taken over by the British American Oil Company. While he was working with the Union Oil, the Company announced a plan for "termination allowances" which was modified from time to time. The plaintiff had been working for the Union Oil for about 19 years. Then he joined the British American Oil Company after the take over. He resigned from the British American Oil Company and then brought an action for the "termination allowance". It was held that he was entitled to get it.[14]

The effect of these cases from *Hughes* v. *Metropolitan Rail Co.*[15] to *Combe* v. *Combe*[12] was discussed by the House of Lords in 1955 in *Tool Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[16] In *Tool Metal's case*[16]

the appellants, owners of certain patent rights, granted the respondents a licence to deal in certain of the materials protected by the patents and the respondents agreed to pay a royalty and compensation should the contract materials exceed a stated quota. When the war started the appellants voluntarily agreed to forego the compensation and intimated that they would prepare a new agreement when the war ended.

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10 (1975) 3 All E.R. 865 Quoted with approval in *Motilal Padampat Sugar Mills* v. *The State of UP* (1979) ASC 621, (1979) 2 SCR 641; *Hughes* v. *Metropolitan Railway* (1877) 2 ASC 439, 448 (Per Lord Cairns)

11 (1951) 2 K.B. 215, 219; (1951) 1 All E.R. 767, 769; *Hughes* v. *Metropolitan Railway* (1877) 2 App. Cas. 439, 448; *Birmingham & Disst Land Co.* v. *L. & N.W. Ry. Co.* (1888) 40 Ch.D. 268, 286; *Foster* v. *Robinson* (1951) 1 K.B. 149, 156 (a landlord telling his tenant that he can stay in the cottage free and he does so); *Robertson* v. *Minister of Pensions* (1949) 1 K.B. 227 (A Government department accepting a disease of a soldier and he gives no evidence); *Charles Rickards* v. *Oppencheim,* (A waiver of stipulation of time and then insisting on it) (1950) 1 K.B. 616. But see *Tool Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (1955) 2 All E.R. 657; (1955) 1 W.L.R. 761 (H.L.); *Joseph Valamangalam* v. *State of Kerala* (1958) A. Ker. 290.

12 *Combe* v. *Combe* (1951) 2 K.B. 215; (1951) 1 All E.R. 767.

13 *Combe* v. *Combe* (1951) 2 K.B. 215, 220; (1951) 1 All E.R. 767, 770; quoted in Halsbury's Laws of England, Vol. 15, p. 175 (3rd Ed.) See *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 660; (1955) 1 W.L.R. 761 (Viscount Simonds held observations to be too widely stated).

14 *Sloan* v. *Union Oil Co. of Can* (1955) 4 D.L.R. 664 (B.C.S.C.)

15 (1877) 2 App. Cas. 439.

16 (1955) 2 All E.R. 657; (1955) 1 W.L.R. 761.

Disputes arose between the parties in 1944, and in 1945 the appellants claimed to revoke the licence.

The Court of Appeal held the arrangement was binding until proper notice of termination was given. The appellants then brought an action claiming compensation from January 1, 1947. The House of Lords held that the appellants had given enough notice that the suspensory period was over and appellants succeeded[16] in their claim for compensation. Viscount Simonds there observed:[17]

"the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in *Combe* v. *Combe* (3) [(1951) 1 All E.R. at p. 770)] and may well be far too widely stated."

It is not clear to what passage in the judgment of the Court of Appeal Lord Simonds was referring but it shows that he accepted the general equitable doctrine. The doctrine of promissory estoppel has been approved and applied in New Zealand. In *P.* v. *P.*[18]

a husband and wife had separated and the husband agreed to pay a monthly sum as maintenance. The parties later divorced and the court ordered the husband to pay a maintenance of one shilling a year. The wife was insane and her administrator told the husband (a) that the court order cancelled the provisions of the separation deed, and (b) if he paid the arrears due under the deed he would have no further liability. The arrears were accordingly paid by the husband but no more instalments were paid. The administrator then sued for monthly instalments alleging he had wrongly interpreted the court order.

It was held that the administrator could not be allowed to enforce his legal claim as the husband had been induced by his statement not to proceed to have the separation deed set aside.

The Supreme Court has dealt with the doctrine of promissory estoppel at great length. That was a case between a Sugar Company & U.P. State. A news item appeared in a newspaper that the Government of U.P. will exempt all the newly established industrial units from Sales Tax for three years. The appellant Sugar Company wrote to the Secretary, Industries Department to confirm the news item which he did. Thereafter it wrote to the Director of Industries saying that in view of the Sales Tax exemption announced by the Government it intended to set up a hydrogenation plant for Vanaspati and sought confirmation that it would be entitled to the three years Sales Tax exemption. The Director also confirmed it. Later the appellant addressed a letter to the Chief Secretary of U.P. Government to the same effect and stated the fact of his intention to set up a hydrogenation plant for Vanaspati. The Chief Secretary also confirmed it. It was held that the categorical representation contained in the letters on behalf of the Government of U.P. on the basis of which the appellant borrowed money from financial institutions and set up a plant invoked the doctrine of promissory estoppel and the Government was bound to carry out the representation and exempt the appellant from Sales Tax in respect of manufactured goods for a period of three years.[19]

The Supreme Court has observed that the doctrine of promissory estoppel is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel' it is neither in the realm of contract nor in the realm of estoppel, but it is a doctrine evolved by equity in order to prevent injustice where promise is made by a person knowing that it would be acted upon by the person to whom it is made and in fact it is so acted upon and it is inequitable to allow the party making the promise to go back upon it.[20]

Promissory Estoppel.—Lord Denning has extrajudicially suggested that where there is a deliberate promise which is intended to affect legal relations, it would be inequitable to hold that the promissor is not bound when the promisee has acted on promise.[21] It is also implicit in

17 *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (1955) 2 All E.R. 657, 660; (1955) 1 W.L.R. 761. See Smith: 18 M.L.R. 609 (1955); *Aryan M. & T. Corpn.* v. *B.N.E. & Co.* (1959) A. Cal. 472.

18 *P.* v. *P.* (1957) N.Z.L.R. 854.

19 *M/s Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of Uttar Pradesh,* (1979) A.SC. 621, 649. also p. 643; (1979) 2 SCR 641.

20 *M/s Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of Uttar Pradesh* (1979) A.SC. 621, 632 (1979) 2 SCR 641; *Beesly* v. *Hallwood Estates Ltd.* (1960) 2 All E.R. 314, quoted with approval by the Supreme Court in (1) above. *Municipal Corporation of Bombay* v. *Secy. of State,* (1905) 29 Bom. 580 at 607. appld. by S.C.

21 (1952) 15 M.L.R. 1.

modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in reliance on the waiver.[22] A landlord who has told his tenant that he can live in his cottage rent-free for the rest of his life is not allowed to go back on it if the tenant stays in the house on that footing.[23] Sometimes it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus, a government department, had accepted a disease as due to war service, were not allowed afterwards to say it was not, when the soldier, in reliance on the assurance, had abstained from getting further evidence about it.[24] The Supreme Court in *Union of India* v. *Anglo Afghan Agencies*[25] has held the observations in *Rederiaktiebolaget Amphirite* v. *R.*[26] to be too wide and quoted with approval the observations of Denning J. in *Robertson* v. *Minister of Pensions*[27] as to the Crown being bound by an estoppel.

Government bound.—The doctrine of executive necessity was not allowed to prevail to answer to a case of promissory estoppel.[28] That the doctrine applies to Government also has been recognised in India as pointed out by the Supreme Court.[29] The Court has also held that the Government cannot claim to be immune from the operation of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action.[30]

"It may also be noted that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be prejudiced from exercising its legislative function by resort to the doctrine of promissory estoppel[31] vide *State of Kerala* v. *Gwalior Rayon Silk Manufacture (Wvg.) Co. Ltd.*[32] It an earlier case[33] the Supreme Court held that there can be no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers except to prevent fraud or manifest injustice. But in its latest pronouncement[34] this case was explained.

Change of Policy and Non-observance of Art. 299. No. Defence.—It is not necessary for the applicability of the doctrine of a promissory estoppel—the promisee must have acted to his

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22 *Re Porter (William) & Co. Ltd.* (1937) 2 All E.R. 767; *Buttery* v. *Pickard* (1946) 174 L.T. 527; *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130; (1956) 1 All E.R. 256; *Ledingham* v. *Bermejo Estancia Co. Ltd.* (1947) 1 All E.R. 749; *Agar* v. *Bermejo Estancia Co. Ltd. idid; Tata L. & E. Co.* v. *Kartar Singh* (1961) A.P. 37. For other cases see under s. 63.

23 *Foster* v. *Robinson* (1950) 2 All E.R. 342; (1951) 1 K.B. 149.

24 *Robertson* v. *Minister of Pensions* (1948) 2 All E.R. 767; (1949) 1 K.B. 227. The House of Lords held these observations to be too widely stated: *Howell* v. *Falsmouth Boat Construction Co. Ltd.* (1951) A.C. 837; (1951) 2 All E.R. 278 (H.L.): but quoted with approval in *Union of India* v. *Anglo-Afghan Agencies* (1968) A.SC. 718.

25 (1968) A.SC. 718.

26 (1921) 3 K.B. 500.

27 (1941) 1 K.B. 227.

28 (1941) 1 K.B. 227 overruled in *Howell* v. *Falsmouth Boat Construction Co.* (1951) AC. 837, but on the ground that Crown can enforce a statutory prohibition. See *Motilal Padampat Sugar Mills* v. *State of U.P.* (1979) A.S.C. 621, 642; (1979) 2 SCR 641.

29 *Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of U.P.* (1979) A.S.C. 621, 632 (1979) 2 SCR 641; *Ganges Mfg. Co.* v. *Sourujmull,* 5 Cal. 669; *Municipal Corporation of Bombay* v. *Secretary of State* (1905) 29 Bom. 580; see also *Union of India* v. *Anglo Afghan Agencies* (1968) 2 S.C.R. 366; (1968) A.S.C. 718; *Collector of Bombay* v. *Municipal Corporation of the City of Bombay,* (1952) S.C.R. 43; (1951) A.S.C. 469.

30 *Motilal Padampat Mills Co. Ltd.* v. *State of U.P.* (1979) ASC 621, 642 (1979) 2 SCR 641; *Union of India* v. *Anglo Afghan Agency* (1968) 2 SCR 364; (1968) ASC 718 applied. *Ramanatha Pillai* v. *State of Kerala* (1974) 1 SCR 505; (1973) ASC 2641 disting; *Excise Commissioner of U.P. Allahabad* v. *Ram Kumar* (1976) Supp. SCR 532; (1976) ASC 2237 disting; *Assistant Custodian* v. *Brij Kishore* (1975) 2 SCR 359; (1974) ASC 2325 referred to.

31 *Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of Uttar Pradesh and others* (1979) A.S.C. 621, 647. (1979) 2 SCR 641;

32 (1974) 1 S.C.R. 671; (1973) A.S.C. 2374.

33 *N. Ramanatha Pillai* v. *State of Kerala* (1973) A.S.C. 2641.

34 *Excise Commissioner U.P.* v. *Ram Kumar* (1976) A.S.C. 2237; Union of India v. *Anglo Afghan*

detriment. All that is necessary is that he should have altered his position as a result of the promise.[35] Mere change of policy is not a sufficient reason for the Court exempting Government from the applicability of the doctrine of promissory estoppel. The Government must show the reason therefor and its justification and what the change in policy is, for the Court to judge for itself, what the equity of the case demands and which way the public interest lies.[36]

Thus where the Government makes a promise knowing or intending that it would be acted upon by the promisee and in fact the promisee acting in reliance on it alters his position the Government would be held bound by the promise and the promise would be enforceable against the Government notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract required by Article 299 of the Constitution.[37]

The Supreme Court after a review of the cases decided by that court and by English Court and after referring to the law as stated in American Jurisprudence (2nd ed.) para 123 was held that[38]:—

1. The State is not immune from liability for promissory estoppel and it cannot rely on the doctrine of executive necessity not to fetter its future executive action (pp.638-642). According to American view it may be applied against the State even its governmental or public or sovereign capacity if its application is necessary to prevent fraud or manifest injustice (p.639). Executive necessity was negative in *Union of India* v. *Anglo-Afghan Agencies* (1968) ASC 718 (p.643).

2. The doctrine of promissory estoppel must yield when equity so required but it is not enough to say that public interest will suffer. It will be for the Court to decide if Government shows reasons therefor (p.644).

3. The legislature can never be precluded, thus there is no promissory estoppel against the State in its legislative capacity (p.648).

4. It is not necessary to show any consideration for the applicability of the doctrine of promissory estoppel (p.643).

5. It is immaterial if no detriment is shown to have been caused, it is enough if there is change of position.

6. The fact that the promise is not in the form of a formal contract required by Art. 299 of the Constitution will not affect the applicability of the doctrine (p.643).

Pages in brackets are of AIR (1979) Supreme Court.

A buyer who had waived the contract date for delivery was not allowed afterwards to set up the stipulated time as an answer to the seller.[39] *Rickard's case* was this:

The defendant ordered from the plaintiffs a Rolls Royce car chassis, which was delivered to him. He wished to have a body built on the chassis, and the plaintiffs accepted this order. The job was to be completed by March 20, 1948, at the latest. On that day it was still not completed, but the defendant continued to press for delivery. On June 29, however, he wrote to the plaintiffs and told them he would not take delivery after July 25. The plaintiffs still having failed to deliver the car, the defendant repudiated the contract.[40]

Agencies (1968) A.S.C. 718 explained; *Associated Cement Companies Ltd.* v. *State of Rajasthan* (1981) A. Raj. 133, 138.

35 *Motilal Padampat Sugar Mills Ltd.* v. *State of U.P.* (1979) ASC 621, 650; (1979) 2 SCR 641; *W.J. Allen & Co. Ltd.* v. *El Nasr Export & Import Co.* (1972) 2 All E.R. 127, 140 applied.

36 *Motilal Padampat Sugar Mills Ltd.* v. *State of U.P.* (1979) ASC 621; (1979) 2 SCR 641.

37 *Ibid* 643.

38 *Motilal Padampat Sugar Mills Ltd.* v. *State of U.P.* (1979) A.S.C. 621, 638, 642; (1979) 2 SCR 641; *Robertson* v. *Minister of Pension* (1949) 1 K.B. 227 quoted with approval; *Howell* v. *Falsmouth Boat Construction Co. Ltd.* (1951) A.C. 837 explained; *Turner Morrison & Co. Ltd* v. *Hungerford Investment Trust Ltd.* (1972) 3 SCR 711; (1972) ASC 1311; *Asst. Custodian* v. *Brij Kishore* (1973) 2 SCR 759; (1974) ASC 2325 (Statutory Prohibition & Enforce); *State of Kerala* v. *Gwalior Rayon Silk Mfg. Co. Ltd.* (1974) SCR 671; (1973) ASC 2734 (Legislature can never be precluded); *Excise Commissioner* v. *Ram Kumar* (1976) Supp. SCR 572 (1976) ASC 2237; (no promissory estoppel against legislature); *Gangetic Fisherman Co-operative Society Ltd.* v. *Sipahi Singh* (1977) ASC 2149 distged; *Rama Natha Pillay* v. *State of Kerala* (1974) 1 SCR 515; (1973) ASC 2641 explained.

39 *Charles Rickards, Ltd.* v. *Oppenheim* (1950) 1 All E.R. 420 (1950) 1 K.B. 616.

40 *Ibid.*

The Court of Appeal held that he was entitled to do so. Although by his conduct he had impliedly waived the original stipulation as to time, he had given reasonable notice of his intention to reimpose a new time-limit. The plaintiffs having failed even then to perform the contract, it was clearly discharged by their breach. Denning L.J. said of the defendant's consent to postponement.[41]

Where it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

This is consistent with his frequently expressed view that "we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations'.[42] A tenant who had encroached on an adjoining building, asserting that it was comprised in the lease, was not allowed afterwards to say that it was not included in the lease.[43] A tenant who had lived in a house rent-free by permission of his landlord, thereby asserting that his original tenancy had ended, was not afterwards allowed to say that his original tenancy continued.[44] The principle of promissory estoppel operates only where there is an already existing legal relationship because "it is a shield not a sword", i.e. it may afford a defence against otherwise enforceable rights.[45] Denning L.J. said in *Combe* v. *Combe*:[46]

"Seeing that the principle never stands alone as giving a cause of action itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action."

Cause of Action: According to the Supreme Court there is no reason why the magnitude of the new doctrine— of promissory estoppel—should be restricted so as not to be the basis of a cause of action. Therefore unlike English Law, the Indian Law does not subscribe to the dictum "it is a shield and not a sword."[47]

Common Law Estoppel and Promissory Estoppel.—By an underlease[48]the defendants leased certain warehouse premises and the under-lessee, the plaintiffs covenanted to keep the premises insured against fire. The defendants themselves insured the premises under a Block Insurance Policy covering the premises which had been under lease and the underlessee, the plaintiffs paid proportion of the premium. The policy was renewed the next year but the defendants did not ask the plaintiffs to pay their proportionate share. Later on a Bank took controlling share in the defendant-company and did not renew the past insurance. The premises caught fire and the plaintiffs brought a suit for reinstatement of premises and insurance money as special damage. On the contrary the plaintiffs amended the claim that they had suffered damage by reason of the defendants' failure to continue the insurance or their failure to notify the plaintiffs of the cancellation. It was held that there was no contract between the parties as to the insurance of the plaintiffs' premises. Accordingly, there was no contract that the defendants would keep in force the policy of insurance nor were the defendants estopped at law or in equity on the basis of representation express or implied. It was also held that the doctrine of promissory estoppel can be used as a shield and not as a sword and that it could not form the basis of a cause of action.

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41 *Charles Rickards Ltd.* v. *Oppenheim* (1950) 1 K.B. 616, 623; (1950) 1 All E.R. 420, 423. See 15 M.L.R. 1.

42 *Lyle Meller* v. *A. Lewis & Co. (Westminster) Ltd.* (1956) 1 W.L.R. 29 at p. 35; Guest (1956). 30 Aus. L.J. 187; Fridman (1957) 35 Can. Bar. Rev. 279; Anson on Contract (22nd Ed.) p. 42.

43 *J.F. Perrott & Co. Ltd.* v. *Cohen* (1950) 2 All E.R. 939.

44 *Foster* v. *Robinson* (1950) 2 All E.R. 342; (1951) 1 K.B. 149.

45 *Beesly* v. *Hallwood Estates Ltd.* (1960) 1 All E.R. 314,324.

46 *Combe* v. *Combe* (1951) 2 K.B. 215, 220; (1951) 1 All E.R. 767 but see Lord Simonds in *Tool Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 660; *Robertson* v. *Minister of Pensions* (1948) 1 K.B. 227 *Charles Rickards Ltd.* v. *Oppenheim* (1950); *Tool Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657; *Lyle Meller* v. *A. Lewis & Co.* (1956) 1 W.L.R. 29.

47 *Motilal Padampat Sugar Mills Ltd.* v. *The State of UP* (1979) ASC 621, 635, 640, (1979) 2 SCR 641; *Candler* v. *Crane Christmas & Co.* (1951) 3 K.B. 164, 178 reffd. to.

48 *Argy Trading Co.* v. *Lapid Developments* (1977) 1 W.L.R. 444, 457; *Central London Property Trust* v. *High Trees House* (1947) K.B. 130 disting; *Hadley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* (1964) A. C. 465 also disting.

Thus this case shows that promissory estoppel is a weapon of defence and not of offence. But the Supreme Court has held that it does afford a cause of action.[49]

It has also been held in *Gilbert Steel Ltd.* v. *University Construction Ltd.*[50] a case from Canada, that reliance on the doctrine of promissory estoppel is effective only as a defence; it does not create cause of action.

The facts in that case were that between the parties there was an agreement to increase the price and for further material supplied the defendants received the plaintiff's invoices showing the new price and paid against them without protest or without any suggestion to the plaintiffs that they did not accept the new price. It was only after the building was complete and negotiations for a subsequent deal had not started as the defendants hoped that they were not liable to pay the new price. The plaintiffs brought a suit which was dismissed. An American Judge identified the problem thus:—

"It is not practical that the law should adopt all precepts of moral conduct, but it is desirable that its rules and principles should not run counter to them in the important conduct and transactions of life. If the phrase justice according to law were transposed into law according to justice, it would perhaps be more accurately expressive.[51]

It has been held that promissory estoppel differs from estoppel properly so called in that the representation relied upon need not be one of present fact. It may be of law, e.g. legal relations[52] and as to the future.

While a representation of existing fact is necessary for the foundation of a true estoppel, the words or conduct necessary to support a promissory estoppel are essentially different in quality. They consist of a *promise or assurance as to the future conduct of a promisor* on which the promisee relies to act to his detriment. Not only does this follow *ex termini* from the very term promissory estoppel, but it is clearly stated as a principal attribute of the estoppel as stated in the cases from which the doctrine takes its origin (p. 375) para 347.[53]

The promissory estoppel relied on by the plaintiff was the representation made by the cargo owners defendants' representative to the plaintiff that the defendants were liable for the post salvage charges sued upon. This representation was said to have been made as the result of the combined effect to the letter of the defendant's solicitors to the plaintiff's solicitors and what was said by the parties counsel before the arbitration when the parties were seeking to arrive at an agreed price of the cargo of the defendant. The solicitors' letter only said that they were prepared to recommend the defendants to agree a sound value of the cargo at a particular figure. In the letter which was marked "without prejudice" the solicitors also said that they had advised their clients that they were liable for the agreed sum.

The counsel also met and arrived at an agreed value of the cargo. It was held by the Privy Council that in the circumstances the statements were not unequivocal and no promissory estoppel was established.[54]

But mere acts of indulgence, particularly in commercial transactions, do not create rights.[55]

Promissory Estoppel and Contract.—When promissory estoppel is invoked the promise or assurance necessary to support it is inevitably less than a promise binding on the parties in contract—it would not be necessary to invoke the doctrine of promissory estoppel at all if the promise held contractual force. But nevertheless the promise supporting a promissory estop-

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49 *Motilal Padampat Sugar Mills Ltd.* v. *The State of U.P.* (1979) A.SC. 621, 635, 640 (1979) 2 SCR 641.

50 (1973) 36 D.L.R. (3d) 496,507.

51 *Allen C.J. of New Hampshire, (Watkins & Son Inc.* v. *Carrig)* (1941) 21 A. 2d. 591, 595.

52 *Lyle Meller* v. *A. Lewis & Co.* (1956) 1 All E.R. 247, 251; (Denning L.J.) cf. *Kai Nam* v. *Ma Kam Chan* (1956) 1 All E.R. 783 (P.C.) (representation about an ordinance being representation of law cannot form an estoppel). See also *London County Territorial & Auxiliary Forces Association* v. *Nichols* (1949) 1 K.B. 35 C.A.; (1948) 2 All E.R. 432 (representation regarding premises being within Rent Restrictions Acts).

53 *Spencer Bower & Turner* "Estoppel by Representation", 3rd Ed. 1977 p. 375 quoted by P.C. in *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 567.

54 *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 566-7 (P.C.).

55 Per Lord Simonds in *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657,

pel is closely analogous in many respects to a promise having contractual effect. One of its essential attributes is the same degree of 'unequivocality', which if the same assurance had been given full consideration would have clothed it with contractual effect. This was the rock upon which the plea of promissory estoppel foundered both in the Court of Appeal and in the House of Lords in *Woodhouse A.C. Israel Cocoa S. A.* v. *Nigerian Produce Marketing Ltd.*[56] In the Court of Appeal "Lord Denning M.R. referred to the extraordinary consequences" of holding that an assurance ineffectual (by reason of indefiniteness) to vary a contract was yet definite to support a promissory estoppel bringing about the same result.[57] (P.672) A.E.R. & 59-60 of Q.B. given above.

Suspensive nature of Doctrine.—The doctrine is suspensive in nature and does not extinguish the promisee's obligation. This is supported by the view of Bowen L.J. in *Birmingham & Distt. Land Co.* v. *L.N.W. Ry.*[58] and was quoted and applied by the House of Lords in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[59] where on the facts it was held that effective notice had been given to end the suspensory period. And this was stressed by the Privy Council in a recent decision. But there is a dictum of the Court of Appeal to the contrary. It was held in the Privy Council case also that it can become irrevocable and final if the promisee cannot resume his position.[60] The learned authors of Halsbury's Laws of England have said.[61]

"Promissory estoppel differs from estoppel properly so called in that the presentation relied upon need not be one of fact."

The new estoppel said Denning L.J. applies to representations about legal relations.[62] Take for instance *Robertson* v. *Minister for Pensions*[63] where a statement to an army officer by the Crown "your disability is attributable to military service" and *Harnam Singh* v. *Jamal Pirbhai*[64] where an unequivocal statement of a landlord by a tenant that "he will remain in occupation as a statutory tenant" were acted upon and were held binding. They did not give rise to a cause of action but prevented the parties making them setting up a defence which otherwise would have been open to them.

The Calcutta High Court has held that an executory agreement would arise between the parties to the effect that upon the plaintiff giving up his claim in the partition suit the defendant would execute a transfer deed without payment of price[65] in favour of the plaintiff which he did give up. This gave rise to an executory estoppel. (Promissory Estoppel).

Hegde J. in *Union of India* v. *Indo Afghan Agencies* (1968) A.S.C. 718 observed[66]

"Estoppel is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel, i.e. promissory estoppel has come to be recognised by the Courts in this country as well as in England. The full implication of promissory estoppel is yet to be spelled out."

Similarly the Supreme Court in *Century Spinning & Manufacturing Co. Ltd.* v. *The Ulhasnagar Municipal Council* pointed out the distinction between representation of the existing fact and representation that something would be done in future and observed—

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660. See *Lala Muddan Gopal Lal* v. *Smt. Khikhinda Koer,* 18 I.A. 9 (a case of H.L.; no inference from acts of kindness).

56 (1971) 1 All E.R. 665, 672 & (1971) 2 Q.B. 23, 59-60 and (1972) A.C. 741; (1972) 2 All E.R. 271 (H.L.)

57 Spencer Bower & Turner; Estoppel by Representation (3rd ed.) 1977 p. 376 quoted with approval in *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 567 (P.C.); *Central London Property Trust Ltd.* v. *High Trees Houses Ltd.* (1947) K.B. 130; (1956) 1 All E.R. 256 (note refd. to by the authors).

58 (1888) 40 Ch.D. 268, 286.

59 (1955) 2 All E.R. 657; (1955) 1 W.L.R. 761; see Smith: 18 M.L.R. 609 (1955).

60 *Ajayi* v. *R.T. Briscoe (Nig.) Ltd.* (1964) 1 W.L.R. 1326, 1330. But see *D. & C. Builders Ltd.* v. *Rees* (1966) 2 Q.B. 617, 624 (C.A.) (smaller sum accepted as the builders were in desperate straits financially).

61 Halsburys Laws of England (3rd ed.) Vol. 15, p.175, cf. *Jorden* v. *Money* (1854) 5 H.L. Cas. 185; (1843-60) All E.R. Rep. 350.

62 *Lyle Meller* v. *A. Lewis & Co.* (1956) 1 All E.R. 247, 251 (Denning L.J.)

63 (1948) 2 All E.R. 767.

64 (1951) A.C. 688.

65 *Sudhanshu Mohan Koley* v. *Mathura Mohan Adak,* (1975) 1 Cal. 182, 189.

66 *Union of India* v. *Anglo Afghan Agencies* (1968) A.SC. 718; *Century Spinning & Manufacturing Co. Ltd.* v. *Ulhasnagar Municipal Council* (1971) A.SC. 1021, 1024 reld. on see *Motilal Padampat Sugar Mills* v. *State of U.P.* (1979) 2 S.C.R. 641 (1979) A.S.C. 621.

"A representation that something will be done in the future may result in a contract if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made.....If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, results in an agreement enforceable at law..."

In *Turner Morrison & Co.'s case*[67] in pursuance of the undertaking given by the plaintiff Company that it would discharge income tax liability of the defendant in respect of undistributed dividends kept back by the plaintiff— Company for being used as working capital the plaintiff actually paid the income tax assessed on defendants and never treated it as a debt due from them. Subsequently, when a transfer of 49% of the shares registered in the name of the third party was effected and control went into third party's hands, the plaintiff sued the defendant for the amount of the tax liability discharged by it and also claimed a lien on the shares, it was held that the claim was barred by the principle of promissory estoppel and the lien claimed had been waived.

A cheque for a smaller amount in full and final payment of a bigger amount was cashed by the creditor without informing the debtor of his not agreeing to the condition; the creditor must be taken to have thereby agreed to the proposal. His subsequent demand does not make any difference to the position.[68]

Pre-existing Contractuality.—The want of Pre-existing contractuality between the parties does not curtail the width and amplitude of the doctrine of equitable estoppel[69] and the limitation as stated by Donaldson J. in *Durham Fancy Goods Ltd.* v. *Jackson (Michael) (Fancy Goods) Ltd.*[70] was negatived by Lord Denning M.R. in *Evenden* v. *Guildford City Association Football Club Ltd.*[71]

Not basis of cause of action.—In England promissory estoppel cannot, by itself be the basis of an action because it cannot found a cause of action it only being a shield and not a sword. It can be a part of the cause of action.[72]

Lord Denning M.R. said in *Combe* v. *Combe* (1951)2 K.B. 215, that promissory estoppel may be a part of cause of action though not a cause of action itself. In fact there have been several cases where the promissory estoppel has been successfully invoked by a party to support his cause of action.[73]

Waiver & Promissory Estoppel.—In *Charles Rickards Ltd.* v. *Oppenheim*[74] the analogy between common law doctrine of waiver and the equitable doctrine of promissory estoppel was relied upon by Denning L.J. who said:

"Whether it is called waiver or forbearance on his part, or an agreed variation or substituted performance does not matter. It is a kind of estoppel."

But this analogy has not been universally accepted. Equitable estoppel is more restrictive than waiver as it requires detriment to the promisee to make it binding.[75] The position as it emerges from the decided cases has been summed up thus:

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67 (1972) A.SC. 1311.

68 *Union of India* v. *Rameshwarlal Bhagchand* (1973) A. Gau. 111,113,114; *Dipchand* v. *Abhachand* (1962) A. Cal. 166; *Shyamnagar Tin Factory (Pvt.) Ltd.* v. *Snow White Food Products Co.* (1965) A. Gau. 541 disting.

69 *M/s Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of U.P. & Others.* (1979) A.SC. 621, 631. (1979) 2 SCR 641.

70 2 All E.R. 987.

71 (1975) 3 All E.R. 269.

72 *Messrs Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of U.P.* (1979) A.SC. 621, 631, 635 (1979) 2 SCR 641 *Combe* v. *Combe* (1951) 2 K.B. 215; (1951) 1 All ER. 164; *Bessly* v. *Hallwood Estates Ltd.* (1960) 2 All E.R. 314 referred to.

73 *M/s. Motilal Padampat Sugar Mills Co. Ltd.* v. *The State of U.P.* (1979) A.SC. 621,632:(1979) 2 SCR. 641; *Robertson* v. *Minister of Pensions* (1949) 1 K.B. 227; *Evenden* v. *Guildford City Association Football Club Ltd.* (1975) 3 All E.R. 269 referred to; *Crabb* v. *Arun District Council* (1975) 3 All E.R. 865 (promissory estoppel gives rise to cause of action).

74 (1950) 1 K.B. 616, 623; (1950) 1 All E.R. 420,423.

75 *Beesly* v. *Hallwood Estates Ltd.* (1960) 1 W.L.R. 549; (1960) 2 All E.R. 314; appd. on other grounds (1961) Ch. 105; (1961) 1 All E.R. 90; (1961) 2 W.L.R. 36; *P.* v. *P.* (1957) N.Z.L.R. 854; *Commissioner of I.R.* v. *Morris* (1958) N.Z.L.R. 1126; *Beesly's case* was quoted with approval by the Supreme Court in *Motilal Padampat Sugar Mills* v. *State of U.P.* (1979) A.SC. 621,632 (1979) 2 SCR 641.

1. Promissory estoppel does not give rise to a cause of action, i.e., a promisee cannot sue upon a promise given by another party not to sue upon a contract without consideration. *(Combe* v. *Combe) supra.* But the Supreme Court has held that it does give rise to a cause of action. *(Motilal Padampat Sugar Mills Ltd.* v. *The State of U.P.* (1979) A.SC. 621, 635, 640 (1979) 2 S.C.R. 641).
2. It may afford a defence against otherwise enforceable rights. *(Beesly* v. *Hallwood Estates Ltd.*) *supra.*
3. The defence of promissory estoppel succeeds if the promisee can show that it will be inequitable to enforce the orignal contract. *(High Trees* case) *supra.*
4. The promise will continue to be operative until reasonable notice has been given that he proposes to resume those rights;[76] i.e., it is suspensory and not abrogatory but this latter is not universally accepted.[77]

Promissory Estoppel—Contract not to be enforced.—The principle laid down by Lord Cairns[78] is that where negotiations between the parties lead one of them to suppose that the strict rights will not be enforced, then the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which had taken place between the parties. This principle was explained later to mean that it may be applied not only as to suspend strict legal rights but also to preclude the enforcement of them.[79] But where the creditor received £300/- for a debt of £482 due to him but it was under a threat of not paying anything at all it was held that the principle did not apply as there was no true accord and no equity in favour of the debtor.

In a Canadian case *John Burrows Ltd.* v. *Subsurface Surveys Ltd. et al*[80], the facts were that the defendants purchased a business belonging to the plaintiff and the Company gave a promissory note for this amount under which monthly instalment payments were to be made. The note contained an acceleration clause permitting the creditor to claim the whole amount owing if there was a default of more than ten days on any monthly payment. Over a period of eighteen months the debtor was consistently more than ten days in default with his payments, but the creditor accepted the late payments without protest and without invoking the acceleration clause. The plaintiff brought an action for the whole amount when the defendant was more than ten days late in his payment in November 1964. The question arose whether in the circumstances disclosed by the evidence were such as would justify that the defence of equitable estoppel by representation applied. It was held that it did not apply unless there was some evidence to show that one of the parties entered into a course of negotiations which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced which means that there must be evidence that the legal relations created by the contract would be altered as a result of the negotiations. It is not enough to show that one party has taken advantage of indulgence granted to him by the other.

In a sale by Kenyan coffee producers to an Egyptian company[81] there was an irrevocable letter of credit and the contract was to be governed by English Law. The buyers opened a confirmed letter of credit in sterling through a bank in Kenya. The sellers raised no objection when the credit was confirmed in sterling and they shipped the coffee under the contract and operated a letter of credit by invoicing the Bank in sterling and accepting payment in sterling. The sellers later on shipped more coffee in pursuance of the contract. Before the invoice for this shipment there was an announcement that the sterling would be devalued and its value in Kenyan currency was not known. The sellers however sent their invoice to the Bank and were

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76 Cheshire & Fifoot: Law of Contract (6th Ed.) 86.
77 *P.* v. *P.* (1957) N.Z.L.R. 854; *Beesly* v. *Hallwood Estates Ltd.* (1960) 2 All E.R. 314.
78 *Hughes* v. *Metropolitan Rail Co.* (1877) 2 App. Cas. 439, 448; (1874-80), All E.R. Rep. 187, 191.
79 *D & C Builders Ltd* v. *Rees* (1966) 2 Q.B. 617; (1965) 3 All E.R. 837; *Rookes* v. *Barnard* (1964) A.C. 1129; (1964) 1 All E.R. 367; *J.T. Stratford & Son Ltd.* v. *Lindley* (1965) A.C. 269, (1964) 3 All E.R. 102 (H.L.): (1964) WLR 541.
80 (1968) S.C.R. 607; 68 D.L.R. (2nd Ed.) 354.
81 *W.J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.* (1972) 2 All E.R. 127 (C.A.).

paid in sterling. When it became known that the Kenyan currency will not be devalued, the sellers prepared an invoice for extra Kenyan shillings to offset devaluation and to ensure that they would be paid the full contract price in Kenyan shillings. However the buyers contended that nothing more was owed to the sellers. The sellers then brought an action for the extra money. It was held that the buyers could not revert unilaterally to the original currency of account since the contract had been varied in this respect. Lord Denning M.R. said—

"A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for excuting an option: see *Bruner* v. *Moore* (1904) 1 Ch. 305. A buyer may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery: see *Charles Rickards Ltd.* v. *Oppenheim* (1950) 1 K.B. 616. A seller may, by his conduct lead the buyer to believe he will not insist on a confirmed letter of credit: see *Plasticmoda,* but will accept on unconfirmed one instead: see *Panoutsos* v. *Raymond Hadley Corpn. of New York* and *Enrico Furst* v. *Fischer.*

A seller may accept a less sum for his goods than the contract price thus inducing him to believe that he will not enforce payment of the balance; see *Central London Property Trust Ltd.* v. *High Trees House Ltd. and D & C Builders Ltd.* v. *Rees* (supra). In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it."

Instances of estoppel by accepting smaller amounts.—Where there has been a true accord under which the creditor voluntarily agrees to accept a lesser sum in satisfaction and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance.[82] But this does not apply where a creditor accepts a smaller sum, showing no accord, and the creditor was in need which the debtor knew. Thus the settlement was procured by intimidation.[83] If a cheque for a smaller amount than the debt due is sent to the creditor in full satisfaction, it does not discharge the debt if the latter does not accept it as such. It depends upon the intention of the parties as expressed in the correspondence and the character of the transaction.[84]

A cheque for a lesser sum than due was sent to the creditor with the request that it be accepted in full payment, accompanied with a receipt to be signed by the creditor in full satisfaction. The cheque was cashed but no receipt was sent. On the contrary, before cashing the cheque a demand for the rest was made.

This payment was held not to be in discharge of the whole debt.[85]

Money deposited with the Union Government for appropriation towards export duty to be refunded to the payer if there is no export of the goods on which the duty was payable. This is on the principle of an implied agreement to refund unappropriated moneys paid in advance to covery duty.[86] Education rules of the Kerala Education Code do not make an offer or promise to pay grants and therefore they do not give rise to an obligation under the contract or estoppel. It cannot be argued that if the conditions in the rules are satisfied the Government is estopped from declining to make grants to schools.[87]

Payment by a stranger.—A creditor cannot sue a son after having received from father half the amount due by the son and that in full satisfaction[88] or where a stranger pays part of

82 *D. & C. Builders Ltd.* v. *Rees* (1956) 2 W.L.R. 288 (C.A.).

83 *D. & C. Builders Ltd.* v. *Rees* (1956) 2 W.L.R. 288 (C.A.) (Settlement under intimidation); *Rookes* v. *Barnard,* 1964 A.C. 1129; (1964) 2 W.L.R. 269; (1964) 1 All E.R. 367 (H.L.) (a threat to break a contract); *Stratford & Son Ltd.* v. *Lindley* (1964) 2 All E.R. 209; (1964) 2 W.L.R. 1002, 1015; *Ishaq* v. *Madanlal* (1965) A.A. 84; *Gaddarmal* v. *Tata Industrial Bank Ltd.,* 49 All 674; (1927) A.A. 407; *Bihari Lal* v. *Radhe Sham* (1953) A.A. 745; *Shyamnagar Tin Factory* v. *Snowhite Food Products* (1965) A. Cal. 541 (a cheque for a smaller amount accepted but no discharge as it was not accepted as such); *Ram Sarandas* v. *Shri Kishan Das* (1961) A.A.91 (agreement to receive a smaller sum than decretal amount which was paid and withdrawn by decree holder. The debt was discharged).

84 *Shyamnagar Tin Factory* v. *Snowhite Food Products* (1965) A. Cal. 541; *Neuchatel Asphalate Co. Ltd.* v. *Barnett* (1957) 1 All E.R. 362; *Day* v. *McLea* (1889) 22 Q.B.D. 610; *Basdeo Ram* v. *Dilsukh,* 44 All. 718; (1922) A.A. 461; *Ramchandra Marwari* v. *Rani Keshobati,* 36 I.A. 85.

85 *Tata L.&.E. Co.* v. *Kartar Singh* (1961) A.P. 37; *F. Basdeo* v. *F. Dilsukhrai,* 44 All. 718; (1922) A.A. 461 folld.; *Sh Jan Mahomed* v. *Munshi Ganga Bishan,* 38 I.A. 80 dist.; *Union of India* v. *Jethabhai* (1960) A.P. 30.

86 *Union of India* v. *Bhagwan Industries* (1957) A.A. 799.

87 *Joseph Valamangalam* v. *State of Kerala* (1958) A. Ker. 290.

88 *Welby* v. *Drake* (1825) 1 C. & P. 537.

the debt in discharge of the whole debt.[89] Similarly compositions with the creditors are binding the consideration being that all the creditors agree to forego a part of their debt.[90]

Discharge from liability on negotiable instruments is specially dealt with in the Negotiable Instruments Act, 1881, ss. 82, 90.

Agreement to extend time.—An agreement simply extending the time for performance of a contract is exempted by this section from any requirement of consideration to support it. No consideration is necessary to support such an agreement, exactly as none is required for the total or partial remission of performance.[91] See, however, the commentary under the head "Remission of performance," above. But an agreement by a mortgagee, about to exercise his power of sale, to postpone the sale for four days is not within the section; for it is not an extension of the time for performing the mortgagor's promise to pay by the debt, which time is already past. Redemption, when the mortgagor is entitled to redeem, is not a performance of the original contract to pay the debt; and the exercise of the power of sale is not an exercise of a right of action on that contract.[92] The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still be allowed to redeem.[93]

It need hardly be added that this section does not entitle a promisee to extend the time for performance of his own accord for his own purposes. Thus, where a date is fixed for delivery of goods under a contract and the seller fails to deliver the goods, the buyer may not of his own accord give further time to the seller for giving delivery, so as to claim damages on the footing of the rate on the later date fixed by him he is entitled to damages on the basis only of the rate prevailing on the date fixed for performance in the contract.[94] A party may forbear from insistence on the performance of the contract by the due date but he cannot fix a date for performance on his own which will benefit him or injure the other party, e.g. to undo the effect of waiver on his part or render the other party liable for damages for breach on the extended date.[95] Where, however, both the buyer and the seller have agreed to extend the time for delivery, damages would be at the rates prevailing on the later date,[96] the buyer cannot unilaterally extend time of his own accord and for his own benefit.[97] Under s. 63 the time for performance of a contract is liable to be extended but the consent of the promissor is also needed because without it any extension will be meaningless. But the consent may be express or implied as also the extension by the promisee.[98] If a proposal for extension of time for performance is subject to two conditions and one of them is not accepted by the other party, there is no valid or binding agreement for extension under s. 63 of the Contract Act.[99] In *Keshavlal* v. *Lalbhai T. Mills Ltd.*[1]

two conditions proposed for extension were (1) "for the period the working of mills was stopped" and (2) 'till the normal state of affairs recurred". The former was accepted and not the latter which was later stated by the buyer to be vague and uncertain.

As a result, it was held, there was no valid agreement for extension, the second condition not being a mere surplusage.

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89 *Hirachand Punamchand* v. *Temple* (1911) 2 K.B. 330; *Cook* v. *Lister* (1863) 13 C.B. (N.S.) 543 reld. on. See *Prince of Berars Case.*

90 Chitty: On Contracts (24th ed.) para 195.

91 *Mahadeo Prasad* v. *Mathura Chaudhari,* 1931 A.A. 589; (1931) All. L.J. 295; 132 I.C. 321; *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398, 402; *Jugal Kishore* v. *Chari & Co.* (1927) 49 All. 599; 101 I.C. 643; 25 All. L.J. 385; 1927 A.A. 451; *Maung Pu* v. *Maung Po Thant* (1928) 6 Rang. 191; 110 I.C. 612; 1928 A.R. 144, *contra,* is not law as reported.

92 *Trimbak* v. *Bhagwandas* (1898) 23 Bom. 348.

93 *Ibid.*

94 *Muthaya* v. *Lekku* (1914) 37 Mad. 412, 413, 417; 14 I.C. 255; *Anandram Mangturam* v. *Bholaram Tanumal* (1946) Bom. 218, 47 Bom.L.R. 719; 222 I.C. 337; 1946 A.B. 1.

95 *Dominion of India* v. *Bhikraj Jaipuria* (1957) A.P. 586; on app. (1962) A.SC. 113; (1962) 2 S.C.R. 880, on another point.

96 *The Paper Sales Ltd.* v. *Chokhani Bros.* (1946) 48 Bom.L.R. 274; 1946 A.B. 429.

97 *Keshavlal* v. *Lalbhai T. Mills Ltd.* (1958) A.SC. 512; (1959) S.C.R. 213.

98 *Abdul Jalil* v. *Muhammadi Steamship Co.,* P.L.D. (1961) 1 S.C. 340; (1961) 2 Pak. S.C.R. 1.

99 *Keshavlal* v. *Lalbhai T. Mills Ltd.* (1959) S.C.R. 213; (1958) A.SC. 512.

1 *Ibid,* 222; 517 (A.I.R.); *Nicolene Ltd.* v. *Simmonds* (1953) 1 Q.B. 543 dist.

No Estoppel after signing document.—In a recent case where the question was whether there was a completed contract for submission of all disputes arising between an Indian Labour sub-contractor and a foreign erection Company to the International Arbitral Tribunal in Paris, the facts were: That before the signing of the sub contract by the parties in Belgrade there was a draft of the agreement for approval of the contractor and he objected to the clause of reference to the foreign tribunal. But the sub contractor's Managing Director signed the contract. Soon thereafter he sent a letter suggesting that arbitration would be acceptable to the sub contractor, if the reference is in India in accordance with Indian Law and Procedure. Thereafter on the Managing Director's arrival in Bombay from Belgrade, he sent a cablegram to the same effect. On these facts the Supreme Court held that where there is a mistake as to the term of a contract as in the instant case, where amendment to the draft was suggested and a counter offer was made, the signatory to the original contract is not estopped by his signatures from denying the correctness of that document by suggesting an amendment in the terms of the original contract, to wit the letter and the cablegram. It may therefore be stated that where the contract is in a number of parts it is essential for its validity that the contracting parties should have assented to the same thing in the same sense or should be *consensus ad idem*.[2] From this it follows that a party may be estopped if he has so conducted himself as to show that he has so assented. Even then a party pleading *novatio* may show that he had not accepted a part of the agreement although he signed the contract containing that part.

Consequences of rescission of voidable contract.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall if, he has received any benefit thereunder from another party to such contract, restore such benefit, so far as, may be, to the person from whom it was received.

Scope of the section.—Contracts declared voidable (s. 2, sub-s. 1) under this Act may be divided into two groups, namely, contracts voidable in their inception under ss. 19 and 19A on the ground of fraud or the like[3] and contracts becoming voidable by subsequent default of one party, as mentioned in ss. 39,53, and 55.

The use of the word "voidable" is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void. It has been suggested that the present section applies only to the first-named class of contracts, which are voidable for want of free consent;[4] but there is no apparent good reason for not including the others. It has now been decided by the Privy Council that the section applies to cases of rescission under section 39.[5]

As to the applicability of this section to contracts rescinded under s. 39, see the commentary on s. 65 under the head "When a contract becomes void", below.

The direct application of this section, according to recognised canons of interpretation, is only to contracts declared voidable by the Act; but the principle which it affirms is one of general jurisdiction and equity, and applicable in various other cases. In *Sinaya Pillai* v. *Munisami Ayyan*[6] a mortgage was executed by the guardian of a minor appointed under the

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2 *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import* (1981) ASC 2085, 2090, 2092; 70 Cal. W.N. 199 revd. Halsbury's Laws of England (4th Ed.) Vol. 9 paras 251, 295, 288 quoted; *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal ex p. Zerak* (1951) 1 All E.R. 482; *Davies* v. *Sweet* (1962) 2 W L R 525, 529 applied.

3 See *Pramada Prasad* v. *Sagarmal,* 1954 A.P. 439.

4 *Brohmo Dutt* v. *Dharmo Dass Ghose* (1898) 26 Cal. 381, per Maclean C.J. expressly without giving a final opinion; *Natesa Aiyar* v. *Appavu* (1915) 38 Mad. 178, at p. 185, per White C.J.; 19 I.C. 462.

5 *Muralidhar Chatterjee* v. *International Film Co. Ltd.* (1943) 70 I.A. 35; 1943 A.P.C. 34; (1943) 2 M.L.J. 369.

6 (1898) 22 Mad. 289; *Tejpal* v. *Ganga* (1902) 25 All. 59. See also *Kuvarji* v. *Moti Haridas* (1878) 3 Bom. 234.

Guardian and Wards Act, 1890, without obtaining the sanction of the Court as required by s. 29 of the Act. Such a mortgage is voidable under s. 30 of that Act. Here the High Court said that the mortgage could not be avoided on behalf of the minor, except on restoring to the mortgagee the benefit received by the minor's estate under the mortgage, and based its decision on the principle which, as the Court said, "is acknowledged in s. 64 of the Indian Contract Act, in s. 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of equity and good conscience." The same rule appears in ss. 38 and 41 of the Specific Relief Act[7] (Ss. 30 & 41 of Act of 1963).

Minor's contract.—It was settled that this section did not apply to a minor's contract, assuming that such contracts were only voidable. The term "person" in the section, it was said, does not comprise a minor, but means such a person as is referred to in s. 11, namely, a person who (among other conditions) is of the age of majority according to the law to which he is subject. But, since the decision of the Privy Council that a minor is wholly incapable of contracting.[8] there is no arguable question, and further authority is needless.[9] Under that decision neither s. 64 nor s. 65 applies, and so there is no liability under them to make compensation.[10] It does not follow, however, that a minor is entitled both to repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result, and it would certainly be contrary to English authority.[11] See notes s. 11 under the head "minor's contract" and the cases there cited.

Election to rescind.—The broad principle on which this and the following section rest, and which, as we have seen, is not confined to cases expressly included in either of them, was thus stated in England in one of the weightiest judgments of recent times:—

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it.".[12]

A seller rescinded the contract of sale of land and the buyer demanded inter alia the return of money of the advance paid as part of the purchase price. It was held that equity demands that if a rescission is granted both parties should be restored to *status quo ante*. In other words if the seller has retained his land or sold it to a third party at no loss he must refund the money paid to him by the purchaser.[13]

For the same reason, a man cannot rescind a contract in part only. When he decides to repudiate it, he must repudiate it altogether. If he has put it out of his power to restore the former state of things, either by acts of ownership or the like, or by adopting and accepting dealings with the subject-matter of the contract which alter its character, as the conversion of shares in a company, or if he has allowed third persons to acquire rights under the contract for

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7 But this section does not empower the Court to impose a change on property; *Ponnammal* v. *Pichai Thevan,* 99 I.C. 687; 1927 A.M. 204; 52 Mad.L.J. 33.

8 *Mohori Bibee* v. *Dharmodas Ghose* (1903) 30 I.A. 114; 30 Cal. 539; *Kamta Prasad* v. *Sheo Gopal Lal* (1904) 26 All. 342.

9 See *Kampai Lal* v. *Baba Ram* (1910) 8 All.L.J. 1058; *Kamola Ram* v. *Kaura Khan* (1912) Punj. Rec. No. 41 (loan to a lunatic).

10 See also *Motilal Mansukhram* v. *Maneklal Dayabhai* (1921) 45 Bom. 225.

11 See *Valentini* v. *Canali* (1889) 24 Q.B.D. 166; and *cp. Nottingham Building Society* v. *Thurstan* (1903) A.C. 6, 8, 10, and judgments of Romer L.J. and Cozens-Hardy L.J. in C.A. (1902) 1 Ch. 1, at pp. 10, 13; *Steinberg* v. *Scala* (*Leeds*) (1923) 2 Ch. 452, C.A. See *Dattaram* v. *Vinayak* (1903) 28 Bom. 181; *Chinnaswami* v. *Krishnaswami* (1918) 35 Mad.L.J. 652; *Limbaji Rovji* v. *Rahi* (1925) 49 Bom. 576; 88 I.C. 643; 1925 A.B. 499, passage in text cited. This does not mean that money lent to a borrower whom the law declares absolutely incapable of contracting a loan can be recovered under cover of equitable compensation or under the present section: *Limbaji Ravji* v. *Rahi, ibid,* See, however, s. 33 of the Specific Relief Act of 1963 as to the discretion of the Court under that section, which was exercised in the case now cited.

12 *Clough* v. *L. & N.W.R.* (1871) L.R. 7 Ex. 26; 37 in Ex. Ch.; followed in *Mathu* v. *Sankaran,* 1932 A.M. 303; 136 I.C. 350.

13 *Surendranath Taluqdar* v. *Lohit Chandra Talukdar* (1975) A. Gau. 58, 61.

value,[14] it is too late to rescind, and the remedy, if any, must be of some other kind. "You cannot both eat your cake and return your cake."[15]

It is hardly needful to say that rescission must be express and unequivocal. The clearest form of it is bringing a suit to set aside the contract. The will to rescind may also be declared by way of defence to an action brought on the contract; a declaration to that effect before action brought is not necessary as matter of law,[16] though, generally speaking, the prudent course is to repudiate as soon as possible. See s. 66. below.

By the Common Law lapse of time is not of itself a bar to setting aside a contract (subject to the risk of indefeasible rights having been acquired by third persons), but may be material as evidence of acquiescence, that is, of a tacit election to affirm the contract. But in India, by the Limitation Act,[17] a suit for the rescission of a contract must be dismissed, even though the defence of limitation is not set up, unless brought within three years from the time when the facts entitling the plaintiff to have the contract rescinded first became known to him. English authorities on what amounts to acquiescence would seem, therefore, to have very little practical application.

Benefit received "thereunder."—Ss. 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of 'profit' or 'clear profit' nor does it matter what the party receiving the money may have done with it".[18] The Act requires that a party must give back whatever he received under the contract. The benefit, however, to be restored must be benefit received *under* the contract.

A agrees to sell land to *B* for Rs. 40,000. *B* pays to *A* Rs. 4,000 as a deposit at the time of the contract, the amount to be forfeited to *A* if *B* does not complete the sale within a specified period. *B* fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period.

A is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received *under* the contract; it is a security that the purchaser would fulfil his contract, and is *ancillary* to the contract for the sale of the land.[19] Where a guardian sells his ward's property for purposes not binding on the ward and the sale price is utilised for the purchase of lands for the ward not contemplated at the time of the sale, the lands so purchased for the ward do not constitute "benefit" received by the ward under the contract so as to entitle the vendee to have it conveyed to him on repudiation by the ward of the sale by the guardian.[20]

A duly appointed guardian of a minor executed a usufructuary mortgage of the minor's property but without the permission of the District Judge. The mortgage was for Rs. 1,400 at 2 per cent per mensem interest, out of which Rs. 1,200 were paid in discharge of a debt due from the minor's father. The mortgagee constructed new buildings on the property. On attaining majority the minor rescinded the mortgage and filed a suit for recovery of possession of his property.

It was held that the mortgagee was entitled only to Rs. 1,200 which had been paid to discharge the minor's father's debt and a sum of Rs. 237 spent by the mortgagee on necessary repairs to the mortgaged bungalow. The mortgagee was not entitled to the value of the newly

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14 *Clarke* v. *Dickson* (1858) E.B. & E. 148; 113 R.R. 583; decided on a state of company law long since obsolete, and not very clear on the facts and dates, but the rule in question is correctly laid down.

15 Crompton J., E.B. & E. at p. 152; 120 E.R. 463, 465.

16 See note 98, *supra, Etbari* v. *Bellamy,* 1938 Rang. 207; 176 I.C. 526, does not seem to have been a s. 64 case at all, the plaintiff having already repudiated the contract and the defendant having accepted the repudiation.

17 XXXVI of 1963, s. 2(1), and Sched, art 59.

18 *Muralidhar Chatterjee* v. *International Film Co. Ltd.* (1943) 70 I.A. 35, at p. 49; 1943 A.P.C. 34; (1943) 2 M.L.J. 369.

19 *Natesa Aiyar* v. *Appavu* (1915) 38 Mad. 178; 19 I.C. 462; 1915 A.M. 896 (F.B.); *Naresh Chandra* v. Ram Chandra, 1952 A. Cal. 93; *Mathradas* v. *Aboobacker,* 1951 A.M. 752; *Ranganayakamma* v. *S.R. Subudhi,* 1955 A. Or. 20.

20 *Chinnaswami* v. *Krishnaswami* (1918) 35 Mad. L.J. 652; 48 I.C. 856.

erected buildings but was entitled to remove the materials composing them.[21] In setting aside a mortgage by the guardian of a Mahomedan minor the Court has discretion to make it a condition that the amount by which the minor had benefited must be refunded.[22] In *Murlidhar Chatterjee*. v. *International Film Co. Ltd.*[23] the Privy Council decided that where a person has elected to put an end to the contract under section 39, he is bound to return any benefit that he has received under the contract, but he is entitled to damages for the defaulting party's breach.

Where an insurance policy is vitiated because of the fraud of the insured the moneys paid by the insured belong to the insurer. Further, where there is a breach of warranty by one of the parties to the contract and there is a stipulation that as a consequence the other party will be discharged from performance neither s. 64 nor s 65 will apply[24] A policy was taken by the deceased on misstatement of material facts but the premiums were being paid regularly and amounted to Rs. 12,000/-. The policy having been avoided the money paid could not be claimed under s. 64 or s. 65 as money had and received because of the contract being fraudulent.[25] A person breaking a contract cannot rescind it and claim what he had paid under the contract to the other party who is ready and willing to perform his part of it.[26] Where both parties are in default neither vendor nor vendee are entitled to damages and vendee is entitled to the refund of his money and interest from date of trial court decree. *Murlidhar Chatterjee* v. *International Film Co. Ltd.* (1943) A.P.C. 34 reld. on. *Gopala Chettiar* v. *Giriappa* (1972) A.M. 36.

Rescission of contract by innocent party—communication of.—An innocent party to a contract of sale of a car can exercise his right of rescission otherwise than by communication or repossessing if the other party to the contract by deliberately absconding put it out of the power of the innocent party to communicate his intention to rescind. Therefore the owner of a car, who sells it to a rogue, who absconds, against a cheque, which is dishonoured, sufficiently expresses his intention to rescind the contract by informing the Police and the Automobile Association. After thus avoiding the sale he becomes the owner of the car again and any subsequent dealings with the car by the rogue are ineffective to pass the property as it had already been revested in the seller.[27]

Rescission of Contract.—Where a plaintiff becomes a partner with a defendant and soon after he discovers that he had been deluded and within almost a minimum period decides to exercise his right to rescind the contract, he would not be debarred from doing so and from recovering the money paid for his share of partnership. This would be so even if he had signed a false statement that he had seen the books of account and the balance sheet of the firm.[28]

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21 *Bechu* v. *Bhabhuti Prasad* (1930) 52 All. 831; 124 I.C. 731; 1931 A.A. 201.
22 *Kadir Meeral Beevi* v. *Muhammad Koya* (1956) A.M. 368; *Rang Ilahi* v. *Mahbub Ilahi,* 7 Lah. 35; (1926) A.L. 170; and *Abdul Majid* v. *Ramiza Bivi* (1931) A.M. 468, folld.
23 (1943) 70 I.A. 35; 1943 A.P.C. 34; (1943) 2 M.L.J. 369; *Vuddanam* v. *Venkatakameswara* 1951 A.M. 470; *Union of India* v. *Dungo Steel Furniture Ltd.* (1963) A. Cal. 70; *Murlidhar Chatterjee* v. *International Film Co.,* 70 I.A. 35; (1943) A.PC. 34 folld.
24 *Mithoolal* v. *Life Insurance Corporation of India* (1962) A.SC. 814; (1962) Supp. 2 S.C.R. 571 (a case of fraud by the insured by giving false particulars). *Life Insurance Corporation of India* v. *Canara Bank* (1971) A. Mys. 51, 59.
25 *Life Insurance Corporation of India* v. *Canara Bank* (1974) A. My. 51, 59; *Mithoolal Nayak* v. *Life Insurance Corporation of India* (1962) A.SC. 814 folld.
26 *Hari Hara Iyer* v. *Mathew George* (1965) A. Ker. 187.
27 *Car & Universal Finance Co. Ltd.* v. *Coldwell* (1964) 2 W.L.R. 600, 613; (1964) 2 All E.R. 290, 296.
28 *Sennanayake* v. *Cheng* (1965) 3 W.L.R. 715, 729; (1966) A.C. 63 (1963) 3 All E.R. 926 (P.C); *Seddon* v. *H.E. Salt Co.* (1905) 1 Ch. 326 dist.; *Mackenzie* v. *Royal Bank of Canada* (1934) A.C. 468 appld.

If a tenderer, after the contract has been concluded, rescinds the contract, the earnest money cannot automatically be forfeited as a consequence without proof of damage ensuing therefrom.[29]

Rescission—Executory and executed contract.—The arrangement between a plaintiff and defendant in regard to a contract of partnership included two stages. In the first stage the plaintiff acted as a partner pending his acceptance by the other partners. In the succeeding stage the defendant and plaintiff were to be in continuing contractual association as partners. It would be quite inapposite to use the word "executed" as applicable to the contract they made. The contract was neither executed nor executory. The important question in such cases is not of executed or executory contract but whether *restitutio in integrum* is substantially possible and whether rescission is just or fair.[30] Where an agreement does not in terms confer on the parties or one of them a power to determine the agreement whether such a power should be inferred is a question of construction of the agreement to be determined in accordance with the ordinary principles applicable to such a question.[31]

Obligation of person who has received advantage under void agreement or contract that becomes void.

65. When an agreement is discovered to be void,[32] or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) A pays *B* 1,000 rupees in consideration of *B's* promising to marry *C, A's* daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the 1st of May. *A* delivers 130 maunds only before that day and none after. *B* retains the 130 maunds after the 1st of May. He is bound to pay *A* for them.

(c) *A,* a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre, and *B,* in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance. (Z contracts with *A* to sell him land which in fact is already sold to *B*. *A* is entitled, notwithstanding a clause exempting Z from liability for defects in the title, to avoid the contract on the ground of fraud and recover his purchase money from Z under this section: *Akhtar Jahan Begam* v. *Hazari Lal* (1927) 25 All. L.J. 708; 103 I.C. 310; 1927 A.A. 693).

Duties of restitution.—The matter corresponding to this and the last foregoing section, besides s. 39, is scattered about English books in the shape of technical rules and exceptions unintelligible, as usually stated, to any one who is not acquainted, not only with modern

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29 *Maheswari Metals & Metal Refinery* v. *Madras State Small Industries Corporation Ltd.* (1974) A.M. 39, 43; *Fatechand* v. *Balkishan Das* (1964) 1 SCR 518; (1963) A.SC. 1405; *Maula Bux* v. *Union of India* (1971) A.SC. 1955 reld. on.

30 *Ibid,* 728, 729 (P.C.).

31 *Re Spendborough U.D.C. Agreement* (1967) 1 All E.R. 959, 962; *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.* (1948) A.C. 173, 203; (1947) 2 All E.R. 331, 343.

32 Parties being presumed to know the law, the date of discovery is taken, so far as material, to have been the date of the agreement unless the Court is satisfied that it was later: *Shambhoo Shukul* v. *Dhaneshar Singh,* 1927 A.O. 177; 101 I.C. 265; *Gopilal Bhawaniram* v. *Pandurang,* 1926 A.N. 241; 92 I.C. 640. But *qu.* is not rather a pure question of fact? See also *Raja Mohan Manucha* v. *Manzoor Ahmad* (1943) 70 I.A. 1, 11-12.

English law but with the formulas of the ancient common law system of pleading which has long been obsolete in England, and survives only in some American jurisdictions. However, the substance of the question involved may be put thus:—"In what cases may an action be brought by a person who has entered into a special contract against the person with whom he has contracted, while his own side of the contract remains unperformed?"[33] And, as in English law the plaintiff, if he recover at all, must do so either on the original contract or on some other implied contract, it has to be considered whether the special contract is subsisting, but the defendant has dispensed the plaintiff from performing his part by making it impossible or otherwise, and, if it is not subsisting, whether a new contract by the defendant to pay for work done or other benefit which he has accepted, as the case may be, can be inferred. In the case where a party has contracted to do an entire work for a specific sum, he "can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusions that the parties have entered into a fresh contract.[34]

The illustrations to this section are rather miscellaneous. In (a) we have a simple case of money paid under a mistake (*cp.* s. 72, below). In (b) it does not seem that the contract has become void at all, but, on the contrary, that *B* has elected to affirm it in part, and dispense with the residue: there is no new contract under which he is bound to pay for the 130 maunds of rice, as is shown by this, that what he does accept he is undoubtedly bound to pay for at the contract price. In (c) it is not clear whether the contract is to be treated as divisible, so that *A* is entitled to Rs. 100 for each night on which she did sing, or the Court is to estimate what, on the whole, the partial performance was worth; nor would it be clear in England without fuller statement of the terms and circumstances. Illustration (d) is again simpler; English lawyers would refer it to the head of money paid on a consideration which fails. This is in India a ground of claim which may be urged in cases to which s. 65 does not apply, but it must be framed as a suit for money had and received and not merely as a suit for refund of money, to give the defendant an opportunity to establish that some consideration had in fact been received by the plaintiff: *Santimmappa* v. *Balbhim Co-operative Society.*[35] There the society obtained a decree against *B*, and in execution Blackacre was sold to *S*. It then transpired that Blackacre belonged not to *B*, but to his adopted son. *S* sued the society for a refund of the purchase-money, but it was held in a bench decision that s. 65 did not apply, as the transfer to *S* was not void, and that *S* could not rely on a plea of total failure of consideration since he had not framed his action as one for money had and received.

S. 65 applies only where an agreement at a subsequent stage is discovered to be void or when a contract becomes void later on by one reason or other.[36]

Sale of property of Judgment-debtor with no interest.—If property in which the judgment-debtor has no interest is sold, the auction-purchaser can sue for return of the purchase price if he can show that it is unconscionable that the defendant should retain the money.[37] This applies to sales under Revenue Recovery Act also.[38] But if more than one property are sold and the judgment-debtor has interest in one or some of them, then unless the considerastion is severable, there cannot be proportionate refund.[39] In execution of his decree the decree holder purchased property purporting to belong to the judgment debtor. But before the suit the property had been transferred to the

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33 2 Sm. L.C. 10, 13th ed.
34 *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651, 661, judgment of the Ex. Ch. per Blackburn J.
35 1950 A.B. 313.
36 *Manoharlal Radhakrishna* v. *The Union of India* (1974) A.P. 56, 62.
37 *State* v. *Padmanabham Pillai* (1956) A.T.C. 216; *Reshee Law* v. *Manik Molla,* 53, Cal. 758; (1926) A. Cal. 971; *Thakur Lal* v. *Nathu Lal* (1964) A. Raj. 140; *Varkey Matthai* v. *Oomen Oomen* (1963) A. Ker. 148.
38 *Bappu Rawther* v. *State of Kerala* (1964) A. Ker. 109.
39 *Bappu Rawther* v. *State of Kerala* (1964) A. Ker. 109. *Narasingi Vannechand* v. *Narasayya* (1945) Mad. 789 (1945) A.M. 363 and *Nagalinga Chettiar* v. *Guruswamy Ayyar* (1930) A.M. 856 reld. on.

judgment-debtor's wife and therefore the judgment-debtor was found to have no saleable interest in the property. The decree holder auction purchaser filed a suit against the judgment debtor to refund the auction price on the basis of total failure of consideration in the matter of the Court sale. The suit was held not maintainable.[40] Similarly an auction purchaser buying property at a court auction sale cannot sue for recovery of his purchase price from the decree holder on discovering that the judgment debtor had no saleable interest in the property. To such a suit neither the principles underlying S. 65 nor the principles of money had and received under S. 72 Contract Act apply.[41]

Scope of the section—Restitution.—Section 65 contains the principle of restituton after benefit has been received and the agreement is later discovered to be void.[42] The basis of the section is the doctrine of *restitio in integrum*. It does not make a new contract between the parties but only provides for restitution of the advantage taken by a party under the contract. Unless the Court can, having regard to circumstances of the case, restore the parties to their original position, section 65 would not be applicable.[43] The section is not wider in scope, than the English doctrine of restitution.[44] The obligation to pay compensation under section 65 is quite different from a claim under the contract itself and the two cannot co-exist. Restitutionary remedies, as quasi-contractual, only arise where the original contract is put an end to or contracts become ineffective due to mistake or impossibility or lack of writing or lack of capacity.[45]

The Supreme Court[46] has explained the scope of section 65 thus:

The section distinguishes between an agreement and a contract. An agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, the phrase in the section "discovered to be void" means that the agreement is not enforceable and is therefore not a contract. It may be that the parties or one of them had no knowledge when they entered into the agreement, that the agreement was in law not enforceable, and they might have come to know of the unenforceability later. The second part of the section refers to a contract becoming void. It refers to an agreement which was enforceable and was, therefore, a contract becoming void due to subsequent happening. In both these cases any person who has received any advantage under the agreement is bound to restore the same or make compensation to the person from whom he receives it. But where at the time when the agreement was entered into, both the parties knew that it was not lawful- and therefore there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently nor is it a case of the contract becoming void due to a subsequent happening. Therefore, section 65 of the Contract Act did not apply.

There was a partnership by an oral agreement to purchase an electrical undertaking in the name of one of the partners 'M'. It was also agreed that the licence should be obtained in the name of 'M' only and the partners had to contribute for the purchase money proportionate to their

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40 *Annamma* v. *Ouseph Tressiamma* (1975) A. Ker. 185.

41 *Vishwanath* v. *Jam Mohammed* (1982) A.B. 30; *Santimmappa* v. *Balbhim Cooperative Credit Society* (1950) A.B. 313 folld.; *Jain Brothers & Co.* v. *State of Rajasthan* (1964) A. Raj. 17 dissent from.

42 *Dominion of India* v. *Preety Kumar Ghosh* (1958) A.P. 203, 207; *Harnath Kuer* v. *Indar Bahadur Singh,* 50 I.A. 69; (1922) A.P.C. 403; *Hansraj Gupta* v. *Dehra Dun Mussorie Electric Co. Ltd.,* 60 I.A. 13; (1933) A.P.C. 63; *Mohan Manucha* v. *Manzur Ahmad,* 70 I.A. 1; (1943) A.PC. 29; *Craven-Ellis* v. *Cannors Ltd.* (1936) 2 K.B. 403; (1936) 3 All E.R. 1066 (C.A.).

43 *A. R. G. Krishnamurthi & Co.* v. *Sitaramayya* (1958) A.AP. 427; *Lakshman Prasad* v. *Achutan Nair* (1956) Mad. 712; (1955) A.M. 662.

44 *A.R.G. Krishnamurthi & Co.* v. *Sitaramayya* (1958) A.AP. 427, 436; see *infra* under s. 69.

45 *New Churulia Coal Co. Ltd.* v. *Union of India* (1956) A. Cal. 138 (Claim for price of a boiler supplied by Government and found to be useless; on ground of failure of consideration, claim not sustained); *Mst. Basso Kuar* v. *Lala Dhum Singh,* 15 I.A. 211; 11 All. 47 (P.C.); see also Stoljar: The Law of Quasi Contract (1964), pp. 196-200.

46 *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.* (1975) 1 SCR; 783; (1974) A.SC. 1892, 1894; *Harnath Kuer* v. *Inder Bahadur Singh* 50 I.A. 69, 75-76; applied (1922) A.PC. 403; *Budhulal* v. *Deccan Banking Co. Ltd.* (1955) A. Hyd. 69 approved; *Ramagya Prasad Gupta* v. *Murli Prasad* (1974) A.SC. 1320 reld. on; *Sivaramakrishnaiah* v. *Venkata Narahari Rao* (1960) A.AP. 180 approved. View of Pollock & Mulla in Contract Act (7th Ed.) disapproved.

respective shares. The electrical undertaking was sold by the official Liquidator to 'M' alone. The oral agreement of partnership was incorporated into a partnership deed. There was a subsequent change in the partners and a new partnership deed was executed and registered. Some time later the Electrical Inspector intimated 'M' that the partnership was illegal and void as it contravened the provisions of the Electricity Act. Thereupon one of the partners brought a suit for declaration that the partnership had been dissolved and for rendition of accounts. The State thereafter took over the undertaking and paid a certain amount of money as compensation. It was held that 'M' was not lawfully entitled to the whole of the compensation money but all partners were entitled to share in it as there was nothing to suggest that the partners were aware of the illegality of the partnership. The illegality, if any, was discovered only after the Government issued a notification revoking the licence and relief to the partners claiming their shares of the compensation was not dependent upon the validity of the partnership and the agreement because it did not contravene the provisions of the Act.[47]

Mutual benefits.—Mutual benefits gained by the parties have to be restituted on the contract being or becoming void but only in circumstances when the proposition applies to the facts.[48]

Restitutio in integrum—Rescission.—Ordinarily rescission is only granted when the parties can be restored to substantially the same position as they were in before the contract was made[49] but as Lord Blackburn said in *Erlanger* v. *New Sombrero Phosphate Co.*[50]

"The practice has always been for a Court of Equity to give this relief by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract and this was done in *Cooper* v. *Phibbs.*[51]

This section applies only to cases where an agreement is discovered to be void, or when a contract becomes void (see s.2, cl.(j)). It does not, therefore, apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the pérformance of his part of the contract. An insurance company is not, therefore, bound under the provisions of this section to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age.[52] Insurance effected by an insured who made false statements about his health, e.g. of not having suffered from or having been treated by a doctor for a serious illness is voidable under s.19 of the Contract Act. As there is a breach of warranty such insured or his assignee cannot take advantage of s. 64 or s. 65 and recover the premia paid.[53] But where a policy of marine insurance is avoided on the ground of misrepresentation or concealment of a material fact by the assured, the assured, if not guilty of fraud, may recover all premiums paid by him.[54] And where a policy of insurance is avoided on the ground that the risk insured against did not exist and the fact was not known to the parties the premium paid may be

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47 *Ramagya Prasad Gupta* v. *Murli Prasad* (1974) A.SC. 1320; (1969) A.AP. 191 reversed.

48 *D.L.F. United (Pvt.) Ltd.* v. *Pt. Prem Raj* (1981) A.SC. 805.

49 *Solle* v. *Butcher* (1950) 1 K.B. 671; (1949) 2 All E.R. 1107, 1119; *Erlanger* v. *New Sombero Phosphate Co.* (1878) 3 App. Cas. 1218; (1874-80) All E.R. Rep. 271, 285; *Sheffield Nickel Co.* v. *Unwin* (1877) 2 Q.B.D. 214 (A contract that cannot be rescinded in *toto* cannot be rescinded at all); *Clarke* v. *Dickson* (1858) E.B. & E. 148, 152 ("You cannot both eat the cake and return your cake". A case of fraudulently inducing to buy a cake); *Western Bank of Scotland* v. *Addie* (1867) Sc. & Div. 145, 165 (per Lord Cranworth).

50 (1878) 3 App. Cas. 1218; (1874-80) All E.R. Rep. 271, 286; *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Paget* v. *Marshall* (1884) 28 Ch.D. 255.

51 (1867) 2 H.L. 149.

52 *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasimha Chari* (1901) 25 Mad. 183, 214.

53 *Mithoolal* v. *Life Insurance Corporation of Inda* (1962) A.SC. 814; *Srinivas* v. *Premier Insurance Co.* (1958) A. My. 53; *Life Insurance Corporation of India* v. *Canara Bank* (1974) A. Mys. 57, 59.

54 *Anderson* v. *Thornton* (1835) 8 Ex. 425, 428; cf: *St. John Shipping Corporation* v. *Joseph Bank Ltd.* (1956) 3 All E.R. 683.

recovered.[55] This section does not apply to a case where one of the parties—such as a minor known at the time so to be[56]—being wholly incompetent to contract, there not only never was but there never could have been any contract.[57] It does apply where a transaction not void but voidable is repudiated by the person entitled to repudiate, as in the case of a sale of Hindu joint family property by the father on behalf of himself and a minor son.[58] The Privy Council have applied the section to a case where a mortgage was avoided on the ground that the mortgagee failed to obtain the sanction of the Deputy Collector to the mortgage.[59]

Where an agreement is discovered to be void.—"The section deals with (a) agreements and (b) contracts.[60] The distinction between them is apparent by s. 2; by clause (e) every promise and every set of promises forming the consideration for each other is an agreement and, by clause (h) an agreement enforceable by law is a contract. Sec. 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void".[61] The expression "discovered to be void" presents some difficulty as regards agreements which are void for unlawful consideration (ss. 23 and 24). On the one hand it has been said that the words "agreement discovered to be void" apply to all agreements which are void *ab initio,* including agreements based upon an unlawful consideration.[62] If this view be correct, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section, even if the illegal purpose is carried into execution and both the transferor and transferee are *in pari delicto*. It is difficult to suppose that such a result was contemplated by the Legislature. Moreover, it would not be correct to say that, where a person gives money for unlawful purpose, the agreement under which the payment is made can be, on his part, *discovered* to be void. On the other hand, it has been said that the present section does not apply where the object of the agreement was illegal to *the knowledge of both the parties* at the time it was made.[63] If this view be correct, a person who has paid money or transferred property to another for an unlawful purpose cannot recover it back even if the illegal purpose is not carried into execution and the transferor is not as guilty as the transferee. This is clearly against the

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55 Chitty: On Contracts (24th Ed.) paragraph 1821.

56 It has been held to apply where the fact of minority was unknown to the parties at the time and discovered later: *Gokuldas* v. *Gulabrao* (1925) 89 I.C. 143; 1926 A.N. 108.

57 *Mohori Bibee* v. *Dhurmodos Ghose* (1903) 30 I.A. 114; 30 Cal. 539; *Motilal Mansukhram* v. *Maneklal Dayabhai* (1920) 45 Bom. 225; 59 I.C. 245; *Punjabhai* v. *Bhagwandas* (1928) 53 Bom. 309; 117 I.C. 518; 1929 A.B. 89. *A fortiori,* where a person deliberately enters into a contract which he knows cannot be valid: *Gopalswami* v. *Vaithilinga* (1940) 1 Mad. L.J. 547; 1940 A.M. 719.

58 *Lachmi Prasad* v. *Lachmi Narain* (1927) 25 All L.J. 926; 107 I.C. 36; 1928 A.A. 41, but the case was mainly governed by the Transfer of Property Act.

59 *Nisar Ahmed* v. *Mohan Manucha* (1941) All.L.J. 316; 1940 A.P.C. 204; *Raja Mohan* v. *Manzoor Ahmad* (1943) 70 I.A. 1, 18 Luck. 130, 206 I.C. 457; 1943 A.P.C. 29. (It was, however, pointed out that the disability affected the right to deal with immovable property, but did not take away his personal liability to repay the loan) *Saraswatibai* v. *Madhukar* (1950) Nag. 467, 1950 A.N. 229; *Sunderlal* v. *Laxmanprasad* (1949) Nag. 52; 1949 A.N. 292; *Audhesh Singh* v. *Rajeshwar Singh,* 1951 A.A. 630; cf. *Ghulam Dastgir* v. *Nur Ali* 1935 A.L. 401; *Lala Baburam* v. *Ganga Devi* (1959) A.A. 788 (mortgage for previous money bonds).

60 *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.* (1974) A.SC. 1892, 1894 (1975) 1 S.C.R. 703.

61 *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 69, 75-76; 45 All. 179; 71 I.C. 629; 1922 A.P.C. 403, Privy Council, per Sir L. Jenkins; *Dist. Council, Wardha* v. *Anna Daulatrao,* 1941 A.N. 273; 197 I.C. 76; *Abhi Singh* v. *Daso Bhogta,* 1952 A.P. 455; *A.A. Khan* v. *Ameer Khan,* 1952 A. Mys. 131; *Bijey Singh* v. *Bhawani Singh,* 1953 A.A. 365; *Dyviah* v. *Shivamma* (1959) A. Mys. 188; *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.* (1974) A.SC. 1892 (1975) 1 S.C.R. 703; *Ramayya Prasad Gupta* v. *Murli Prasad* (1974) A.SC. 1320.

62 *Jijibhai* v. *Nagji* (1909) 11 Bom. 693, at pp. 697, 698; *Gulabchand* v. *Fulbai* (1909) 33 Bom. 411, at pp. 416, 417.

63 *Nathu Khan* v. *Sewak Koeri* (1911) 15 C.W.N. 408, at p. 409. See also *Dayabhai Tribhovandas* v. *Lakshmichand Panachand* (1885) 9 Bom. 358, at p. 362 (case of a wagering container under s. 30 of the Act), followed in *Changa Mal* v. *Sheo Prasad* (1920) 42 All. 449; 55 I.C. 965. It is not clear what the wide dictum in *Khushal* v. *Labhan Rao,* 1928 A.N. 232; 110 I.C. 351, 356 (authorities apparently not considered) was intended to include. *Ranjeetsingh* v. *Ramlal,* 1951 A.M.B. 113; *Firm Sagarmal* v. *Bishambar Sahai,* 1947 A.A. 14, 230 I.C. 23.

provisions of s. 8 of the Indian Trusts Act, 1882.[64] It seems on the whole that the present section does not apply to agreements which are void under s. 24 by reason of an unlawful consideration or object,[65] and still less to those which are tainted with fraud or other moral turpitude,[66] and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. If the illegal purpose or any material part of it has been performed, the money paid cannot be recovered back, for then the parties are equally in fault, and *in pari delicto melior est conditio posidentis.*[67] But according to the English rule, money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon a failure of consideration.[68] The English rule has been followed in a large number of cases in India,[69] and is reproduced as regards the transfer of property in s. 84 of the Trusts Act. It has thus been held that though an agreement for payment of money to the parent or guardian of a minor in consideration of his giving his son or daughter in marriage is void under ss. 23 and 24 as being against public policy, yet if the marriage is not performed, as where the son or daughter to be given in marriage died before the marriage could take place or the parent or guardian refuses to give the boy or girl in marriage, a party who has paid money under the agreement is entitled to recover it back.[70] But if the marriage is performed, money paid under the agreement cannot be recovered back.

Similarly a man, marrying a second time, during the lifetime of his first wife representing himself as a bachelor, and thus committing bigamy, cannot claim restitution under s. 65 by recovery of jewels given at the time of the marriage because after consummation of marriage which was *ab initio* void there can be no *restitutio in integrum,*[71] but this rule does not apply to a contract of marriage of minors against the Hindu Marriage Act where the marriage does not come off.[72] Similiarly, money paid under an agreement of subletting a telephone cannot be recovered as the agreement is forbidden by law.[73] Where a higher price is paid in contravention of a control order the buyer cannot under s. 65 sue for the return of the excess price. Nor would s. 72 apply.[74] If a partnership agreement in contravention of s. 59 of the Motor Transport Act

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64 That section runs as follows: "Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor." See acc. *Prabhu Mal-Ghula Mal* v. *Babu Ram Basheshar Das.* 1926 A.L. 159; 89 I.C. 684.

65 In *Budhulal* v. *Deccan Banking Co.,* 1955 A. Hyd. 69, 74 (F.B). this view is criticised, and it is held that where the parties honestly think the agreement is legally valid, restitution is permitted under s. 65, even where the agreement has been executed and therefore s. 84 of the Trusts Act would not apply.

66 See *Gulabchand* v. *Fulbai* (1909) 33 Bom. 411, at p. 417; *Amir Khan* v. *Saif Ali* (1893) Punj. Rec. No. 86; *Sibkisor* v. *Manik Chandra* (1915) 21 Cal.L.J. 618, 620; *Srinivasa Ayyar* v. *Sesha Ayyar* (1918) 41 Mad. 197, 199, 204; 41 I.C. 783; *Ledu* v. *Hiralal* (1916) 43 Cal. 115; 29 I.C. 625; *Rudragowda* v. *Gangowda,* 1938 A.B. 54; 39 Bom. L.R. 112; 173; I.C. 553, a case of gross fraud, *Karamchand* v. *Parekh,* 1951 A. Kutch 50. See also *Dayabhai Tribhovandas* v. *Lakshmichand Panachand* (1885) 9 Bom. 358, 362, and *Srikakolapu* v. *Gudivada* (1918) 34 Mad. L.I. 561; 44 I.C. 319, both cases of agreements by way of wager under s. 30. In *Dhanna Munda* v. *Mst. Kosila Banian,* 1941 A.P. 510; 193 I.C. 851, the agreement was void as being contrary to a local Act which both parties must be presumed to have known when the agreement was made. The then Judicial Commissioner's Court has however held in *Sadhusingh* v. *Jhamnadas,* 1937 A.S. 211; 171 I.C. 1005, that s. 65 does apply to agreements void *ab initio* because of an unlawful object or purpose, following (1909) 33 Bom. 411.

67 *Herman* v. *Jeuchner* (1885) 15 Q.B.D. 561; *Kearley* v. *Thompson* (1890) 24 Q.B.D. 742; *Petherpermal* v. *Muniandi Servai* (1908) 35 I.A. 98, at p. 103; *Ranjeetsingh* v. *Ramlal,* 1951 A.M.B. 113; *Jharia Coalfield Electric Supply Co.* v. *Kaluram Agarwala,* 1951 A.P. 463.

68 *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291.

69 *Sham Lal Mitra* v. *Amerendra Nath Bose* (1895) 23 Cal. 460; *Dharnidhar* v. *Kanhji Sahay* (1949) 27 Pat. 287; 1949 A.P. 250; *Gopi Krishna* v.*Janak Parshad,* 1951 A.P. 519; *Alsidas* v. *Punamchand* (1944) Nag. 535, 214 I.C. 168; 1944 A.N. 159; *Jahed Shaikh* v. *Kamlesh Chandra* (1959) A.Cal. 165.

70 *Gulabchand* v. *Fulbai* (1909) 33 Bom. 411; *Ram Chand Sen* v. *Audaito Sen* (1884) 10 Cal. 1054; *Srinivasa Ayyar* v. *Sesha Ayyar* (1918) 41 Mad. 197; 41 I.C. 783; *Jiwana* v. *Malak Chand* (1919) P.R. 113; *Sadhusing* v. *Jhamnadas,* 1937 A.S. 211; 171 I.C. 1005; *Mst. Sonphula Kuar* v. *Gansuri,* 1937 A.P. 330; 169 I.C. 901; *Bhan Singh* v. *Kaka Singh,* 1933 A.L. 849. See also *Hermann* v. *Charlesworth* (1905) 2 K.B. 123.

71 *Gurunadha Rao* v. *Rasaiah* (1959) A.AP. 277.

72 *Pallamsetti* v. *Sriramulu* (1968) A.AP. 375 (where marriage of minors does not come off).

73 *Seetharama Sastry* v. *Naganath* (1968) A.AP. 315.

74 *A.R.G. Krishnamurthi & Co.* v. *Sitharamayya* (1958) A.A.P. 427; *Lakshmanprasad* v. *Achutan Nair* (1956) Mad. 712; (1955) A.M. 662, cf. *Somraj* v. *Jeltmal* (1957) A.Raj. 392 (Excess rent over controlled rent recoverable).

allows a partner to share in the permit for a vehicle in the name of another partner without the permission of the Transport Authority then it is void under s.23 of the Contract Act. And there can be no restitution as the agreement was void to the knowledge of the parties.[75]

The Supreme Court has held that where a mining lease in favour of the plaintiff was in contravention of the Mines & Minerals (Regulation & Development) Act, 1948, and the Rules made thereunder and there was proof that the plaintiff could not be ignorant of the legal position, sec. 65 did not apply and the plaintiff was not entitled to claim refund of the sum paid nor was it a case to which s.70 or sec.72 applied. The money was neither paid lawfully nor under a mistake nor under coercion.[76] It is well settled that s.65 cannot be invoked when the agreement or the contract was known to the parties to be void *ab initio*. Where both parties were aware that the contract was prohibited by law sec.65 will not be applicable. Therefore, an Insurance Agent who procured insurance business before getting a licence, will not be entitled to commission even though it was promised.[77] S.65 does not apply to contracts which were *ab initio* void to knowledge of the parties. But if the plaintiff was unaware of the void character of the contract and discovered it later, he can get the benefit of section 65.[78]

A transaction of a loan of grain being illegal the suit to recover the same is not maintainable. The transaction does not fall under s.65. Contract Act, because of the knowledge of illegality which flows from the fact that the operation of law imputes knowledge to a party and ignorance of a statutory provision of law cannot be set up as a defence and the Court will not assist a party perpetrating an illegality.[79]

Sections 53 and 65 do not apply where a party is not prevented from carrying out the contract and that party did not repudiate it and no loss had occasioned to him nor would s.65 apply where the contract was never discovered to be void.[80]

A contract with the Government to construct a godown was not in conformity with Art. 299 of the Constitution and was, therefore, void from its inception. The Government in such a case would be entitled to recover the amounts advanced under the contract.[81] The plaintiff discovered at a late stage the effect of non-registration of the deed of purchase of standing trees and the effect of their vesting in the State under the West Bengal Estates Acquisition Act. That gave him the right to protection provided under s.65 and claim to get restitution on the basis of agreement subsequently found to be void.[82]

Consideration unseverable.—Where two properties were sold the consideration being one and unseverable the purchaser will not be entitled to proportionate refund if it is discovered that the vendor had no interest in one of the properties sold.[83] Where the entire agreement becomes void and cannot be separated, then each party deriving benefit under it was liable to make compensation to the other party to the extent of the benefit derived by that party.[84]

In cases where the illegal purpose has not been accomplished, English law examines the reason which led to the failure of the unlawful project. There must be repentance by the plaintiff,[85] and

75 *Inderjit Singh* v. *Sundar Singh* (1969) A.Raj. 155.
76 *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.* (1975) 1 SCR 703; (1974) A.SC. 1892, 1896.
77 *Life Insurance Corporation of India* v. *K.A. Madhava Rao* (1972) A.M. 112, 116; *State of Madras* v. *Periasami Gounder* (1972) A.M. 154; *Abdul Lateef* v. *Sri Sargaru Sarva Samarasa Sanga* (1967) 80 Mad. LW 240; *State of West Bengal* v. *B.K. Mondal* (1962) A.SC. 779, disting.
78 *Lakhiram Agarwalla* v. *Braijlal Agarwala* (1974) A. Or. 49,50; *Thakurain Harnath Kuar* v. *Thakur Indar Bahadur Singh* (1922) A.PC. 403; *Sivaram Krishnath* v. *Venkata Narahari Rao* (1960) A.AP. 186 folld. *Qadir Buksh* v. *Hakam* 13 Lah. 713; (1932) A.L. 503 (F.B.) reld. on.
79 *Bhaskarrao Jageshwarrao Buty* v. *Smt. Saru Jadhaorao Tumble* (1978) A.B. 322.
80 *D.S. Bist* v. *S.K. Chaturvedi* (1969) 2 All. 421, 445.
81 *State of Orissa* v. *Rajaballav Misra* (1976) A.Or. 19; *Thakurain Harnath Kuar* v. *Thakur Indar Bahadur Singh* (1922) A.PC. folld. *Ananth Bandhu* v. *Dominion of India* (1955) A. Cal. 626 disting.
82 *Walamji Lalji* v. *Anil Charan Bangal* (1975) A. Cal. 92, 97.
83 *Khuma* v. *Jin Rai* (1974) A.Raj. 28,29; *Bapu-Rawther* v. *State* (1964) A. Ker. 109; *Nogalinga Chettiar* v. *Guruswami Ayyar* (1930) A.M. 856; *Firm Narasingi Vannechand* v. *Narasayya* (1945) A.M. 363 folld.
84 *State of Rajasthan* v. *The Associated Stone Industries Kota Limited* (1971) A. Raj. 128, 134.
85 *Chettiar (Palaniappa)* v. *Chettiar Arunasalam* (1962) A.C. 294; (1962) 1 All E.R. 494, 497.

where the scheme has been frustrated by the vigilance of third parties,[86] or a change of mind on the part of the defendant,[87] the plaintiff cannot recover. In *Alexander's case*[86] in order to defraud the Rating Authority the landlord split up the rent of the flat in two parts, for providing certain services and amount payable as rent of the flat thus showing the rent to be lower that it actually was. The tenant failed to pay in accordance with the terms of the documents. The Court of Appeal held them unenforceable as they were to be used for a fraudulent purpose. In *Bousted's case*[87]

A had agreed to provide foreign money to *B* in Italy in contravention of the Exchange Control Act and *B* had deposited as security a share certificate of 140 shares with the plaintiff. *A* failed to provide the foreign money. *B* claimed the return of the share certificate.

but failed as the parties were *in pari delicto* at the time of making the contract.

In India it suffices for the plaintiff to establish that the illegal purpose has not been achieved for whatever cause.[88] The same principle applies to cases where a person transfers his property *benami* to another in order to defraud his creditor.[89] In such cases, where the fraudulent purpose is not carried into execution, the transferee will be deemed to hold the property for the benefit of the transferor, as provided in s. 84 of the Trusts Act.[90] Where, however, the fraudulent object is accomplished,[91] or substantially accomplished,[92] the transferee will not be disturbed in his possession.

If the transferee is not in possession, there is a conflict of judicial opinion whether the transferee can obtain possession from the transferor where the unlawful purpose has been accomplished, or whether a plea of *par delictum* will defeat his claim.

In England, if the transfer is *ex facie* a legal one, the transferee will recover possession, because there is a maxim that no one can plead his own wrongdoing, and this the tranferor will be forced to do. One party cannot recover what he had given to the other party if in order to substantiate his claim he is driven to disclose the illegality. And courts will not assist either party to a contract that is forbidden by law.[93] Any rights which he may have irrespective of illegal contract will of course be recognised and enforced.[94] In *Amar Singh* v. *Kulubya*[95]

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86 *Alexander* v. *Rayson* (1936) 1 K.B. 169, C.A.; (1935) All E.R. Rep. 185.

87 *Bigos* v. *Bousted* (1951) 1 All E.R. 92; *C. Alexander* v. *Rayson,* ibid, appd.; *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291, dist.; see *Tirupathi* v. *Lakshmana* (1953) A.M. 545. The refusal to grant relief to the plaintiff in such circumstances as in this case and the *Alexander* v. *Rayson* situation has been described as a new and regrettable trend; Grodecki in 71 L.Q.R. 254, 263.

88 *Petherperumal Chetty* v. *Muniandi Servai,* 35 I.A. 98; (1908) 35 Cal. 551, 559 (P.C.); 24 T.L.R. 462; *Tirupathi* v. *Lakshmana,* 1953 A.M. 545, 547, rejecting *Bigos* v. *Bousted* (supra) s. 84, Indian Trusts Act, 1882.

89 A transaction is not necessarily fraudulent though *benami,* and if there is no such intention to defraud any particular person, but only an intention to practise a fraud upon a Court e.g. by creating a false impression that the *benamidar,* has a real interest in the land to fecilitate recovery from a third party in wrongful possession the real owner will be allowed to recover the land from the *benamidar* even though the deception upon the Court has been completed: *Kalipada* v. *Kali Charan,* 1949 A. Cal. 204; see *infra;* cases dealing with *particips criminis & in pari delicto.*

90 *Venkataramayya* v. *Pullayya* (1936) 59 Mad. 998 (F.B.); *Sham Lal Mitra* v. *Amarendra Nath Bose* (1895) 23 Cal. 460.

91 *Petheperumal* v. *Muniandi Servai* (1908) 35 I.A. 98; *Chenvirappa* v. *Puttappa* (1887) 11 Bom. 708; *Honappa* v. *Narasapa* (1898) 23 Bom. 406; *Rangammal* v. *Venkatachari* (1895) 18 Mad. 378; affd. (1896) 20 Mad. 323; *Varamati* v. *Chundru* (1897) 20 Mad. 326; *Kondeti Kama Row* v. *Nukamma* (1908) 31 Mad. 485; *Raghavalu* v. *Adinarayana* (1908) 32 Mad. 323; *Goverdhan Singh* v. *Ritu Roy* (1896) 23 Cal. 962; *Banka Behary Dass* v. *Raj Kumar Dass* (1899) 27 Cal. 231; *Govinda Kuar* v. *Lala Kishun Prosad* (1900) 28 Cal. 370; *Jadu Nath Poddar* v. *Rup Lal Poddar* (1906) 33 Cal. 967; (The portion of the heed-note stating that 11 Bom. 708 and 20 Mad.326 have been dissented from is misleading: see per Rampini J. on p. 969 and per Mookerjee J. on p. 983); *Mst Roshun* v. *Muhammad* (1887) Punj. Rec. No. 46; *Pirtha Das* v. *Hira Singh* (1898) Punj. Rec. No. 63; *Girdharlal* v. *Manikamma* (1914) 38 Bom. 10; 21 'i.c. 50.

92 *Muthuramman Chetty* v. *Krishna Pillai* (1906) 29 Mad. 72.

93 *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C. 294; (1962) 1 All E.R. 494; *Holman* v. *Johnson* (1775) 1 Cowp. 341; 98 E.R. 1120, refd. to. (No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act—Lord Mansfield.)

94 Per Lindley L.J. in *Scott* v. *Brown, Doering McNab & Co.* (1892) 2 Q.B. 724, 729.

95 (1963) 3 All E.R. 499; (1963) 3 W.L.R. 513; *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (1945) K.B. 65; (1944) 2 All E.R. 579 (C.A.) and other authorities refd. to. (In *Bowmakers case* the illegal bailments of machinery under hire-purchase agreements were assumed terminated by sale of the machinery to the plaintiffs on demand).

the respondent's claim was based on his being a "registered owner" and the agreement under which the appellant took possession was illegal as a non-African was in possession without Governor's permission. The respondent admitted the illegality but he sued for possession of the land nevertheless as protected African.

He succeeded as

"in spite of and not because of those illegal agreements that he was entitled to possession."

Similarly in *Sajan Singh* v. *Sardara Ali*[96]

a lorry was registered in the name of the defendant because he could and did obtain a permit. The plaintiff had contributed towards its cost and he removed it from the defendant and used it. Subsequently the defendant took it away from the plaintiff.

The plaintiff succeeded because the defendant would have to disclose the illegal transaction to which he was a party. In *Palaniappa Chettiar case*[97]

a father in order to defeat the Regulation regarding holdings of rubber growing lands got an area, which exceeded the allowable maximum, registered in the name of his son, but the certificate and possession remained with the father although the two holdings were treated as separate. The father brought proceedings for declaration that the son held the land in trust for him and for an order that the son retransfer it to him. The son did not plead illegality affecting the transfer.

The suit failed. The Privy Council held that where the fraudulent purpose had not been carried out and there was room for repentance the father might have been allowed to have the land retransferred to him.[98] But where the fraudulent purpose has been actually effected by means of the colorable transfer there is no room for repentance. The process of the courts cannot be used by a person to achieve his fraudulent purpose and also get back his property. The courts will say: "Let the estate lie where it falls."[99] *Sajan Singh's case*[96] was distinguished on the ground that there the plaintiff's claim to the lorry was founded on his right to and possession of the lorry and no immoral or illegal act was alleged. Thus, there are in English law three exceptions to the rule of non-recoverability:

(1) where the plaintiff is not relying on illegal contract.[96]

(2) parties are not *in pari delicto;*[1]

(3) *Locus poenitentiae.* The parties' right to rescind such a contract while still executory.[2]

In *Doe d. Roberts* v. *R.*,[3] *X* conveyed land by deed to *D*, his brother, to achieve two secret unlawful purposes, first to give *D* a qualification to kill game, and secondly to get rid of a criminal information pending against *D*. *X* remained in possession, and died. The Court held that *D* could recover possession from; *X*'s widow. This authority has been followed in some bench decisions in Madras,[4] and in a bench decision in Bombay,[5] but there is another Bombay bench decision,[6] an Allahabad bench decision,[7] a Calcutta bench decision,[8]and a Lahore Full Bench decision,[9] rejecting the English case. The decisions of the other courts are in accord with the view of Lahore High Court, Rangoon High Court,[10] Nagpur Judical Commissioner's

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96 (1960) A.C. 167; (1960) 1 All E.R. 269.

97 *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C. 294; (1962) 1 All E.R. 494.

98 *Ibid; Petherpermal Chetty* v. *Muniandy Servai* (1908) 24 T.L.R. 462; 35 I.A. 98; 35 Cal. 551 (P.C.); *Davies* v. *Otty* (1865) 35 Beav. 208; *Symes* v. *Hughes* (1870) 9 Eq. 475; refd. to.

99 *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1962) A.C. 294; (1962) 1 All E.R. 494, 497; *Sajan Singh* v. *Sardara Ali* (1960) A.C. 167, 177; (1960) 1 All E.R. 269, 273; *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192, 202-3; (1960) 1 All E.R. 177, 180.

1 *Harse* v. *Pearl Life Insurance Co.* (1904) 1 K.B. 558. (There was no insurable interest and policy was void though effected through the innocent representation of the insurer's agent. Hence the premia paid were irrecoverable).

2 *Chettiar* v. *Chettiar* (1962) A.C. 294; (1962) 1 All. E.R. 494; 497.

3 (1819) 2 B. & Ald. 367, 106 E.R. 401; 20 R.R. 477.

4 See e.g. *Kotayya* v. *Mahalakshamma* (1933) 56 Mad. 646.

5 *Sidlingappa* v. *Hirasa* (1907) 31 Bom. 405.

6 *Luckmidas Khimji* v. *Mulji Canji* (1881) 5 Bom. 295; folld. in *Chenvirrappa* v. *Puttappa,* 11 Bom. 708; *Babaji* v. *Krishna,* 18 Bom. 372; *Honapa* v. *Harsapa,* 23 Bom. 406.

7 *Vilaiyat Hussain* v. *Misran* (1923) 45 All. 396.

8 *Raghupati Chatterjee* v. *Nrishingha,* 1923 A.Cal. 90, 71 I.C. 1.

9 *Qadir Bakhsh* v. *Hakam* (1932) 13 Lah. 713 (F.B.) (1932) A.L. 503; where there is a full discussion of authorities; *Nandlal* v. *Jethumal,* 21, P.R. 1916; 33 I.C. 255; appd.

10 *Maung Tin* v. *Ma Myi Myint,* 65 I.C. 459; affd. in *Ma Nan Chaw* v. *Ma E.* (1926) 4 Rang. 429.

Court,[11] Oudh Chief Court[12] and Sindh Judicial Commissioner's Court.[13]

In the Lahore case, a piece of agricultural land belonging to a statutory agriculturist was in contravention of the provisions of the Alienation of Lands Act, really mortgaged to defendant, a non agriculturist, but ostensibly the mortgage was in the name of the plaintiff, a statutory agriculturist, the defendant remaining in possession. The plaintiff sued for possession on his title and the defendant pleaded the real nature of the transaction which the court allowed him to do.[9]

Tek Chand J. in the *Full Bench case*[14] referred to several English cases where the defendant was allowed to raise the plea of *in pari delicto* to show the true facts or true nature of the transaction.

The difficulty has arisen because of the interplay of the two maxims, the one regarding *par delictum,* and the other preventing a party from pleading his own wrongdoing—*nemo allegans turpitudinem suam audiendus.*

The respective spheres of the maxim *nemo allegans turpitudinem suam audiendus est* and *in pari delicto potior est conditio possidentis* were delineated in *Hakam's case.*[15] The former is the general rule and the latter is an exception to that rule and there is no real conflict between the two; a rigid application of the former might give effect to the fraudulent design of the authors and defeat the very object for which the maxim was framed.

As was observed by Robinson C.J. in the *Rangoon case*[16] "It is one thing to forbid the pleading of a fraud to obtain an advantage and quite another to refuse a party to the fraud to plead the true nature of the transaction. In the one case the Courts would be lending themselves to helping a party to a fraud to obtain the benefit of his fraud, while in the other case it would be preventing a party to the fraud from pleading and thereby permitting a further fraud to be committed."

The rule in *Ayerst* v. *Jenkins*[17] does not lay down an invariable rule that the plaintiff is disqualified from seeking the aid of courts. A man in that case had settled property on a woman with whom he was cohabiting. A claim by his personal representatives to have the settlement set aside failed on the ground that "the voluntary gift of a part of his own property by one *particeps criminis* to another is in itself neither fraudulent nor prohibited by law." The application of the rule is limited as indicated in *Thasi Muthukannu* v. *Shanmugavalu*[18] and *Istak Kannu* v. *Ranchhod,*[19] wherein it was held that a transaction though completed and intended to be for consideration can be impeached if the consideration was immoral. It made no difference whether the transaction was executed or executory. Refusal to grant relief on the basis of such maxims as *ex turpi causa non oritur actio or pari delicto* or *particeps criminis* is based on public policy. This rule is subject to a higher public policy that the rule in *Ayerst* v. *Jenkins*[17] should not be used to defeat the provisions of a statute eg.s. 6(h)(2) of Transfer of Property Act; or to make the palintiff liable to prosecution and punishment; or to violate the express provision of the Constitution (Art. 23); or to perpetuate illegality or immorality. Therefore property let out for brothel keeping can be recovered by the trustees and executors of the will of the lessor as they were not in *particeps criminis.* Such a transaction is no transfer

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11 *C.P. Automobile Engineering Co.* v. *Ramchandra,* 91 I.C. 1029.
12 *Bansidhar* v. *Ajudhia Prasad,* 82, I.C. 333.
13 *Mulchand Hemraj* v. *Khemchand Thaurmal,* 118 I.C. 202, 1930 A.S. 9.
14 *Qadir Baksh* v. *Hakam,* 13 Lah. 713, 738; (1932) A.L. 503; referring to *Holman* v. *Johnson* (1775) 1 Cowp. 741; 98 E.R. 1120; *Taylor* v. *Bowers* (1876) 1 Q.B. 291; *Taylor* v. *Chester* (1869) 4 Q.B. 309; *Herman* v. *Jeuchner* (1885) 15 Q.B.D. 561; *Kearley* v. *Thomson* (1890) 24 Q.B.D. 742; (illegal object had already been partially performed; action for recovery of money failed) and *Gascoigne* v. *Gascoigne* (1918) 1 K.B. 223 refd. to; Judgment of Jenkins C.J. in *Sidlingappa* v. *Hirasa,* 31, Bombay relying on *Doe d. Roberts* v. *Roberts* (1819) 2 B & Ald. 367; 106 E.R. 401 & *Brackenbury* v. *Brackenbury* (1820) J. & W. 391, 394; 22 R.R. 180 not folld. *Luchmidas Khimji* v. *Mulji,* 5 Bom. 295 folld.
15 Ibid, 725.
16 *Maung Tin* v. *Ma Myi Myint,* 65 I.C. 459; affirmed in *Ma Nan Chaw* v. *Ma E.,* 4 Rang, 429, refd. to in *Qadir Baksh* v. *Hakam,* 13 Lah. 713; (1932) A.L. 502.
17 (1874) 16 Eq. 275, 283.
18 28 Mad. 413.
19 (1947) A.B. 198.

under s. 6(h)(2) of Transfer of Property Act. It makes no difference whether the contract is executory or executed.[20]

Public policy requires interference by Courts to check vicious practices.[21] Reasons of public policy allow the defendant to take the plea of *particeps criminis;* greater reasons of public policy may allow the plaintiff to repel that plea.[22]

It is submitted that the heirs and legal representatives of a person in *particeps criminis* can be in no higher position than the ancestor himself.[23] But the correct position is that if the transaction of transfer is void under s. 6(h)(2) of Transfer of Property Act then an owner who leases out his house for brothel keeping can recover possession on the strength of his original title.[24]

To such a case, it is submitted, s. 84 of Trusts Act will be applicable.

Relief should be given where public interest or interest of a third party require that relief should be given or where denial of relief would defeat a legal prohibition or where transaction is such that it ought not to be allowed to stand on grounds of public policy.[25]

The result of the application of the principle *in Pari delicto est conditio defendantis* is that where both parties are aware of the illegal nature of the contract whether on the face of it or whether the common intention is to carry out the contract in an illegal manner neither party can recover anything paid or transferred thereunder. Thus in *Taylor* v. *Chester* the plaintiff failed to recover the half of £50 banknote deposited with the defendant by the plaintiff to pay for the wines and suppers supplied by the defendant in her brothel for the purposes of a debauch and of loans of money by the defendant to the plaintiff for riot, debauchery and immoral conduct. The plaintiff failed because he had to plead illegal transactions to which he was a party.[26]

The very words of the maxim *in pari delicto* indicate one of the limitations to its operation: it will not apply where the transferor is not as guilty as the transferee."[27] where in the words of Lord Ellenborough[28] one holds the rod and the other bows to it." Thus where a statute for the protection of one class of persons from the machinations of another, e.g. a prospective tenant, is contravened by payment of premium which is prohibited, the premium is recoverable[29] If a contract is in contravention of a provision of law, e.g. the Iron & Steel Control Order, but is not executed, then a party who is not *in pari delicto* or is more innocent or is

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20 *Pranbala* v. *Tulsibala* (1958) A. Cal. 713; *Ayerst* v. *Jenkins* (1874) 16 Eq. 275 (dist.); *Thasi Muthukannu* v. *Shanmugavalu,* 28 Mad. 413; and *Istak Kamu* v. *Ranchhod* (1947) A.B. 198 folld. *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (1945) 1 K.B. 65; (1944) 2 All E.R. 579 appd.; *Alexander* v. *Rayson* (1936) 1 K.B. 169, 186-7; case dealing with contract or *benami* dist. e.g. *Qadir Baksh* v. *Hakam* (1932) 13 Lah. 713 (a case of benami); *Bigos* v. *Bousted* (1951) 1 All E.R. 62; a case of agreement of contravention of Exchange Control Act; *Kali Kumari* v. *Mono Mohini,* 40 C.W.N. 329; (1935) A.Cal. 748 (a case of promissory note tainted with immorality); *Scott* v. *Brown* (1892) 2 Q.B. 724 (a similar case; to rig the market by artificially enhancing the true value of shares by entering into a contract to purchase at a fictitious premium).

21 *Whittingham* v. *Burgoyne* (1797) 8 Anst. 900; 145 E.R. quoted in *Pranbala* v. *Tulsibala* (1958) A.Cal. 713; 727.

22 *Pranbala* v. *Tulsibala Dassi* (1968) A.Cal. 713, 730.

23 *Ibid,* 727; *Sidlingappa* v. *Hirasa,* 31 Bom. 405 doubted.

24 *Ibid,* 729; See *Thasi Muthukannu* v. *Shanmugavelu,* 28 Mad. 413.

25 *Ibid,* 729; see s. 84 of Trusts Act. See *Amar Singh* v. *Kalubya* (1963) 3 All E.R. 499; (1963) 3 W.L.R. 513; *Sujan Singh* v. *Sardara Ali* (1960) A.C. 167; (1960) 1 All E.R. 269 (P.C.)

26 (1869) 4 Q.B.D. 309, 314 cf. *Selangor United Rubber Estates Ltd.* v. *Cradock* No. 3 (1968) 1 W.L.R. 1555, 1654; Chitty: On Contracts (24th Ed.) Para 1637; *Parkinson* v. *College of Ambulance Ltd.* (1925) 2 K.B.1; See: *Shaw* v. *Shaw;* (1965) 1 W.L.R. 537.

27 S. 84, Indian Trusts Act, 1882.

28 In *Smith* v. *Cuff* (1817) 6 M. & S. 160, 165; cited and followed by Chagla C.J. in *Trikamdas* v. *Bombay Corporation,* 1954 A.B. 427. See also *Atkinson* v. *Denby* (1862) 7 H.& N. 934; *Barclay* v. *Pearson* (1893) 2 Ch. 154; *Gray* v. *Southouse* (1949) 2 All E.R. 1019; *Viswanathan* v. *Namakchand,* 1955 A.M. 536, 541. See Trusts Act, s. 84, and Specific Relief Act, s. 35(b), and illustration thereto, now s. 27(1)(b) of Act of 1963.

29 *Kiriri Cotton Co.* v. *Dewani* (1960) A.C. 192; (1960) 1 All E.R. 177; *Gray* v. *Southouse* (1949) 2 All E.R. 1019; referring to *Browning* v. *Morris* (1778) 2 Cowp. 790, 792; *Amar Singh* v. *Kalubya* (1963) 3 All E.R. 499; (1963) 3 W.L.R. 513 P.C.; see also *Sajan Singh* v. *Sardara Ali* (1960) A.C. 167; (1960) 1 All E.R. 269 (P.C.).

not suing to enforce the contract but is repudiating it is entitled to recover back the money paid by him. The law allows a *locus paenitentiae* and permits the recovery of money paid under the contract.[30] The same principles have been held to apply to payments made under agreements which are void under s. 30 as being by way of wager.[31] If parties are not *in pari delicto* the purchaser who advances money under a contract is not precluded from recovering the money on the contract being discovered to be void, because of the contravention of a control order.[32]

In a pre-emption case *A* agreed that *B* should file an appeal at his own expense and if successful *B* would pay him half the expense and half the purchase price and share the property half and half. This agreement was held champertous and the circumstances showed that the agreement was for gambling, the agreement was opposed to public policy and would not be enforceable. But where in a champertous agreement a party had received the advantage of financing of litigation from another party, he is bound to restore it to the latter under s. 65. But the latter is not entitled to compensation over and above the return of the advantage.[33] See notes on s. 23 under the heads "Legislative enactments." "Immoral," "Stifling prosecution," "Marriage brocage contracts," and "Sale of public offices."

A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void.[34] So also the purchaser of an expectancy.[35] The time at which an agreement for the sale of an expectancy is "discovered to be void," so that a cause of action to recover the consideration arises under this section, in the absence of special circumstances, is the date of the agreement.[36]

At an auction sale the defendant gave the highest bid to collect market fees but no registered deed was executed. The transaction was an agreement which was discovered to be void, i.e. unenforceable and s. 65 became applicable.[37]

Section 65 is applicable to a contract which was void *ab initio* because of the non-compliance of requirement as to registration under the Municipal Law. That will not prevent the Municipal Committee from recovering from a contractor collecting *teh bazari* on behalf of the Municipality to restitute the benefit of collections made under the contract.[38]

The defendants obtained as the highest bidder in an auction for the collection of a tax which they collected and paid a part to the Town Area Committee. They thus ceased to pay the Town Area Committee but continued collecting the tax for the full term of the contract and a large sum of money was owing from them to the Area Committee. The transaction took place under the belief that it was valid but subsequently it was discovered to be invalid. To such a case s.65 is

30 *Jahed Shaikh* v. *Kamlesh Chandra* (1959) A.Cal. 165. But see *Bigos* v. *Bousted* (1951) 1 All E.R. 92 (Exchange Control Act contravened).

31 *Dayabhai Tribhovandas* v. *Lakshmichand Panchand* (1885) 9 Bom. 358, 362; *Srikakolapu* v. *Gudivada* (1918) 34 Mad.L.J. 561; 44 I.C. 319; *Devi Dial* v. *Sunderdas* (1919) P.R. 65; *Nagappa Pillai* v. *Arunachalam Chetty* (1924) 85 I.C. 1016; 1925 A.M. 281 (Court divided).

32 *Ram Singh* v. *Jethanand* (1964) A. Raj. 232; *Onkarmal* v. *Banwarilal* (1962) Raj. 202; (1962) A. Raj. 127 reld. on.

33 *Suganchand* v. *Balchand* (1957) A.Raj. 89.

34 *Krishnan* v. *Sankara Varma* (1886) 9 Mad. 441; *Jijibhai* v. *Nagji* (1909) 11 Bom. L.R. 693; *Haribhai* v. *Nathubhai* (1914) 38 Bom. 249; 23 I.C. 602; *Javerbhai* v. *Gordhan* (1915) 39 Bom. 358; 28 I.C. 442; *Bai Diwali* v. *Umedbhai* (1916) 40 Bom. 614; 36 I.C. 564, the last four being cases under the Bombay Bhagdari Act V of 1862. The word "illegal" which is frequently applied to transfers of this character, is not the proper word in such a case; the attempted transfer is a nullity. *Dyviah* v. *Shivamma* (1959) A.My. 186.

35 *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 69; 45 All. 179; 71 I.C. 629; 1922 A.P.C. 403. See also *Annada Mohan Roy* v. *Gour Mohan Mullick* (1923) 50 I.A. 239; 50 Cal. 929; 74 I.C. 499; 1923 A.P.C. 189; *Prem Sukh* v. *Habib Ullah,* 1945 A.Cal. 355.

36 (1923) 50 I.A. 239; 50 Cal. 929; 74 I.C. 499. *supra; Hansraj* v. *Dehra Dun—Mussoorie Electric Tramways Co.* (1933) 60 I.A. 13; 54 All. 1067; 142 I.C. 7; 1933 A.P.C. 63. For a case of special circumstances see *Suja* v. *Padam Chand,* 1955 A. Ajm. 54.

37 *Village Panchayat of Jangareddigudem Venkapatasuwami* v. *Narasayya* (1965) A.AP. 191; *Town Area Committee* v. *Rajendra Kumar* (1978) A.A. 103, 104; *Ishwar Dayal Hingwasia* v. *Municipal Board Rath* (1980) A.A. 143, 145; *Sheikh Kallan* v. *Municipal Board, Aligarh* (1956) All L.J. 715 reld. on.

38 *Ishwar Dayal Hingwasia* v. *Municipal Board Rath* (1980) A.A. 143, 145; *Sheikh Kallan* v. *Municipal Board Aligarh* (1956) All L.J. 715 reld. on.

applicable and the Area Committee was entitled to recover its dues. And equity will step in to stop unjust enrichment.[39]

Contract with a minor.—A contract made by a minor or a lunatic is void and neither s. 64 nor s.65 can be applied.[40] S. 68 applies to necessities in the case of a minor but he cannot be sued under s. 70 for compensation.[41] Therefore a promissory note executed by a minor is void and the creditor is not entitled to the return of his money in cases where no misrepresentation of age is made by the minor.[42] But if the sale by a guardian is unauthorised he must repay the earnest money paid. *Ayissa* v. *Prabhakaran* (1971) A. Ker. 239.

Contract by an illegal Association.—A contract by an illegal association, not registered under the Companies Act, is not enforceable as the association cannot maintain a suit. To such a case, sections 65 and 70 are inapplicable because the association had no legal competence and the infirmity was not attached to the form of the contract.[43] Nor would s. 65 apply where neither the agreement is discovered to be void nor has the contract become void.[44]

"When a contract becomes void".—The expression "becomes void" includes cases of the kind contemplated by the second clause of s. 56. (See notes on s. 56 under the head "Refund", above, and the notes on s. 65, below, under the head "Received any advantage.") The Privy Council have held that s. 65 is applicable where a voidable contract has been avoided.[45]

On a suit to enforce a registered mortgage, the mortgage was found to be void because permission under para 11 of the third schedule to the Code of Civil Procedure had not been obtained. The claim on the personal covenant appeared to be time-barred and was formally abandoned by the mortgagee.

The Privy Council held that the mortgagee had the right to refuse to be bound by the contract of loan when the basis of the contract had gone. Their Lordships said:

"The lender who has agreed to make a loan upon security and has paid the money is not obliged to continue the loan as an unsecured advance. The bottom has falled out of the contract and he may avoid it."

The mortgagee was given relief under the section[46] But a mortgage in lieu of that mortgage after the collector's possession came to an end is valid under s. 25 Contract Act as the borrower was bound to restore to the vendor the advantage received under the contract under s. 65 of the Contract Act[47] It was deemed applicable by the High Court of Bombay[48] to the case of a lease which was terminated by the lessee under the provisions of the Transfer of Property Act on the destruction of the property by fire.

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39 *Town Area Committee* v. *Rajendra Kumar* (1978) A.A. 103, 104; *Fibrosa Spolka Akcyina* v. *Fairbairn Lawson Combe Barbour Ltd.* (1943) A.C. 32; (1942) 2 All E.R. 122 appld.

40 *Mohori Bibee* v. *Dharmodas Ghose,* 30 I.A. 114; 30 Cal. 539.

41 *Bankey Behari Prasad* v. *Mahendra Prasad,* 19 Pat. 737; (1940) A.P. 324. Both quoted in *State of West Bengal* v. *B.K. Mandal & Sons* (1962) A.SC. 779, 789; (1962) Supp. 1 S.C.R. 876.

42 *Veeraiah* v. *Sarraju* (1959) A.AP. 100; *Vaikuntarama Pillai* v. *Athimoolam Chettiar,* 38 Mad. 1071; (1914) A.M. 641 folld.; *Hanumantha Rao* v. *Sitharamayya* (1939) Mad. 203; (1939) A.M. 106 dist.

43 *Bapulal* v. *Laxmi Bharat Trading Co.* (1966) A.Raj. 14.

44 *State of Orissa* v. *Mohammad Khan* (1961) A.Or. 75.

45 *Satgur Prasad* v. *Har Narain* (1932) 59 I.A. 147; 7 Luck. 64; 136 I.C. 108; 1932 A.P.C. 89; and see also *Raja Mohan Manucha* v. *Manzoor Ahmad,* 1943 A.P.C. 29; (1943) 1 Mad.L.J. 508. In *Labh Singh* v. *Jamnun* (1934) 15 Lah. 751; 151 I.C. 1; 1934 A.Lah. 853 (F.B.) the principle of the first of the two cases just cited was followed where an occupancy tenant had mortgaged his tenancy and the alienation had been set aside at the instance of the landlord under s.60 of the Punjab Tenancy Act, 1887, the mortgagee being held entitled to sue the mortgagor for refund of the mortgage money; *Dyviah* v. *Shivamma* (1959) A. My. 188.

46 *Raja Mohan Manucha* v. *Manzoor Ahmad Khan* (1943) 70 I.A. 1; (1943) 1 M.L.J. 508; 1943 A.P.C. 29. See also *Thaker Ganpat* v. *Sukhram,* 1955 A.J. & K. 20. The mortgagee, however, must not omit the repudiate within a reasonable time, otherwise his conduct may be treated as an election to affirm the contract based on the personal convenant. *Ibid. Audesh Singh* v. *Rajeshwari Singh,* 1951 A.A. 630; *Lala Babu Ram* v. *Ganga Devi* (1959) A.A. 788.

47 *Lala Babu Ram* v. *Ganga Devi* (1959) A.A. 788; *Raja Mohan Manuch* v. *Manzoor Ahmad* (1943) A.PC. 29; 70 I.A. 1 folld.

48 *Dhuramsey* v. *Ahmedbhai* (1898) 23 Bom. 15, followed in *Muhammad Hashim* v. *Misri* (1922) 44 All. 229; 65 I.C. 253.

In that case the plaintiff hired a *godown* from the defendant for a period of twelve months and paid the whole rent to him in advance. After about seven months the *godown* was destroyed by fire, and the plaintiff claimed a refund from the defendant of a proportionate amount of the rent, and subsequently brought a suit for the same.

The Court held that the provisions of s. 108(e) of the Transfer of Property Act applied to the case, and that the plaintiff was entitled under this section to recover the rent for the unexpired part of the term. The demand for a refund was treated by the Court as a notice to the defendant avoiding the lease.[49] It was also stated in the judgment that the right to compensation under this section does not depend on the possibility of apportionment.[50]

Sec. 108 of the Transfer of Property Act provides that, in the event of the property let being destroyed by fire, "the lease shall at the option of the lessee be void." S. 65 applies in the case of frustration of leases.[51] It has been applied in the case of leases which were terminated because of their being void or having become void.[52] and in the case of a mortgage of occupancy tenancy which was avoided at the instance of the landlord.[53] Where a transaction is set aside under s. 53 of the Transfer of Property Act, the transferee is entitled to the return of the sale price but is not entitled to the cost of defending a suit against the transferor's creditors[54] A contract also "becomes void" when a party disables himself from suing upon it by making an unauthorised alteration.[55] The advantage is not recoverable unless it has been received before the contract becomes void.[56] A mere failure to sue within the time specified by a statute of limitations does not cause a contract to become void.[57] It has been held that under the Bihar Moneylenders' Act, an unregistered moneylender cannot recover a loan advanced, as there *is* a contract, only the right to sue upon it being barred.[58]

S. 65 was held applicable in the following cases and compensation by way of restitution was claimable: Rent paid in excess of fair rent even in absence of a provision for refund of excess under a Rent Act is recoverable as compensation under s. 65[59] Where an occupancy tenancy created by a Lambardar becomes void under a subsequent statute, the consideration paid to the Lambardar is recoverable, but for breach of covenant for quiet enjoyment no damages were recoverable as the property was taken back under a statute.[60] A grant of a lease of a forest area by a third class Jagirdar in breach of the order of the Ruler of the State is void but not illegal under s. 23 as the Jagirdar has no authority to enter into that contract. The premium is therefore recoverable.[61] After a notification vesting the estate in the State but before possession was taken by the State a landlord gave to *A* the right to collect Biri leaves and received a premium and security. *A* was held entitled to recover the premiums paid and the security given from the landowner as he discovered void nature of the transaction when he received a notice from the Collector calling upon him to pay premium.[62] The High Court based the decision on the ground of incapacity of the landowner, not in respect of his person but

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49 See s. 66, *post*.
50 Citing Cunningham and Shephard's notes to s. 65.
51 *Gurdarshan Singh* v. *Bishan Singh* (1963) A. Punj. 49 (F.B.) overruled in *Raja Dhruv Chand Dev* v. *Raja Mohinder Singh* (1968) A.SC. 1024 on the question of frustration of leases.
52 *Dhurmsey* v. *Ahmadbhai* (1899) 23 Bom. 15.
53 *Labh Singh* v. *Jamnun* (1934) 15 Lah. 751; (1934) A.L. 853 (F.B.).
54 *Parasharam* v. *Sadasheo,* 1936 A.N. 268. It appears from the report that the transferee was party to the fraud of defeating and delaying creditors. If so, he was not entitled to any relief. See *Bhiku Appa* v. *Dattatraya* (1947) Bom. 156, 49 Bom. L.R. 87, 1947 A.B. 392.
55 *Anantha Rao* v. *Surayya* (1920) 43 Mad. 703; 55 I.C. 697; *Hemchand* v. *Govind,* 1925 A.N. 243; 86 I.C. 185.
56 *Wolf & Sons* v. *Dadyba Khimji & Co.* (1920) 44 Bom. 631; 58 I.C. 465; *Jagadish Prasad* v. *Produce Exchange Corporation Ltd.* 1946 A.Cal. 245, (1945) 2 Cal. 41; *Babulal Agarwala* v. *Firm Vijaya Stores,* 1955 A. Or. 49.
57 *Mahant Singh* v. *U Ba Yi* (1939) 66 I.A. 198, 207; *Vishwanath* v. *Deokabai* (1948) Nag. 50
58 *J.P. Misser* v. *B. Das* (1952) Pat. 963, 1953 A.P. 259.
59 *Somraj* v. *Jethmal* (1957) A. Raj. 392. Cf. *Krishnamurthi & Co.* v. *Sitaramayya* (1958) A.AP. 427 (Control Price).
60 *Shrinanandlal* v. *Laxman Singh* (1959) A.MP. 315.
61 *Sk. Umar* v. *Shivdan Singh* (1958) A.MP. 88.
62 *State of Bihar* v. *Dakhulal Das* (1962) A.P. 140; overruling *Dhanna Munda* v. *Mt. Kosila* (1941) A.P. 510.

in respect of property.[63] A contract to cut and remove babul trees subsequently became impossible of performance by the coming into effect of an ordinance. S. 65 was held applicable to this contract and benefits received under the contract were held returnable.[64] Similarly if a plaintiff has done work for the defendant under the belief that contract exists but the contract is a nullity he may obtain reasonable compensation in a *quasi* contract.[65]

Illegal Contracts.—If money is paid under a contract which is illegal and not merely void the general rule is that it cannot be recovered *in pari delicto*.[66]

While determining whether s. 65 Contract Act is applicable, the Court must take into account the express language of the Contract and the implied terms and the surrounding circumstances in order to find out the intention of the parties whether they intended to violate the laws at the time when they entered into the contract. The plaintiff Company wanted to expand its textile mill and entered into a contract to purchase parcels of land near the existing factory. The land could not be sold without the permission of the Government which was refused. The agreement became unenforceable after the Government's refusal and hence s. 65 became applicable and therefore earnest money was recoverable.[67]

The respondent invested Rs. 2,00,000 in the shares of the Adarsh Bima Company. This was a transaction which was against the statutes of the Company and it was the result of a fraud committed by the Managing Director on the investor respondent. After the Company was taken over by the Life Insurance Corporation of India the respondent brought a suit against the Corporation for the restoration of Rs. 2,00,000 on the ground that the contract was void and the Corporation was bound to restitute the benefit which the Bima Company had received from the respondent. The Supreme Court[68] found that under section 7(2) of the Life Insurance Corporation Act, the Corporation was bound to restitute the benefit received under the void contract entered into by the Adarsh Bima Company and that the Corporation was liable under s. 65 to restitute the benefit received under such contract and to interest from the date of the suit but not prior thereto.

The parties entered into a partnership to run a travelling cinema and the licence was in the name of one of the defendants. The plaintiff went out of the partnership and the defendants gave a promissory note for his share of the partnership capital. But the note was not paid. When the partners entered into partnership they were ignorant of its illegality and the plaintiff came to know about it when in reply to his notice of demand the defendant said that the partnership was illegal and hit by s. 23 Contract Act. In these circumstances the plaintiff was entitled[69] to recover his share of the partnership capital.

Any transaction regarding a loan prohibited by law under a statute in Maharashtra is not saved under section 65, it being illegal, the illegality flowing from the law.[70]

A contract made illegal by a statutory order cannot be enforced even when its illegality is raised by the guilty party and even when the other party honestly believed the representation of the guilty party that no breach was being committed. The contract is unlawful as being prohibited and the court must enforce the prohibition even though the person breaking it relies upon it.[71] A contract to sell foodgrains to an unlicensed dealer is void, being in contravention

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63 *Ibid*, 148.

64 *Man Singh* v. *Khazan Singh* (1961) A.Raj. 277; *Fibrosa Spolka* v. *Fairburn etc. Ltd.* (1942) A.C. 32; (1942) 2 All E.R. 122 (H.L.).

65 *Craven Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403. But see Denning: *Quantum Meruit*, 55 L.Q.R. 54.

66 Chitty on Contracts Para 1819 (24th Ed.); *Parkinson* v. *College of Ambulance Ltd.* (1925) 2 K.B.1

67 *Modern Mills Ltd.* v. *Gangadharaiah* (1973) Knt. 1093, 1096.

68 *The Life Insurance Corporation of India* v. *Rajmata Sahib Chowhanji* (1978) A.SC. 1447 (1979) 1 SCR 11.

69 *P.N. Dorairaj* v. *N.G. Rajan* (1977) A.M. 243, 246; *Ramagya Prasad* v. *Murli Prasad* (1974) A.SC. 1320; *Kuju Collieries* v. *Jharkhand Mines* (1974) A.SC. 1892; *Viswanatha* v. *Namakchand* (1955) A.M. 536; *Kanniappa Nadar* v. *Karuppiah Nadar* (1962) A.M. 240 (F.B.) reld. on.

70 *Bhaskar Rao Buty* v. *Smt. S.M.T. Saru Jadhao Rao* (1978) A.B. 322, 324; *Kuju Collieries* v. *Jharkhand Mines* (1974) A.SC. 1892; *Koteswar Vithal Kamath* v. *K. Rangappa Baliga* (1969) A.SC. 504; revd. (1964) A. Ker. 92.

71 *In re Mahmoud & Ispahani* (1921) 2 K.B. 716; (1921) All E.R. Rep. 217 reld. on in *Sivaramakrishnaiah* v. *Narhari Rao* (1960) A.AP. 186.

of the Food Control Order. Even if the foodgrains are supplied the contract would be unenforceable as being illegal and void in spite of the seller's ignorance of the buyers not being duly licensed. S. 65 also applies to contracts which attract penal consequences.[72] S. 65 applies to cases, where one of the parties is not *in pari delicto*. Such party can claim restoration even where the contract would result in penal consequences. Courts will not assist persons inducing innocent parties to enter into contracts which are void.[73] *A* purchased pipes which were subsequently found to be stolen property and were taken away by the police. To such a transaction s. 65 applies and the buyer is entitled to the return of price paid.[74]

Contracts with corporations.—At common law the contracts of corporations must in general be under seal. But to this rule of the common law there are and probably always have been exceptions.[75] One of them is where the whole consideration has been executed and the corporation has accepted the executed consideration in which case the corporation is liable on an implied contract to pay for the work done provided that the work was necessary for carrying out the purposes for which the corporation exists.[76]As a general rule but subject to certain exceptions an unsealed contract is neither enforceable by nor against a corporation. A compliance with the corporation's standing orders is not sufficient to make a contract binding on it where the law requires a seal not even where it is signed by someone authorised by standing orders.[77]

But to this rule of the common law there are some exceptions. Wherever the rule applicable would defeat the very object for creating the corporation or would occasion very great inconvenience, exception would prevail; hence retainer by parol of an inferior servant; the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal are exceptions.[78] The exception is based on the injustice of allowing a corporation to take the benefit of work without paying for it.[79] The acceptance of the highest bid at an auction of *Teh bazari* dues followed by a resolution of the Municipal Board would constitute a contract.[80]

The exception applies to trading as also to non-trading corporations,[81] and to both executed and executory contracts.[82] In the case of non-trading corporations if the subject-matter of the contract was connected with the purposes for which the corporation was established and the party claiming had performed his part of the contract, the law will imply a promise to pay for the benefit requested and received.[83] It follows therefore that an executory contract is not a common law enforceable by or against corporation (non-trading) unless it is under

72 *Sivaramakrishnaiah* v. *Narhari Rao* (1960) A.AP. 186; *In re Mahmoud and Ispahani* (1921) 2 K.B. 716; (1921) All E.R.Rep. 217 reld. on.

73 *Sivaramakrishnaiah* v. *Narahari Rao* (1960) A.AP. 186; *Sriramulu* v. *Dy. Registrar Co-operative Societies* (1957) And L.T. 607; (1957) 2 And.W.R. 226 overruled. See also *Krishna Rao* v. *Kodanda Rao* (1960) A.AP. 190.

74 *Charanjilal* v. *Hansraj* (1961) A. Punj. 437.

75 *A.R. Wright & Son Ltd.* v. *Romford Borough Council* (1956) 2 W.L.R. 896, 898; (1956) 3 All E.R. 785, 787.

76 *Lawford* v. *Billericay Rural Distt. Council* (1903) 1 K.B. 772; folld. in *Mohammad Ibrahim* v. *Port Commissioners of Chittagong,* 54 Cal. 189; (1927) A. Cal. 465; dist. in *Sitaram* v. *Corporation of Calcutta* (1956) A.Cal. 18, 22 (on the ground that the rule applies to exceptions under the Common law but not to requirements of a statute). See also *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218. (A case under s. 175(3) Govt. of India Act.).

77 *A.R. Wright & Sons* v. *Romford Borough Council* (1956) 3 W.L.R. 896, 898; (1956) 3 All E.R. 785, 787.

78 *Church* v. *Imperial Gas Light & Coke Co.* (1837) 6 Ad. El. 846, 861 (does not apply to supply of gas by a gas company); *Austin* v. *Guardians of Bethnal Green* (1874) 9 C.P. 91; *A.R. Wright & Son Ltd.* v. *Romford Borough Council* (1956) 3 W.L.R. 896, 898; (1956) 3 All E.R. 785, 787. (This case is not within the exception). See also *Chatturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.S.C.236 (Art. 299(1) of Constitution).

79 *Clarke* v. *Cuckfield Union* (1852) L.J.Q.B. 349, 351; 91 R.R. 891.

80 *Ishwar Dayal* v. *Municipal Board, Rath* (1980) A.A. 143.

81 *Wells* v. *Mayor Aldermen & Burgesses of Kingston-upon-Hull* (1875) 10 C.P. 402; *A.R. Wright and Son Ltd.* v. *Romford B.C.* (1956) 3 W.L.R. 896, 898; (1956) 3 All E.R. 785, 787. (A contract with a corporation to demolish a building rescinded, contract held not enforceable because not under seal).

82 *Church* v. *Imperial Gas Light & Coke Co.* (1837) 6 Ad. & El. 846; *A.R. Wright & Son Ltd.* v. *Romford Corporation* (1956) 3 All E.R. 785, 787.

83 *Lawford* v. *Billericay Rural Distt. Council* (1903) 1 K.B. 722; folld. in *Mohamad Ebrahim* v. *Port*

seal,[84] and exceptions to the common law rule are not applicable to cases where formalities required are prescribed by a statute.[85]

Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as, for instance, under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal, the fact that the consideration has been executed on either side does not entitle the party who has performed his part to sue the other on an implied contract for compensation. This may work hardship, but the provision of the Act being imperative and not merely directory, it must be complied with. The present section, accordingly, does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal corporation, and goods are supplied or the work done in pursuance of the contract, but the contract is requiried by the Act under which the corporation is constituted to be executed in a particular form, and it is not so executed. In such cases.[86] the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation.

The House of Lords in *H. Young & Co.* v. *The Mayor & Corporation of Lamington Spa*[87] held that sub-section (1) of s. 174 of the Public Health Act which enacts that "every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority" is obligatory and not directory and applies to executed contract of which the urban authority have had full benefit and enjoyment and which has been effected by their agent duly appointed under their common seal. In that case[88] Lord Blackburn quoted with approval the observations of Lindley L.J. in the Court of Appeal:

> "It may be said that this is a hard and narrow view of the law; but...Parliament has thought expedient to require this view to be taken, and it is not for this or any other court not to give effect to a clearly expressed statute because it may lead to apparent hardship."

And Lord Bramwell there said:

> "The Legislature has made provisions for the protection of ratepayers, shareholders and other who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer.. The decision may be hard in this case in the plaintiffs, who may not have known, the law. They and others must be taught it, which can only be done by its enforcement.[89]

Similar observations were made by Shah J. in *Bhikhraj* v. *Union of India.*[90] a case under s. 175(3) of Government of India Act of 1935:

> "But a person who seeks to contract with the Government must be deemed to be fully aware of statutory requirements as to the form...inadvertence of an officer...the other contracting party acquiescing in such isolation...will not justify the court not giving effect to the intention of the legislature, the provision having been made in the interest of the public."

Section 65 applies even to void contracts and therefore where a contract with a Municipal Committee was discovered to be void for want of consideration the defendant Collector of *Tehbazari* itself was held to be liable to account to the Municipality or to pay the dues which he had collected.[91]

Commissioners of Chittagong, 54 Cal. 189; 1927 A. Cal. 465; *Clarke* v. *Cuckfield Union Gurdians* (1852) 21 L.J.Q.B. 349; 99 R.R. 891; *A.R. Wright & Son Ltd.* v. *Romford Borough Council* (1956) 3 W.L.R. 896, 898; (1956) 3 All E.R. 785, 787; (1957) 1 Q.B. 431. (But this case was not within the exception).

84 *A.R. Wright & Son Ltd.* v. *Romford Borough Council* (1956) 3 W L.R. 896; (1956) 3 All E.R. 785; (1957) 1 Q.B. 431.

85 *Sitaram* v. *Corporation of Calcutta* (1956) A. Cal. 18, 22; *Lawford* v. *Billericay District Rural Council* (1903) 1 K.B. 772, dist. See also *Ahmedabad Municipality* v. *Sulemanji,* 27 Bom. 618.

86 *Young & Co.* v. *Corporation of Royal Leamington Spa* (1883) 8 App. Ca. 517.

87 (1882-3) 8 App. Cas. 517 (was said to be now obsolete in *State of West Bengal* v. *B.K. Mondal & Sons* (1962) A.SC. 779, 784; (1962) Supp. 1 S.C.R. 876 on the ground of change in statute in England.)

88 (1882) 8 App. Cas. 517, 522. See also Shah J. in *Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880, 903; (1962) A.SC. 113, 122 (Case under s. 175(3) Govt. of India Act).

89 *Ibid* p. 528. The wafer is the common modern substitute for a waxen seal.

90 (1962) 2 S.C.R. 880, 903; (1962) A.SC. 113, 122.

91 *Ishwar Dayal Hingwasia* v. *Municipal Board* (1980) A.A. 143; *B.C. Mohindra* v. *Municipal Board Saharanpur* (1970) A.SC. 570 reld. on.

Lack of form for making appointments by a corporation.—By the British Guiana Credit Corporation Ordinance, 1964, the following three conditions were necessary for the appointment of a General Manager:

(1) The Corporation shall appoint and employ at such remuneration and on such terms and conditions as they think fit a General Manager.... Provided that no salary in excess of the rate of 4,800 dollars per annum shall be assigned to the post "without the prior approval of the Governor in Council". (Section 6.)

(2) All documents, other than those required by law to be under seal made by... the Corporation may be signified under the hand of the Chairman or Deputy Chairman or General Manager and the Secretary. (Section 7(3)).

(3) Any... agreement or other document requiring to be executed by the Corporation... shall be deemed to be duly executed if signed by a person or persons specially or generally authorised by resolution of the Corporation so to sign. (Section 13.)

On a claim by a General Manager so appointed for damages for breach of contract of service, the Corporation contended, *inter alia,* (1) that there was no concluded contract of service; (2) that it was unenforceable through lack of proper from, not being in the form prescribed under (2) above; (3) that it was nevertheless *ultra vires* the Corporation because it had not received the prior approval of the Governor-in-Council. But the Privy Council held (1) that the contract of service had been concluded when the Corporation's Secretary authorised so to do, communicated by letter the Corporation's acceptance of the application of the General Manager.

Negotiations as a whole must be looked into to determine whether a contract has come into being. Once it has, susbequent negotiations seeking to claim better terms, will not affect the existence of the previously concluded contract.

Neither of the conditions (2) and (3) above was mandatory in form. Clause (3) above did not automatically involve that any letter signed otherwise than in accordance with clause (2) was a nullity.

The contract was not *ultra vires* the Corporation because the provision referred to a salary to the post, and not to each individual holder. Once a salary assigned to a post had been approved by the Governor-in-Council the same salary could be paid to a subsequent incumbent without further approval.[92] The decision in *Young's case* has been followed by the High Courts of Allahabad[93] and Calcutta.[94] It was quoted with approval by the Supreme Court where it was held that a contract of letting of premises by the Municipality cannot, in the absence of formalities required by the statute for formation of contracts, be created by a rent receipt to the tenant.[95] A full Bench of the Madras High Court mentioned this case and interpreted it by saying "the ratio of the decision is the negation of the contract when the formalities have not been complied with. Such a contract cannot be enforced by either party".[96]

In the Allahabad case

the plaintiff had supplied to the defendant municipality stone ballast for metalling the municipal roads in accordance with his tender, which had been accepted, but the contract was not in writing and signed as required by the Municipal Act.[97] The plaintiff sued the municipality for the value of the materials supplied,[98] and for damages for refusing to accept delivery of the rest of the ballast.

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92 *British Guiana Credit Corporation* v. *Clement Hugh Da Silva* (1965) 1 W.L.R. 248 (P.C.).

93 *Radha Krishna Das* v. *Municipal Board of Benares* (1905) 27 All. 592.

94 *Mathura Mohan Saha* v. *Ram Kumar Saha* (1916) 43 Cal. 790, 814, *seq;* 35 I.C. 305. *Mohamad Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (1926) 54 Cal. 189, 210, *sqq.;* 103 I.C. 2; 1927 A. Cal. 465; *Sitaram* v. *Corporation of Calcutta* (1956) A. Cal. 18 (in spite of part performance).

95 *Dr. H.S. Rikhy* v. *New Delhi Municipal Committee* (1962) 3 S.C.R. 604; (1962) A.SC. 554. On app. from (1956) A. Punj. 181. See *Madura Municipality* v. *Alagirisami Naidu* (1939) Mad. 928; (1939) A.M. 957.

96 *Corporation of Madras* v. *Kothandapani Naidu* (1955) A.M. 82, 87.

97 N.W.P. and Oudh Municipalities Act XV of 1883, s. 40, and Local Act No. 1 of 1900. s. 47. Both Acts have been repealed. See now the U.P. Municipalities Act, 1916.

98 The Municipality had in this case paid the plaintiff for a part of the ballast supplied to them and as to

He was held not entitled to recover; the contract, not having been committed to writing and signed as required by the Municipalities Act, could not form the basis of any suit against the municipality, notwithstanding that ballast was supplied in pursuance of it. It was also held that the section did not apply, as the case was not one where the agreement was "discovered to be void," or had "become void," within the meaning of the section. This decision is in obvious conflict with a prior decision of the High Court of Bombay already cited and considered on another point.[99] The Bombay case was the converse of the Allahabad case, the plaintiff being the municipality and the other party to the contract the defendant.

In that case the Municipality of Trimbak granted to the defendant the right of levying and collecting certain tolls for a period of fourteen months, for which the defendant agreed to pay to the municipality Rs. 15,001. The contract was required by the Bombay District Municipal Act.[1] to be sealed with the seal of the municipality, but it was not so sealed. The defendant levied and collected the tolls and paid part of the agreed amount, but failed to pay the balance, for which the municipality sued him. The defence was (1) that the municipality had dispensed with payment of the balance, (2) that the contract, not being under seal, was unlawful within the meaning of s. 23, as, if enforced, it would defeat the provision of the Act, and that it could not therefore be enforced against the defendant; though the consideration had been executed for his benefit.

The defence failed on the first point, as we have seen above on s. 63, and on the second point on the ground thus stated in the judgment:

"It is a well recognised law in England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration an action will lie, though this formality has not been observed. Notwithstanding s. 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think, when regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of s. 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract."

But, as the Allahabad High Court said in *Radha Krishna Das's case.*[2]

"According to the ruling of the House of Lords to which we have referred, an action will not lie in England against a corporation which is governed by an Act such as the Public Health Act of 1875 in the absence of a sealed contract, even though there is an executed consideration."

The reference to s. 23 of the Contract Act seems to be irrelevant. If the plaintiff was disabled from suing, it was by the Bombay District Municipal Act, and the real question was whether that Act was imperative and not subject to any implied exception in a case where the consideration had been executed in favour of the municipality. As the municipality cannot be sued upon a contract which is required to be, but which is not under seal, though the consideration has been executed for its benefit, so it cannot sue upon the contract, though it has performed its own part of the contract so that the other party has had the benefit of it.[3] In *Mohammad Ebrahim Molla* v. *Commissioners for the Port of Chittagong*[4] the Commissioners for the Port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract with him. The contract was not under seal as required by s. 29 of the Chittagong Port Act, 1914. It was held that the Act was imperative in its terms and that the plaintiffs could not sue on the contract. It was held at the same time that the plaintiffs were entitled to payment upon a *quantum meruit.*[5] The Court of Appeal in *Craven*

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another part supplied to them they deposited Rs. 1,094 in Court, as the plaintiff claimed more. The rest of the ballast was not accepted as being of inferior quality.

99 *Abaji Sitaram* v. *Trimbak Municipality* (1903) 28 Bom. 66, see notes on s. 63, "Remission of performance", above. But the remarks were only *dicta,* see *Municipality of Sholapur* v. *Abdul Wahab* (1920) 45 Bom. 797, 804; *Municipal Corporation, Bombay* v. *Secretary of State* (1934) 58 Bom. 660, 702. Also, it seems, with *Lucknow Municipal Board* v. *Debi Das* (1926) 1 Luck. 444; 99 I.C. 643; 1926 A.O. 388, but the report is confused.

1 Bombay Act II of 1884, s. 30, repealed; see now Bombay Act III of 1901.

2 (1905) 27 All. 592, at p. 600.

3 *Raman Chetti* v. *Municipal Council of Kumbakonam* (1907) 30 Mad. 290; *South Barrackpore Municipality (Chairman of)* v. *Amulya Nath Chatterjee* (1907) 34 Cal. 1030; 35 I.C. 305; *Mohamad Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (1926) 54 Cal. 189, 210 *et. seq.;* 103 I.C. 2; 1927 A. Cal. 465.

4 (1927) 54 Cal. 189; 103 I.C. 2; 1927 A. Cal. 465.

5 *Infra,* s. 70.

Ellis v. *Canons Ltd.*[6] allowed payment on *quantum meruit* where the contract was ineffective for want of seal and services were rendered to a company and there was implied acceptance by the latter.

Two of the English cases cited[7] in *Chittagong case*[4] lay down that where the provision of a statute as to the form of a contract is not imperative—but there only—either party may sue the other on an implied contract to pay for work done. It appears from the report of this case that counsel for the defendant (who was the appellant before the Court) himself conceded that the plaintiffs were entitled (though not in that suit) to some compensation for the use of the tug. It is submitted that both counsel and the Court were in error in thinking that the plaintiffs were entitled to recover *quantum meruit*. No question of payment upon a *quantum meruit* can arise where an Act is imperative.

Quantum Meruit.—*Quantum Meruit* is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation under a contract cannot be displaced by assuming that stipulation is not reasonable. Compensation *quantum meruit* is awarded for work done or services rendered when price thereof is not fixed by contract. For work done or services rendered pursuant to the terms of a contract, compensation *quantum meruit* cannot be awarded when the contract provides for the consideration payable in that behalf.[8] *Quantum meruit* is a remedy which is alternative to, rather than a form of, damages. It is a right *dehors* a contract, a *quasi* contractual right and not a contractual one. It is an incident of, and not a remedy for, the breach of a contract.[9]

Quantum Meruit and Damages.—Damages are compensatory and *quantum meruit* is restitutory. The amount which any injured party is entitled to recover may differ according as it is assessed on one or the other of these two principles.[10] In *Ram Nagina Singh* v. *Governor General*[11] the Calcutta High Court held section 65 as "compensatory in principle" and "for prevention of unjust enrichment". In the case of repudiation of the contract, where the injured party sues upon the contract he refers to its terms at least in order to ascertain the damages. In the case of *quantum meruit*, he is not proceeding under the contract but upon *quasi* contract. The obligation he incurs and the sum he recovers may differ from those provided in the contract and are not dependent upon its terms.[12] A *quantum meruit* claim arises where work is done or services performed by one person for another in circumstances which entitled the person doing the work or performing the services to receive a reasonable remuneration thereof.[13]

If no price for goods sold has been fixed the law will imply a reasonable price to be paid dependant upon the peculiar circumstances of the case.[14]

Similarly, if no scale of remuneration is fixed in a contract for work to be done, the law imposes an obligation to pay a reasonable sum (quantum meruit).[15]

Quantum meruit and partnership.—A partner employed his sons in the business of the partnership and credited certain sums of money to them as compensation for services

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6 (1936) 2 K.B. 403; (1936) 3 All E.R. 1066. See also *Corporation of Madras* v. *Kothandapani Naidu* (1955) A.M. 82 (F.B.); *Municipal Council, Tiruvarur* v. *Kannuswami Pillai* (1930) A.M. 600; 53 Mad. 352 *(Obiter)*.

7 *Lawford* v. *Billericay Rural District Council* (1903) 1 K.B. 773; *Douglas* v. *Rhyl Urban District Council* (1913) 2 Ch. 407.

8 Per Shah J. in *Alopi Parsad* v. *Union of India* (1960) 2 S.C.R. 793, 809; (1960) A.SC. 588, 593; *Smith* v. *Hartshorn* (1960) S.R. (N.S.W.) 391, 395; *B.N. Elias & Co.* v. *State of West Bengal* (1959) A. Cal. 247; relying upon *Union of India* v. *Ram Nagina Singh,* 89 Cal. L.J. 342; Contra *Ramakrishna* v. *Rangoobai* (1959) A.B. 519 (submitted it is erroneous). See p. 485; *Puran Lal Sah* v. *State of U.P.* (1971) 3 S.C.R. 469; (1971) A.S.C. 712; (1971) 1 S.C.C. 424.

9 Anson: Law of Contract (22nd Ed.), p. 510; (24th Ed.), p. 555

10 *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 398; (1942) 1 All E.R. 337. Anson: Law of Contract (22nd Ed.), p.511 (24th Ed.), p. 555. *Jagdish Prasad* v. *Produce Exchange Corporation* (1945) 2 Cal. 41; (1945) A. Cal. 245 *Puran Lal Shah* v. *State of U.P.* (1971) A.SC. 512; See n. 30 *Alopi Parsad's Case.*

11 (1952) A. Cal. 306 (Sinha J.) on appeal 89 Cal. L.J. 346. See also *Jagdish Prasad* v. *Produce Exchange Corporation* (1945) 2 Cal. 41; (1946) A. Cal. 245.

12 *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 399; (1942) 1 All E.R. 337, 360.

13 *Smith* v. *Hartshorn* (1960) S.R. (N.S.W.) 391, 395.

14 *Foley* v. *Classique Coaches Ltd.* (1934) 2 K.B.1.

15 *Way* v. *Latilla* (1937) 3 All E.R. 759; H.L.; *William Lacey Honslow Ltd.* v. *Davis* (1957) 1 W.L.R. 932. Chitty: On Contracts (24th Ed.) para 1892.

rendered. At the time of the dissolution he claimed more sums of money for their services. It was held that the sons were eligible for reasonable remuneration on the principle of *quantum meruit* even though there was no agreement or order of the partnership available.[16]

Jaganmohan Reddy J. has explained this principle thus:

"The principle of *quantum meruit* is rooted in English Law under which there were certain procedural advantages in framing the action for compensation for work done. In order to avail of the remedy under *quantum meruit* the original contract must have been discharged by the defendant in such a way as to entitle the plaintiff to regard himself as discharged from any further performance and he may have elected to do so. The remedy, it may be noticed, is not available to the party who partially performed part of his obligation. This remedy by way of *quantum meruit* is restitutory, that is, it is recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this regard it is different to a claim for damages which is compensatory remedy aimed at placing the injured party as never as may be the position he would have been in had the other party performed the contract.[17]

Conditions for applicability of Quantum Meruit.—A *quantum meruit* is only available if the original contract has been discharged. If the contract is still "open" the remedy of *quantum meruit* cannot be used but only damages can be claimed.[18] It is unavailable to the plaintiff if there is a contract, though unenforceable on foot.[19] But a claim must be brought by a party not in default.[20]

The term *quantum meruit* is also used where the parties have not performed the terms of the contract, but it can be inferred from their conduct that they have tacitly agreed to substitute another contract for the first one.[21]

In *Steven* v. *Bromley & Sons* the facts were summarised by Bankes L.J. by saying "When the charterers tendered a cargo which was outside the charterparty and for which no rate of freight had been agreed, the inference is justified that they made an offer to the owners to pay a reasonable rate if the cargo were accepted for carriage"[22]

The principle of *quantum meruit* may allow recovery of a reasonable sum as additional remuneration for extra work done by a building contractor.[23]

Quantum meruit is a quasi contract and arises in a sense on an implied contract and not on any express agreement but in the circumstances of some cases it may arise out of the contract. It is not a remedy for a breach nor does it arise on frustration, but it is an incident, which does arise as a consequence of the contract or "arising out of" it.[24] The fact that a person does the work under an agreement which was in fact void, does not disentitle him from recovering on a *quantum meruit*. The obligation to pay reasonable remuneration for work

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16 *Shelat Bros.* v. *Nand Lal Harilal* (1973) A.M. 78

17 *Puranlal Shah* v. *State of U.P.* (1971) 3 SCR 469; (1971 ASC 712, 715; *Alopi Parshad & Sons Ltd.* v. *Union of India* (1960) 2 SCR 793, 809; (1960) ASC 588, 595 quoted.

18 *Planche* v. *Colburn* (1831) 5 C. & P. 58; (1831) Bing. 14, 16 (Stoppage of a publication after the plaintiff had completed a part of the work undertaken by him); *De Bernady* v. *Harding* (1853) 8 Ex. 822 (An agent appointed to sell tickets for seats to see a funeral and the agency was wrongfully terminated); *Craven Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066 (Appointment of *P* as estate agent was defective as both *P.* & appointing directors were not qualified though *P*'s appointment was otherwise *infra vires* of the Co.); *State of Madras* v. *Madras Electric Tramways Ltd.* (1957) A.M. 169; *Vanjeeswara* v. *Distt. Board South Arcot* (1941) A.M. 169; *Lukose* v. *Uthuppan* (1957) A. Ker. 19; *Bhikraj* v. *State of Bihar* (1964) A.P. 555, 559; *Smith* v. *Hartshorn* (1906) S.R. (N.S.W.) 391.

19 *Smith* v. *Hartshorn* (1960) S.R. (N.S.W.) 391, 392; *James* v. *Kent* (1951) 1 K.B. 551.

20 Anson: The Law of Contract; *Puran Lal Sah* v. *State of U.P.* (1971) A.SC. 712, 715, (1971) 3 S.C.R. 469.

21 Chitty: On Contracts (24th Ed.) para 1893.

22 (1919) 2 K.B. 722, 726.

23 *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioner of Works* (1949) 2 K.B. 632; (1950) 1 All E.R. 208; cf. *Gilbert & Partners* v. *Knight* (1968) 2 All E.R. 248.

24 *Government of Gibralter* v. *Kenney* (1956) 3 W.L.R. 466; (1956) 3 All E.R. 22, 26 (case of arbitration where the claim by the plaintiff a surveyor was for a *quantum meruit* the agreement having ceased to be applicable to the plaintiff's services); *Cf. Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 809; (1960) A.S.C. 588, 593.

done when there is no binding contract is imposed by a rule of law and not by an inference of fact from acceptance of the services (per Greer L.J.).[25] The case of *Craven Ellis* v. *Canons Ltd.*[26] was this;

The plaintiff and two others without the requisite qualification purported to act as directors of the defendant company. The plaintiff purported to act under an agreement with the company as its Managing Director on terms therein defined. He then sued for remuneration. The agreement was held not binding on either party but the plaintiff was held entitled to recover on a *quantum meruit*. The Court of Appeal held that the plaintiff was entitled to recover on a *quantum meruit* since the company through qualified Directors or through the shareholders had accepted the benefit of the plaintiff's services.[27]

Greer L.J. said:

"The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by rule of law and not by an inference of fact from the acceptance of services or goods"

thus showing that the obligation is merely *quasi* contractual.[27]

When an innocent party learns that the object of the contract is illegal, the innocent party although he must refuse to continue the performance of the contract may sue on a *quantum meruit* for the lawful work already done.[28]

The Supreme Court in a case of a building contract said:

A claim for *quantum meruit* is a claim for damages for breach of contract and the value of materials used in a building contract is a factor relevant only as furnishing a basis for assessing the amount of compensation. That is to say, the claim is not for price of goods sold and delivered but for *damages*. That is also the position under section 65 of the Indian Contract Act.[29]

This it is submitted goes counter to accepted view of this doctrine.[30]

If a party to a contract renders service to the other not intending to do so gratuitously and the other party has obtained benefit thereof, he is entitled to compensation for the value of services rendered by him. If the former fails to prove an oral agreement, compensation *quantum meruit* can be awarded.[31]

In *Alopi Parshad's case*[32] dealing with *quantum meruit* the Supreme Court observed—

"Compensation *quantum meruit* is awarded for work done or services rendered when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract compensation *quantum meruit* cannot be awarded where the contract provides for consideration payable in that behalf."

In *Puran Lal Sah* v. *State of U.P.*[33] the Supreme Court said that where work is done under a contract pursuant to the terms thereof, no amount can be claimed by way of *quantum meruit*. The remedy is a recompense for the value of the work done by the party in order to restore him to the position which he would have been in, if the contract had never been entered into. In this regard it is different to a claim for damages which is a compensatory remedy aimed at placing the injured party as near as may be in the position which he would have been in had the other party performed the contract.

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25 *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066 (C.A.); *William Lacey (Hounslow) Ltd.* v. *Davis* (1957) 1 W.L.R. 932, 936; *Lawford* v. *Billericay R.D.C.*, (1903) 1 K.B. 772 (a case of a contract not under seal and remuneration for work done); Denning: Quantum Meruit, 55 L.Q.R. 54. Section 65 of Indian Contract Act.

26 (1936) 2 K.B. 403; (1936) 2 All E.R. 1066. Stoljar: The Law of Quasi Contract (1964).

27 *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066.

28 *Clay* v. *Yates* (1856) 1 H&N. 73; 108 R.R. 461.

29 *State of Madras* v. *Gannon Dunkerley & Co. Ltd.* (1959) S.C.R. 379, 423; (1958) A.S.C. 560, 577.

30 *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793, 809; (1960) A.SC. 588, 593; *Puran Lal Sah* v. *State of U.P.* (1971) A.SC. 712, 715-16; *Heymans* v. *Darwins Ltd.* (1942) A.C. 356, 398; (1942) 1 All E.R. 337.

31 *V.R. Subramanyam* v. *B. Thayappa* (1961) 3 S.C.R. 663; (1966) A.S.C. 1034; (1961) 1 M.L.J. 30; *Gangapathi Pillai* v. *Irudayaswamy Nadar* (1962) A.M. 345; *Venkataswami* v. *Narasayya* (1965) A.A.P. 191, 195; *Pallanjee Eduljee* v. *Lonavala City Municipality*, 37 Bom. 782; 1937 A.B. 417; *Mohammad Ebrahim* v. *Commissioners of Port Trust*, 54 Cal. 189; 1927 A. Cal. 465; *Smith* v. *Hartshorn* (1960) S.R. (N.S.W.) 391, 395.

32 *Alopi Parshad & Sons Ltd.* v. *Union of India* (1960) 2 SCR 793; (1960) A.SC. 588, 595.

33 (1971) A.SC. 712, 716.

In the Indian Law of Contract there is nothing which justifies the view that a change in circumstances outside the contemplation of parties at the time of making the contract, while holding the parties bound by the terms of the contract, will justify the parties in departing from the express terms thereof. Nor can a party claim rates different from stipulated rates on the basis of *quantum meruit* that is just and reasonable. The Indian Contract Act does not allow a party to ignore the express terms of a contract and claim on the vague plea of equity.[34]

The Patna High Court[35] has held that the principle of *quantum meruit* is based on a *quasi* contract which arises in a sense of implied contract and not express contract. When a party has wholly or partially performed his obligation, he may sue upon *quantum meruit* neglecting the contract but without neglecting the contract or repudiating, it, the principle of *quantum meruit* cannot be invoked. But where the rate for the finished goods is expressly included in the contract and the parties expressed their extra claim on the contract the principle of *quantum meruit* does not apply.

In *Gonda Municipality* v. *Bachchu*[36] a full bench considered the applicability of s. 65 to a case where there was sanction of the municipality and goods had been delivered to the contractor but there was lack of formalities in the making of the contract. One of the judges did not apply *Young's case*[37] and applied s. 65; another Judge agreed with him. Agarwala J. drew a distinction between capacity to enter into a contract and formalities necessary to the making of the contract and held that *Young's case* applied to the former and not to the later and therefore s.65 was applicable not to cases of capacity but cases of non-observance of formalities. The two other judges agreed with Agarwala J. thus making s. 65 inapplicable where the corporation lacked capacity and not where there was non-observance of formalities. A more frontal attack upon *Young's case*[37] has been launched by the two minority judges in the *Gonda case*[36] in Assam,[39] Bombay,[40] Calcutta,[41] and Madras.[42] In a later case it was again held in Calcutta that a contract with a municipality not in accordance with the form prescribed by statute—not in writing, signed and sealed—is invalid but if the other party has performed his part of the contract, he is entitled to restitution under s. 65 of the Contract Act by way of compensation.[43] In a *Rajasthan case,* a Municipal Committee borrowed money from the plaintiff and agreed to pay interest thereon but no document in conformity with the requirements of law was executed. To this agreement which was void *ab initio* s.65 was held applicable.[44]

Quantum meruit for work done where the contract is terminated by breach.—In *Planche* v. *Colburn*[45] the plaintiff was engaged to write a book for the defendant's proposed series. After the plaintiff had finished a part of it the defendants abandoned the whole project and it

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34 *State of Rajasthan* v. *Motiram* (1973) A. Raj. 223, 231; *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioner of Works* (1950) All E.R. 208 explained; *Alopi Parshad & Sons Ltd.* v. *Union of India* (1960) 2 S.C.R. 793; (1960) A.SC. 588 reld. on.

35 *M/s Patel Engineering Co. Ltd.* v. *Indian Oil Corporation Ltd.* (1975) A.P. 212, 219; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, 399; (1942) 1 All E.R. 337, 360 appld; *Alopi Parshad & Sons Ltd.* v. *Union of India* (1962) SCR 793; (1960) A.SC. 588 reld. on.

36 *Gonda Municipality* v. *Bachhu* (1952) 1 All 825; (1951) A.A. 736 (F.B.). This is the complete antithesis of *Radhakishan Das* v. *Municipal Board, Benaras* (1905) 27 All. 592 & of *Municipal Board, Agra* v. *Babu Ramlal,* 58 All. 1069, 1072; (1936) A.A. 723.

37 (1883) 8 App. Ca 517.

39 *Dharmeswar* v. *Union of India* (1955) A. Asm. 86.

40 *Pallonjee & Sons* v. *Lonavala Municipality* (1937) Bom. 872; (1937) A.B. 417.

41 *Ram Nagina* v. *Governor-General in Council* (1952) A. Cal. 306, on app. 89 Cal. L.J. 346; *Akhoy Kumar* v. *Municipal Commissioners of Tollygunge Municipality* (1942) 46 C.W.N 393 folld. in *Ranendra Nath* v. *Dhuliyan Municipality* (1956) A. Cal. 203. But see *Anath Bandhu* v. *Dominion of India* (1955) A. Cal. 626, which supports the view of the learned authors.

42 *Arunachala* v. *Srivilliputtur M.C.,* 58 Mad. 65, (1934) All. 480; *Madura Municipality* v. *Alagirisami* (1939) Mad. 928, (1934) A.M. 957; *Mohammed Rowther* v. *Tinnevelly Municipal Council* (1938) A.M. 746 (A Full Bench left the point open in *Madras Corporation* v. *Kothandapani Naidu* (1955) A.M. 82, 83-4).

43 *Ranendra Nath* v. *Dhuliyan Municipality* (1956) A. Cal. 203; *Ram Nagina Singh* v. *Governor General* (1952) A. Cal. 306, 315; on app. 89 Cal. L.J. 346 and *Akshoy Kumar Bannerjee* v. *M.C. Tollygunge,* 46 C.W.N. 393 folld.

44 *Kishangarh Municipality* v. *M.K. Mills Ltd.* (1961) A. Raj. 6; *Craven-Ellis* v. *Canons Ltd.* (1950) K.B. 403, where Greer L.J. applied the principle of obligations arising *quasi ex contractu.*

45 (1831) 8 Bing. 14.

was held that the plaintiff might, without tendering his completed work, sue to recover reasonable remuneration for his work already done. In *Prickett* v. *Badger*[46] an agent was employed to sell land at a certain price and he found a purchaser. The owner refused to sell and revoked the agent's authority. The agent successfully sued for reasonable remuneration for his work and labour upto that date.

The position of such an agent was fully considered by the House of Lords in *Luxor (Eastbourne) Ltd.* v. *Cooper.*[47]

Luxor's case (1941) A.C. 108[48] In that case the appellant Companies wishing to sell some property agreed to pay to the respondent a commission on the completion of the sale to any purchaser. He did introduce a willing and able buyer. But the Companies then determined to effect the transaction they had in mind by a sale of shares of the Company and not to proceed with the sale of property. It was contended by the respondent that there ought to be implied in the agreement with the respondent a term to the effect that the Companies will not without just cause so act as to prevent the respondent from earning his commission. It was held that there was no such implied term that the vendor will not refuse to go on with the proposed sale as long as the matters were still in negotiation as no binding contract had been made between the vendor and purchaser. There was therefore no breach of contract by the companies and they were not liable to the defendant in damages. The question of just cause or reasonable excuse did not arise.

Ratification.—Such contracts, i.e. not conforming to statutory formalities, being null and void cannot be ratified.[49] It was held in an English case that where the corporation takes the benefit of a contract made in a regular manner, though not *ultra vires* of the corporation itself, the adoption will amount to ratification.[50] The Supreme Court in *Chaturbhuj's case*[51] observed that a contract not conforming to s. 175(3) Government of India Act was capable of being ratified. But in later cases it has, it is submitted, rightly held that such contracts being void cannot be ratified and the doctrine of estoppel is not applicable *Chaturbhuj's case* was not referred to.

Estoppel.—There can be no estoppel against a corporation in a case where it enters into a contract which is not in accordance with the requirements of a statute providing for formalities for making contracts.[52]

Where a contract which fails to comply with the statutory formalities is only executory, neither party can enforce performance against the other.[53]

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46 (1856) 1 C.B. (N.S.) 296; disting by W.C. *Luxors Case.*

47 (1941) A.C. 108, 140-141; (1941) 1 All E.R. 33, 37.

48 *Luxor (Eastbourne) Ltd. (In Liquidation) & others* v. *Cooper* (1941) A.C. 108, 140-141; (1941) 1 All ER. 33, 37; (1939) 4 All E.R. 411 (C.A.) reversed; *Trollope (George) & Sons* v. *Martyn* (1934) 2 K.B. 436; *Trollope (George) & Sons* v. *Caplan* (1936) 2 K.B. 382 overruled; *Bentall Horsley & Baldry* v. *Vicary* (1931) 1 K.B. 253. approved; *Prickett* v. *Badger* (1856) 1 C.B. (N.S.) 296 disting.

49 *Sitaram* v. *Corporation of Calcutta* (1956) A.Cal. 18; *Ezekiel & Co.* v. *Annoda Charan Sen* (1923) A.Cal. 35 reld. on; *Bhikraj* v. *State of Bihar* (1964) A.P. 555 (a contract under s. 175(3) Government of India Act); *Ashbury Railway Carriage Co.* v. *Riche* (1874-5) 7 H.L.Cas. 653, 673; *Madura Municipality* v. *Alagirisami Naidu* (1939) Mad. 928; (1939) A.M. 957; see also cases under s. 175(3) Govt. of India Act. But see *Brooks, Jenkins & Co.* v. *Torquay Corpn.* (1902) 1 K.B. 601 (where such a contract was held to be capable of ratification after partial execution thereof. It must be confined to its own facts). See *infra* s. 70.

50 But see *Smith* v. *Hall Glass Co.* (1852) 11 C.B. 897; *Re Bonell's Telegraph Co. Collies Claim* (1871) 12 Eq. 246, 249; See also *Brooks Jenkins & Co.* v. *Torquay Corporation* (1902) 1 K.B. 601, 607.

51 *Chaturbhuj Vithaldas* v. *Moreshwar* (1954) SCR 317; (1954) A.SC. 236, 243; *Mulamchand* v. *State of Madhya Pradesh* (1968) 3 SCR 214; (1968) A.SC. 1213, 1222; *Seth Bikhraj Jaipuria* v. *Union of India* (1962) 2 SCR 880; (1962) A.SC. 113; *State of West Bengal* v. *B.K. Mandal* (1962) Supp. 1 S.C.R. 876; (1962) A.SC. 779; *Bengal Coal Co.* v. *Union of India* (1971) 2 Cal. 42; (1971) B. Cal. 219; *Union of India* v. *A.L. Rallia Ram* (1963). But see *Motilal Padampat Sugar Mills Ltd.* v. *State of UP.* (1979) A.SC. 621, 635, 640, where the Supreme Court has held that Art. 299 does not apply in the case of promissory estoppel.

52 *Dr. H.S. Rikhy* v. *New Delhi Municipal Committee* (1962) 3 S.C.R. 604, 621; (1962) A.SC. 554, 561; *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; Cf. *State of West Bengal* v. *B.K. Mandal & Sons* (1962) 1 Supp. S.C.R. 872, 912; (1962) A.SC. 779, 794; see also *Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880, 903; (1962) A.S.C. 113, 122. See *infra* under s. 70, Sub Nomine Ratification & Estoppel.

53 *Ahmedabad Municipality* v. *Sulemanji* (1903) 27 Bom. 618.

Contract cannot control statutory powers of Government.—During the period of an agreement between the State and a certain firm for distribution of salt, which was then a controlled commodity, the Government decontrolled it and the firm suffered a loss thereby. In a suit for recovery of damages for breach of contract by the firm, it was held that a contract could not control the statutory powers of the Government to control or decontrol nor could the matter fall within s. 65 of the Contract Act as Government derived no benefit from the agreement assuming it was a contract.[54]In the *Union of India* v. *Anglo-Afghan Agencies*[55] which was a case involving consideration of an export promotion scheme the import quota was reduced without an opportunity being given to the respondent. The Supreme Court held that if import policy was executive in character the court could compel the performance of the obligation imposed by the scheme upon the authorities, i.e. full entitlement under the scheme. The Union relied on *Rederiaktiebolaget Amphitrite* v. *R.*[56] The Supreme Court held the observation in the case as too wide and cited with approval the observations of Denning J. in *Robertson* v. *Ministry of Pensions*[57] that the Crown could be bound by an estoppel. The Court also rejected the argument that to enforce the policy on the Government would amount to enforcing contractual right without conforming to the requirements of Art. 299 because the respondents were not seeking to enforce a contractual right but an equity arising in their favour consequential upon their carrying out their part of the policy. A contract by the Crown which fetters its executive powers is unenforceable in a court of Law[58] nor can it hamper its freedom in matters which concern the welfare of the State.

The plaintiff acting on certain assurances given by the military authorities opened a club for the use of the Armed Services of the Crown in the Island of Malta during the Second War. It was placed out of bounds. The plaintiff claimed damages for loss of profits contending there was an implied contract for the Club to be allowed to run during the duration of the War.

It was held that the Crown could not bind itself not to close the Club in the public interest.[59]

"Any person".—The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage.[60] A *sajadanishin* leased the property of a *kankah* and received *nazarana* for the same. Thereafter a Receiver was appointed who avoided the lease. The lessee was held entitled to recover the *nazarana* from the Receiver on the ground that the *kankah* had benefited from the *nazarana* and the person in charge of the *kankah* estate was bound to restore the advantage received.[61]

Limitation.—In two cases[62]the Privy Council held that in the absence of special circumstances the time at which the agreement is discovered to be void within s. 65 is the date of the agreement. But in *Mt. Basso Kuar* v. *Lala Dhum Singh*[63] it was held that where an agreement is discovered to be void the period of limitation for a suit for restoration of "advantage" under s. 65 runs from the date of such discovery.

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54 *Barada Kanta* v. *State of Assam* (1956) A.Asm. 23. See *F. Babu Munir Ghulam Sadiq* v. *N.W.F. Province* (1955) 1 F.C.R. (Pak.) 144 (contract fettering Executive powers of the Crown not enforceable) relying on *Antonio Buttigieg* v. *Cross* (1947) A.PC. 29; & *Rederiaktiebolaget Amphitrite* v. *R.* (1921) 3 K.B. 500, held to be too wide in *Union of India* v. *Anglo-Afghan Agencies* (1968) A.SC. 718, 722.

55 (1968) A.SC. 718; referring to *Ramchand Jagdishchand* v. *Union of India* (1962) 3 S.C.R. 72, 80; (1963) A.SC. 563; *Prabhudas* v. *Union of India* (1966) A.SC. 1044; & *Controller* v. *Aminchand* (1966) 1 S.C.R. 262; (1966) A.SC. 478.

56 (1921) 3 K.B. 500.

57 (1949) 1 K.B. 227, 231; (1948) 2 All E.R. 767.

58 *Rederiaktiebolaget Amphitrite* v. *R.* (1921) 3 K.B. 500; folld. in.

59 *Antonio Buttigieg* v. *Cross* (1947) A.PC. 29; *Adams* v. *London Motor Coach Builders* (1921) 1 K.B.495 refd. to. Both cases reld. on in *F. Babu Munir Ghulam Sadiq* v. *N.W.F. Province* (1955) 1 F.C.R. (Pak) 144 (where the contract alleged was not to acquire a dehydration plant during the period of the War).

60 *Girraj Baksh* v. *Kazi Hamid Ali* (1886) 9 All. 340, 347..

61 *Devi Prasad* v. *Mehdi Hasan* (1939) 18 Pat. 654; 186 I.C. 674; 1940 A.P. 81.

62 *Hans Raj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co.* (1933) 60 I.A. 13; 54 All. 1067; (1933) A.PC. 63; *Annada Mohan Roy* v. *Gour Mohan Mullick,* 50 I.A. 239; (1923) A.PC. 189.

63 *Mussamat Basso Kuar* v. *Lala Dhum Singh,* 15, I.A. 211, 219. See also *Harnath Kuar* v. *Indar Bahadur Singh,* 50 I.A. 69, 76 (where limitation began when the right or true nature of the rights was discovered when demand for possession was made).

The respondent in that case being in debt to the appellant agreed to convey certain property to him, setting off the debt against part of the price. No money was paid. Disputes arose about terms of the agreement. The respondent unsuccessfully sued to enforce it. Being afterwards sued for his debt, he pleaded limitation.

The Privy Council held[63] that the agreement became wholly ineffectual and was discovered to be so when the respondent failed in the High Court. The advantage which was received by the respondent under the agreement was the retention of the debt. Therefore, by s. 65 of the Contract Act, he became bound to pay his debt on the date the decree was given in his favour and against the appellant.

"Received any advantage".—This, it is submitted, does not include a case where a plaintiff has abandoned an entire contract and left unfinished work—buildings on the defendant's land, for instance—in such circumstances that the defendant cannot help keeping it; for here, in English law, there is nothing to show a fresh contract to pay the actual value of what has been done, as there would be if the defendant had kept goods which he might have returned;[64] and no reason appears why the same principle should not hold in India.

In England, where a contract becomes impossible of performance by the destruction of the subject-matter or the failure of an event or state of things contemplated as the foundation of the contract to happen or exist (see on s. 56 above) the rule, as laid down by the Court of Appeal in 1904, was that not only where the parties excused from further performance[65] but that they acquired no rights of action, so that each must bear any loss or expense already incurred, and could not recover back any payment in advance.[66] This was not the law in India. The present section appears to include such cases so far as they fall within s. 56, and not to lay down any special rule with regard to them. It would seem, therefore, that the general rule of this section applies to such cases, and that each party is bound to return any payment received.[67] Even in England, the House of Lords in the *Fibrosa Case*[68] overruled the Court of Appeal decision in *Chandler* v. *Webster,*[69] and held that advance payments were recoverable, provided there had been a total failure of consideration.[70] The learned authors expressed the view that justice could most nearly be done by treating such payments as returnable, but allowing to either party compensation for anything reasonably done by him towards performance, whether the other party actually derived any advantage from it or not, but considered that the Indian rule would not yield this result unless the Courts were prepared to take the bold step of applying s. 70 to acts done under an express contract at the time subsisting.[71] An English statute, the Law Reform (Frustrated Contracts), Act, 1943, has modified the rule laid down in the *Fibrosa Case* in many respects, and achieved a solution similar to that advocated by the learned authors, but certain types of contract are expressly excluded from its operation.

Burden of Proof.—A party claiming the restoration, after a contract has become void, of any advantage received, must prove the value of that advantage. In *Govindram* v. *Edward Radbone,*[72] the defendant had contracted to purchase machinery from Germany, and the German firm had agreed to send a technician to India to set up the machinery. The greater part of the machinery had arrived in India, and rather more than half the purchase price had been

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64 *Sumpter* v. *Hedges* (1898) 1 Q.B. 673, C.A.

65 *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651; *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1903) 2 K.B. 756 C.A.; subject to any express agreement; *Elliott* v. *Crutchley* (1906) A.C.7.

66 *Chandler* v. *Webster* (1904) 1 K.B. 493.

67 *Gandha Horliah* v. *Janoo Hassan* (1925) 49 Mad. 200; *Munshi Lal* v. *Vishnu Das,* 1954, A.A. 450.

68 (1943) A.C. 32.

69 (1904) 1 K.B. 493.

70 The *Fibrosa Case* was followed in *Manasseh Film Co.* v. *Gemini* (1944) Mad. 124; *Parshotam Das* v. *Batala M.C.,* 1949 A.E.P. 301. Qu. whether there was a total failure of consideration in the latter case. See supra s. 56. *Lakshmanan* v. *Kamarajendara,* 1955 A.M.606.

71 S. 65 does, however, seem to allow the defendant to set off any expenses he has legitimately incurred out of money advanced by the plaintiff, in furtherance of the agreement, before it has become void; *Rajendra Bahadur* v. *Roshan Singh,* 1950 A.A. 592—*P* deposited cash, ornaments, and clothes with *D* for the marriage of *P*'s daughter with *D*'s son. The daughter died before the marriage could take place. *P* is entitled to the return of the money and articles, subject to a deduction for legitimate expenses (*P* did not deny that *D* was entitled to make such deductions).

72 (1947) 74 I.A. 295, (1947) Bom. 860, 50 Bom. L.R. 561, ('48) A.P.C. 56.

paid, when the contract was frustrated by the declaration of war. The Custodian of Enemy Property sued the defendant for the value of the machinery received, but failed to establish that the advantage received exceeded the sum of Rs. 96,010, the amount the defendant had already paid to the German firm. Their Lordships said:

"In estimating the value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany, and the fact that the purchasers could no longer have the services of a qualified erector sent from Germany and of the sellers' Chief Chemist. Further, the Court would have to consider the question whether or not the purchasers were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and if so, at what price and within what period of time, and what quantity and quality of products could be produced by the plant so assembled."

Agents.—Where on the instructions of a principal an agent entered into a transaction with a third party and paid money to a third party, it was held that the agent did not become liable to restore the money to the principle on the agreement being discovered to be void, since it could not be said that the agent had received any advantage.[73] An agent knowing that goods he was purchasing for the principal were to be exported in contravention of the Control Order, cannot recover anything under the contract as the object of the contract of agency was illegal.[74] If under a contract of agency goods purchased by the agent for the principal for the purpose of export in contravention of an order were not exported and were not delivered to the principal, the principal cannot be said to have received any benefit under the contract and s. 65 does not apply.[74]

If at the instance of the Government of India, rice is delivered to the officers of the Provincial Governments, the latter receive it on behalf of the Government of India and they do not get any benefit or advantage and s. 65 does not apply nor s. 70.[75]

Mode of communicating or revoking rescission of voidable contract.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with *B* to repair *B*'s house.

B neglects or refuses to point out *A* the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Refusal or neglect of promisee.—The illustration is apparently founded on *Makin* v. *Watkinson,* decided by the Court of Exchequer in 1870.[76] There the question was, in effect, whether a covenant by the lessor of a building with the lessee to repair the main walls, main timbers, and roofs was to be taken as absolute, or as implying that the lessor was entitled to have notice from the lessee of any want of repair. The majority of the Court held that it must be read as a covenant to repair on notice, as the lessor had no sufficient and reasonable means of ascertaining for himself what repairs were necessary. Perhaps a case more exactly in point is

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73 *Harjivanlal* v. *Radhakison* (1938) All L.J. 77; 172 I.C. 330; 1938 A.P.C. 4.

74 *Krishna Rao* v. *Kondarama,* 1960 A.AP. 190.

75 *Government of India* v. *Jamunadhar* (1960) A.AP. 19; *Government of India* v. *Prity Kumar Ghosh* (1958) A.P. 203 dist.

76 L.R. 6 Ex. 25.

that of an apprentice, whom a master workman has undertaken to teach his trade, refusing to let the master teach him. "It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught".[77] Conversely, if a master undertakes to teach several trades, and gives up one of them, the apprentice need not stay with him. "If the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve,"[78]

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77 *Raymond* v. *Minton* (1866) L.R. 1 Ex. 244.

78 *Ellen* v. *Topp* (1851) 6 Ex. 424, 442; 86 R.R. 353. The use of the word "stipulated" is incorrect. A man stipulates for what he is to be entitled to, not for what he is to perform. The term is proper to Roman Law, and is better avoided in our system.

CHAPTER V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT[1]

Chapter V of the Contract Act does not deal with the rights or liabilities accruing from the contract but those accruing from relations resembling those created by contract.[1] This discussion may be divided under two heads (i) *quasi* contracts, and (ii) *quantum meruit* which will be dealt with here. The expression *quasi* contract is a misnomer. It has little or no affinity with contract. The Roman lawyers were content to explain them as misfits. Justinian refers to "those obligations which do not originate, properly speaking in contract but, which as they do not arise from a delict, seem to be quasi-contractual". A simple illustration is money paid by mistake.[2] A contract implied in law or a *quasi* contract is not a real contract or as it is called, a consensual contract and section 175(3) of the Government of India Act is concerned with only such contracts and that Section applies to consensual contracts and not to something which is called a contract but which law brings into existence by a fiction irrespective of the agreement of parties.[3] In the case of *quasi* contracts the courts do not take notice of the intention. Sometimes they may act in disregard of their known intentions. In such cases the liability exists, independent of the agreement and rests upon the equitable doctrine of unjust enrichment. *Quasi* contracts give rise to a situation where an obligation or duty is cast upon the parties by law but not by the terms of the contract to which they have given assent.[4]

The term "implied contract" was described in an English case as an unfortunate expression because there cannot be a contract by a lunatic. But whatever necessities are supplied to such a person, the law implies an obligation on the part of such person to pay for such necessaries out of his own property... Said Cotton L.J.: "I think that the expression implied contract is erroneous and very unfortunate."[5] Shah J. has termed *quasi* contracts or restitution as a third category of law not founded upon contract or tort.[6]

Quasi contract.—In what cases will the law impute a promise to repay depends on the principles of law which have been stated thus by Lord Denning.*

1. In the absence of express contract, there must be established an implied contract to pay reasonable remuneration for services rendered by the plaintiff to or for the defendant or to reimburse the plaintiff for money paid by him to a third person i.e. a genuine contract established by inference. In such cases the obligation is consensual. It does not arise *quasi ex contractu*.[7] According to Sarkar J. (minority view) an implied contract is not a real contract or a consensual contract.[8] The obligation cannot be based on any rule of *aequum et bonum*, e.g. the finder of perishable chattels or goods who expends money to preserve them. The finder cannot bring an action for repayment nor even a lien on goods for his expenditure. There can

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1 *State of West Bengal* v. *B.K. Mondal* (1962) Supp. 1 S.C.R. 876, 892; (1962) A.SC. 779; *Great Eastern Shipping Co.* v. *Union of India* (1971) A. Cal. 150, 151.

2 Cheshire & Fifoot, (9th Ed.) p. 631 Just. Inst. III Tit. xxvii, pr.

3 *State of West Bengal* v. *B.K. Mondal* (1962) 1 Supp. S.C.R. 876, 912; 1962 A.S.C. 779, 794 (Sarkar J.).

4 *State of Punjab* v. *Hindustan Development Board* (1960) A. Punj. 585; (1960) 2 Punj. 676.

5 *Rhodes* v. *Rhodes* (1890) 44 Ch.D. 94, 105; *State of Punjab* v. *Hindustan Development Board* (1960) 2 Punj. 676; (1960) A. Punj. 585. Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-9; (1940) 4 All E.R. 20, 35-37, described the fiction as "obvious", "fanciful" & "transparent".

6 *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218, 1222; (1968) 3 S.C.R. 214.

* Denning, Quantum Meruit; 55 L.Q.R. 54.

7 Denning: 55 L.Q.R. 54, 56; *Cf. Falcke* v. *Scottish Imperial Co.*, 34 Ch.D. 234, 248; *Att. General* v. *De Keysers Royal Hotel* (1920) A.C. 508 (where the hotel was taken possession of by Crown without consent of the hotel); *Pontypridd Union* v. *Drew* (1927) 1 K.B. 214 (where guardians sought to recover amount paid by way of poor relief).

8 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 912; (1962) A.SC. 779, 794; see *Ram Nagina Singh* v. *Governor-General in Council*, 89 C.L.J. 342.

be only one principle in common law upon which a claim for repayment can be based and that is when an implied contract to repay or give a lien is implied.[9]

2. Where a valid contract remains open and unrescinded, matters covered by it are governed by it and there cannot be an implied contract in regard to them. But where parties are discharged from further performance by impossibility of performance, this proposition debars a person who has done work under it from claiming on a *quantum meruit* because the contract is not rescined and the party must make good his claim under it or not at all.[10]

3. Although the parties have come to a valid express contract yet if subsequent facts showing that the mutual intention was to vary or rescind the express contract and to pay reasonable amount for services rendered, then the plaintiff can sue upon a *quantum meruit*.[11] The mere fact that the defendant takes the benefit of work which he has no opportunity of accepting or refusing does not suffice.[12]

4. If one of the parties to the contract refuses or disables himself from performing it by his own act, the other party has the right to elect to treat it as rescinded and may immediately sue on a *quantum meruit* for anything which he has done before rescission.[13]

5. If services are rendered under a contract which is for any reason void, then the plaintiff is entitled to sue upon a *quantum meruit,* provided he can show facts from which, in the absence of the void contract, there would be inferred a contract that the services were to be paid for.[14]

6. If services rendered under an express contract, which although not void is unenforceable by reason of Statute of Frauds, it has been said that the plaintiff can sue upon a *quantum meruit*. But this is doubtful, because the Statute of Frauds does not make the contract void but there is no right to sue.[15]

7. If accessories are supplied to a person incapable of contracting and the circumstances are such that, but for the inability to contract, there would be implied a promise to pay, the law imposes a liability to make reasonable payment. The obligation is based on a notional promise to pay.[16]

8. If a person primarily liable to perform a duty imposed on him by contract or law omits to perform it, and in consequence of his omission another person is compelled to perform it the person guilty of the omission is under an obligation to pay him for the services and reimburse him for his expenditure. Mere failure is enough.[17] There need not be an express contract to pay for goods delivered or personal services performed but where these have been obtained by means of deception, the law will imply a contract to pay which is usual and reasonable.[18]

Quantum meruit: (See also under s. 65 *supra*).

1. Where a person renders service to another in circumstances showing that it is to be paid

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9 55 L.Q.R. 54, 58; *Falcke* v. *Scottish Imperial Co.,* 34 Ch.D. 234, 248-9; see also *Re National Motor Mail Co.* (1908) 2 Ch. 520; *Morgan* v. *Ashcroft* (1938) 1 K.B. 49, 62; (1937) 3 All E.R. 92; Bennet J. in *Re Cleadon Trusts Ltd.* (1938) Ch. 660, 666 appd. on app. 55 T.L.R. 154; (1938) 4 All E.R. 518 (unsought benefit conferred by a stranger on a company; he had no equitable right of recoupment against the company); *Cf. Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066. See ill, (b) to s. 70.

10 See *Appleby* v. *Myers,* 2 C.P. 651; *French Marine* case (1921) 2 A.C. at p. 523; *Hirji Mulji* v. *Cheong* (1926) A.C. 497, 510. See *supra*..

11 Denning: 55 L.Q.R. 54, 60.

12 Cases collected in the notes to *Cutter* v. *Powell,* 2 Smiths L.C. 1. See also *Morgan* v. *Ashcroft* (1938) 1 K.B. 49, 62, (1937) 3 All E.R. 92 & the doctrine of money "had & received" *infra.*

13 55 L.Q.R. 54, 61. Cases in Notes to *Cutter* v. *Powell,* 2 Smiths L.C. 1.

14 Denning: 55 L.Q.R. 54, 61; *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All. E.R. 1066. See s. 65 of Indian Contract Act and *Quantum Meruit,* supra.

15 Denning: 55 L.Q.R. 54, 63; See *Scarisbrick* v. *Parkinson,* 20 L.T. 175; *Scott* v. *Pattison* (1923) 2 K.B. 723. See s. 175(3) of Government of India Act.

16 55 L.Q.R. 54, 63. See *Re Rhodes,* 44 Ch.D. 94. See *Pontypridd Union* v. *Drew* (1926) 1 K.B. at p. 575 (per Salter J.). See s. 68 of Contract Act.

17 55 L.Q.R. 55, 64. Notes to *Lampleigh* v. *Braithwaite,* 1 Sm. L.C. 155, 160-74; *Johnson* v. *Royal Mail,* 3 C.P. at p. 43. Cf. s. 70 of Contract Act.

18 *Rumsey* v. *N.E. Ry. Co.* (1863) 14 C.B. (N.S.) 641; 143 E.R. 596. Cf. s. 72 of the Contract Act.

for although no particular remuneration has been specified, the law will infer a promise to pay *quantum meruit,* i.e. a reasonable sum.[19]

2. Where parties to a contract conduct themselves in a manner showing substitution of the contract by a new contract, e.g. tender and acceptance of a completely different type of cargo from that envisaged by the original contract—general cargo in place of steel billets.[20] For these kind of contracts each side should have had the option to accept or reject the substituted contract.[21] A new and different contract cannot be forced by one party on the other against his will.[22]

3. The same principle applies where one party has in breach of contract only partially performed his side of the agreement or performed it in a manner different from that contemplated by its terms and the other party not in default accepts it, the latter will have to pay *quantum meruit* the value of the benefit which he has received.[23] But the opportunity to accept or reject is essential for the application of this principle, e.g. where a house is left unfinished by a building contractor and the owner finishes it using material left on the site.[24] But this is subject to the exception were the work is defective only in most minor respects.[25] and the doctrine of substantial performance.[26]

If the contract be indivisible and not severable then nothing can be recovered under the contract unless it be completed according to its terms or a new contract is made or is to be implied from the acts of the parties giving rise to new rights.[27]

Claim for necessaries supplied to person incapable of contracting, or on his account.

68. If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.[28]

Illustrations

(a) *A* supplies *B,* a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

Minors.—Since the decision of the Privy Council in *Mohori Bibee* v. *Dhurmodas Ghose*[29] it is clear that this section applies to minors as well as to persons of unsound mind (see the illustrations) and others, if any, disqualified from contracting by any law to which they are subject. It is therefore needless to consider the doubts expressed in earlier Indian cases.

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19 *Hall* v. *Wallaud* (1621) Cro Jac. 618; *Paynter* v. *Williams* (1833) 1 C. & M. 810: *William Lacey (Hounslow) Ltd.* v. *Davis* (1957) 1 W.L.R. 937; *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403: (1936) 2 All E.R. 1066; see *Alopi Parsad* v. *Union of India* (1960) 2 S.C.R. 793, 809; (1960) A.SC. 588, 593; *supra.*

20 *Steven* v. *Broomley & Son* (1919) 2 K.B. 722. See also *Sullivan* v. *Constable* (1932) 48 T.L.R. 369; Anson: The Law of Contract (22nd Ed.), 589.

21 *Forman & Co. (Pty) Ltd.* v. *Ship Liddesdale* (1900) A.C. 190; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 892; (1962) A.SC. 779, 788; *Mariam* v. *Ndrayanan* (1965) A. Ker. 55. See also *Taylor* v. *Laird* (1856) 25 L.J. Ex. 329, 332.

22 Anson: Law of Contract (22nd Ed.), p. 589; cf. s. 62 of the Contract Act.

23 Anson: The Law of Contract (22nd Ed.), p. 589.

24 *Sumpter* v. *Hedges* (1898) 1 Q.B. 673; *Munro* v. *Butt* (1858) 8 E. & B. 738; *Bradley* v. *Horner* (1957) 10 D.L.R. (2nd) 446.

25 *Dakin* v. *Lee* (1916) 1 K.B. 566.

26 *Dakin* v. *Lee* (1916) 1 K.B. 566; *Vigers* v. *Cook* (1916) 2 K.B. 476.

27 *The Madras* (1898) P. 90 at p. 94; *Forman & Co. (Pty) Ltd.* v. *Ship Liddesdale* (1900) A.C. 190, 202.

28 The application of this section is not excluded by the Punjab Court of Wards Act; *Umrao Singh* v. *Banarsi Das-Dip Chand,* 1927 A.L. 414; 101 I.C. 702; *Vishwa Nath* v. *Shiam Krishna,* 1936 A.A. 819; (1936) All L.J. 1120; 166 I.C. 47.

29 (1903) 30 I.A. 114; 30 Cal. 593.

"**Necessaries.**"—Cost incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are "necessaries" within the meaning of this section.[30] And so are costs incurred in defending him in a prosecution for dacoity.[31] So also is a loan to a minor property to save his property from sale in execution of a decree.[32]

There are a number of cases in which the question of the liability of a Hindu minor for money advanced to him to meet his marriage expenses has been considered,[33] but a distinction has been drawn, it would seem rightly, between the case of male and female minors, on the ground that the Hindu texts enjoin the marriage of the latter but not of the former.[34] Expenses for the marriage of a Muslim minor girl are recoverable as necessaries, if the payment was not gratuitous.[35] It is submitted that the passing of the Child Marriage Restraint Act, 1929, (the Sarda Act) has also affected the law, since, as pointed out in the Nagpur High Court, a Court of justice can scarcely regard expenditure on a purpose forbidden by law as expenditure on "necessaries".[36]Some of the earlier decisions may not be good law at the present day. Moneys spent on obsequies of the father of a minor are not spent on 'necessaries' for the minor within the meaning of s.68; but a debt incurred for the purpose by the minor's guardian may be a debt binding on the minor and his estate under Hindu law and therefore enforceable against the minor if, after attaining his majority, he undertakes to pay it.[37]

As to the definition of necessaries in general, see notes to section 11, under the head "Necessaries," above.

Reimbursement of person paying money due by another in payment of which he is interested.

69. A person who is interested in the payment of moneys which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.[38]

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30 *Watkins* v. *Dhunnoo Baboo* (1881) 7 Cal. 140. In this case the suit was brought by an attorney appointed by the guardian *ad litem* of the minor to recover his costs from the minor. The attorney was engaged by the guardian and no question was raised whether under the circumstances the suit would lie against the minor. In *Branson* v. *Appasami* (1894) 17 Mad. 257, it was held under similar circumstances that the suit would not lie. See also *Venkata* v. *Timmayya* (1898) 22 Mad. 314. In *Phalram* v. *Ayub Khan* (1926) 49 All. 52; 98 I.C. 657; 1927 A.A. 55, the Court appeared to have followed the Calcutta ruling without being aware of it.

31 *Sham Charan Mal* v. *Chowdhry Debya Singh* (1894) 21 Cal. 872. See also *Sundaraja Ayyangar* v. *Pattanathusami Tevar* (1894) 17 Mad. 306.

32 *Kidar Nath* v. *Ajudhia* (1883) Punj. Rec. No. 185. See also *Atmaram* v. *Hunar* (1888) Punj. Rec. No. 96.

33 *Pathak Kali Charan* v. *Ram Deni Ram* (1917) 2 Pat.L.J. 627; 42 I.C.963; *Shriniwasarao* v. *Baba Ram,* 1933 A.N. 285; 145 I.C. 350; and not the less because it is part of a larger and otherwise invalid loan; *Yadorao* v. *Chandudas* (1927) 101 I.C. 254; 1927 A.N. 196; cp. *Regd. Jessore Loan Co. Ltd.* v. *Gopal Hari Ghose Choudhury* (1925) 30 C.W.N. 366; 94 I.C. 159; 1926 A.Cal. 657. Money advanced to the manager of a joint Hindu family who was a minor at the date of the loan, for the marriage of his sister, held to be recoverable from the joint family property, because of the duty imposed by Hindu law on such a manager to provide for the marriage expenses of the female members of the family: *Nardan Prasad* v. *Ajudhia Prasad* (1910) 32 All. 325. Under s. 68 a claim lies only against the estate of the minor, and a Hindu mother who has incurred expenses in getting her minor daughter married cannot sue the father: *Sundaramma* v. *Suryanarayana,* 1950 A.M. 274.

34 *Tikkilal* v. *Kamalchand* (1940) Nag. 632: 1940 A.N. 327. The validity of the distinction was doubted in *Rahima Bibi* v. *Sherfuddin* (1947) Mad. 541, 1947 A.M. 155.

35 *Rahima Bibi* v. *Sherfuddin* (1947) Mad. 541, 1947 A.M. 155.

36 *Ibid.* Doubts were expressed whether the marriage of a young man should be considered a 'necessary' in *Sundarama Pillai* v. *Kandaswami Pillai,* 1941 A.M. 387; (1941) 1 Mad. L.J. 140, but the point was not discussed.

37 *Bechu Singh* v. *Baldeo Prasad,* 1933 A.O. 132; 145 I.C. 180. Money advanced for *Divali* expenses held not to be for necessaries: *Sadasheo Balaji* v. *Hiralal Ramgopal,* 1938 A.N. 65; 175 I.C. 149. The two cases cited in this note also illustrate the distinction between a minor's liability for necessaries and cases where a guardian as a manager of an estate alienates a minor's property for the benefit of the minor; see also *Gramlal* v. *Tukaram* (1941) Nag. 255; 1939 A.N. 33.

38 Obviously a plaintiff's claim under this section fails if the Court concludes that he was really the per-

Illustration

B holds land in Bengal, on a lease granted by *A*, the *zamindar*. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B* to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid[39] (As to the date from which time runs for the purpose of limitation in cases within this section, see *Muthuswami Kavundan* v. *Ponnayya Kavundan* (1928) 110 I.C. 613; 51 Mad. 815; 1928 A.M. 820.)

English law.—This section lays down in one respect a wider rule than appears to be supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money.[40] This is not enough, in the Common Law, to found a claim to reimbursement by the person interested if he makes the payment himself. Authoritative statements in English books are much more guarded, for example:

"If *A* is compellable to pay *B* damages which *C*, is also compellable to pay *B*, then *A*, having been compelled to pay *B*, can maintain an action against *C* for money so paid, for the circumstances raise an implied request by *C* to *A* to make such payment in this case. In other words, *A* can call upon *C* to indemnify him.[41]

It will be observed that the obligation had to be stated as a fictitious contract in order to find a place for it within the rules of common law pleading. The meaning is that *C*, who did not in fact ask *A* to pay, is treated as if he had done so. In jurisdictions where the old rules of pleading have been abrogated, or were never in force, the fiction is superfluous, and the duty may be expressed, as in this section, in plain and direct terms without any talk of an implied request.[42] The late Mr. Leake did this in language which has been made authoritative by high judicial approval:—

"Where the plaintiff has been compelled by law to pay, or, being compelled by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount".[43]

Such a right to indemnity arises where one man's goods are lawfully seized for another's debt, e.g. as being liable to distress, and are redeemed by the owner; the owner will be entitled to indemnity from the debtor, though he may have exposed his goods to the risk of distress by a voluntary act done at the debtor's request or for his benefit.[44]

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son bound to pay: *Muhammad Habib-ul-Rahman* v. *Sheonandan Singh,* 1928 A.P. 552; 111 I.C. 243,.

39 *Faiyazunissa* v. *Bajrang Bahadur Singh,* 1927 A.O. 609; 104 I.C. 358, is almost identical with this.

40 The view propounded in the text was adopted by Stanley C.J. in *Tulsa Kunwar* v. *Jageshar Prasad* (1906) 28 All. 563, by the Madras High Court in *Subramania Iyer* v. *Rungappa* (1909) 33 Mad. 232 and by the Calcutta High Court in *Pankhabati* v. *Nani Lal* (1914) 18 C.W.N. 778, 781; 21 I.C. 207; *Eastern Mortgage & Co.* v. *Muhammad Fazlul Karim* (1925) 52 Cal. 914; 90 I.C. 851; 1926 A. Cal. 385; see also *Sattya Bhusan* v. *Krishna* (1914) 18 C.W.N. 1308, 1310-1311; 24 I.C. 259; *Nagendra Nath Roy* v. *Jugal Kishore Roy* (1925) 29 C.W.N. 1052, 1053; 90 I.C. 281; 1925 A. Cal. 1097; *Siti Fakir* v. *Chand Bewa* (1928) 32 C.W.N. 1087; 108 I.C. 46; 1928 A.Cal. 389; *Muthurakku* v. *Rakkappa* (1914) 26 Mad. L.J. 66, 70-71; 22 I.C. 9.

41 *Bonner* v. *Tottenham, etc. Building Society* (1898) 1 Q.B. 161, 167, per A.L. Smith L.J.

42 We fail to understand Mukerji J's dictum in *Eastern Mortgage & Co.* v. *Muhammad Fazlul Karim* (1925) 52 Cal. 914, 928; 90 I.C. 85; 1926 A. Cal. 385, a case complicated by bad pleading and a groundless charge of fraud.

43 Adopted by Cockburn C.J. in the Ex. Ch. *Moule* v. *Garrett* (1872) L.R. 7 Ex. 101, 104 and Vaughan Williams L.J. in *Bonner's Case (supra,* note 41) (1898) 1 Q.B. 161, at p. 173, and by Wright M.R. in *Brook's Wharf, Ltd.* v. *Goodman Bros.* (1937) 1 K.B. 534, 543-544. Approved in *Hari Chand* v. *Gyaniram* (1944) Nag. 638; 1944 A.N. 282, but see the contrary view propounded by Sir Maurice Gwyer *infra* under sub-head "Suit for Contribution". The learned author's words are altered in recent editions of Leake on Contracts (8th ed., p. 46), but the sense in unaffected.

44 *Edmunds* v. *Wallingford* (1885) 14 Q.B.D. 811, disapproving *England* v. *Marsden* (1866) L.R. 1 C.P. 529. The simpler case of a decree-holder who has attached property of his debtor and pays to save it from sale in distraint proceedings is on the same footing: *Chuni Lal* v. *Manik Chand* (1926) 97 I.C. 319; 1926 A.A. 745.

But the English authorities do not cover a case where the plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay, though the payment was to his advantage. The assignee of a term of years mortgaged the premises by sub-lease. The mortgagees took possession, but did not pay the rent due under the principle lease. The original lessees, who of course remained liable to the lessors, had to pay the rent, and sued the mortgagees to recover indemnity. It was held that the action did not lie,[45] for there was no obligation common to the plaintiff and the defendant. It was to the mortgagees' interest that the rent should be paid, but no one could call on them to pay it. This case, it would seem, would be decided in the same way under the present section. The words "bound by law to pay," as they fix the limit of the law in India, mark the point beyond which the Court of Appeal refused to extend it in England. The case of a second or later mortgagee paying off a prior mortgage to avoid a sale is different. He has his remedy under this section, and the special rights conferred on him by s. 74 of the Transfer of Property Act do not exclude that remedy.[46]

Subrogation.—Subrogation by operation of law or legal subrogation relied upon rests on the same equity of reimbursements as is enacted in section 69 of the Contract Act. Even in the case of subrogation there must be an obligation, express or implied, to repay and the principle of subrogation can never be applied to a mere volunteer.[47]

"Person...interested in the payment of money."—This section only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover under this section.[48] Thus where *A* purchases property from *B*, but the sale is fictitious, *A* cannot recover from *B* money paid by him to save the property from being sold in execution of a decree against *B*.[49] It is otherwise, however, if the sale is *bona fide*.[50] A *putnidar* who makes payments on account of Government revenue due by his superior landlord who had failed to pay the same is entitled to recover under this section, even though the risk to his *putni* may be remote, provided he had *some* interest in making the payment.[51] Payment made by the *darputnidar* of a share of a *putni* of the whole rent due on the *putni* to save it from being sold in execution of a decree obtained by the landlord in a suit for arrears of rent comes within this section, though the suit was brought against some only and not all of the *putnidars*.[52] Similarly, where *A*'s goods are wrongly attached in order to realise arrears of Government revenue due by *B*, and *A* pays the amount to save the goods from sale, he is entitled to recover the amount from *B*[53] A Hindu reversioner is interested in

45 *Bonner's Case, supra,* note 41.

46 *Durga Charan Chandra* v. *Ambica Charan Chandra* (1927) 54 Cal. 424; 101 I.C. 130; 1927 A. Cal. 393. S. 74 has since been repealed by the Transfer of Property (Amendment) Act, 1929, s. 39.

47 *Arulanandam Vethakannu Nadar* v. *Bhagavathi Pillai Thanakachi* (1972) A.M. 207, 211-212; *Rajasthan Golden Transport Co. Ltd.* v. *India Fire & General Insurance Ltd.* (1980) A. Guj. 184, 189. (Insurance subrogated).

48 See *Desai Himatsingji* v. *Bhavabhai* (1880) 4 Bom. 643, 652. A railway executive engineer has no interest in the payment of freight on goods under a contract made in his name on behalf of the Railway Administration: his proper remedy was to refuse delivery: *Secy. of State* v. *Rangaswami & Co.* (1927) 106 I.C. 657; (1927) Mad. W.N. 872.

49 *Janki Prasad Singh* v. *Baldeo Prasad* (1908) 30 All. 167.

50 *Subramania Iyer* v. *Rangappa* (1909) 33 Mad. 232.

51 *Smith* v. *Dinonath* (1885) 12 Cal. 213; *Bama Sundari Dasi* v. *Adhar Chunder* (1894) 22 Cal. 28; *Chelapathi Reddi* v. *Provincial Government, Madras,* 1951 A.M. 650; *Kunhiraman* v. *Govindram,* 1954 A.M. 641; *Subbiah Mooppanar* v. *Venkatarama Ayyangar,* 1955 A.M. 265. And see *Nath Prasad* v. *Baij Nath* (1880) 3 All. 66; and *Krishno Kamini Chowdhrani* v. *Gopi Mohun* (1888) 15 Cal. 652 (where the point actually decided was that cases falling within ss. 69 and 70 are cognisable by a Court of Small Causes in the Mufassal). *Cp. Ajudhia Prasad* v. *Bakar Sajjad* (1883) 5 All. 400, cited in the commentary on s. 70. Much more is the mortgagee of a share in a *mahal* purchasing it at a sale under a decree obtained by him a person interested in the payment of arrears of revenue on the whole, all the co-sharers being jointly and severally responsible therefore under the Land Revenue Act: *Ram Rattan* v. *Gaura* (1930) 122 I.C. 765.

52 *Rajani Kanta* v. *Haji Lal* (1917) 21 C.W.N. 628; 41 I.C. 242.

53 *Tulsa Kunwar* v. *Jageshar Prasad* (1906) 28 All. 563; *Khushal Singh* v. *Khawani* (1906) All W.N. 282; *Abid Husain* v. *Ganga Sahai* (1928) 113 I.C. 441; 26 All. L.J. 435; 1928 A.A. 353. The decision in *Chunia* v. *Kundan Lal* (1882) All W.N. 149, 150, where it was held that a vendor who had paid under

the payment of arrears of Government revenue which a Hindu widow is bound to pay in respect of property in which she has a widow's estate, and he is entitled to recover the same from the widow.[54] So also is he interested in making a deposit under Order XXI, rule 89, of the Code of Civil Procedure, to have a sale in execution of a decree against a Hindu widow set aside, the sale being of the entire interest in the property sold and not merely the widow's interest.[55] A Hindu mother who has incurred expenses for her daughter's marriage is entitled to recover the expenses from her husband's coparceners. The liability of the co-parceners is clearly one which arises under the Hindu law, but it has been said, though not without some difference of opinion, that it also arises under this section.[56] Where *A* makes a gift of a portion of land to *B* himself undertaking to pay the *judi* in respect of it, and then makes a gift of the rest of the land to *C* subject to the condition that *C* shall pay the *judi* in respect of the whole land, *B* is entitled, on failure of *C* to pay the *judi*, to make the payment and to recover it from *C*.[57]

It is enough for a person claiming under the provisions of this section to show that he had an interest in paying the moneys claimed by him *at the time of payment*. Thus moneys paid by a person while in possession of an estate under a decree of a Court to prevent the sale of the estate for arrears of Government revenue may be recovered by him under this section, even though the decree may be subsequently reversed and he may be deprived of possession.[58] In the case now cited the Privy Council said:—

> "It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payment for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment if he has failed through no fault of his to reimburse himself out of the rents."[59]

The mortgagee whose tenant has raised the crop on the mortgaged land is interested in paying the instalment of revenue which the mortgagor defaults in paying. Merely because the Revenue Recovery Act entitles a mortgage to take on the instalment paid to his mortgage, does not disentitle him from recovering the money paid by him on the default of the mortgagor.[60]

Insurer's right to sue.—An insurance Company, after paying the insured consignor of goods got a deed of subrogation from him. It can sue the carrier for the amount paid by it.[61]

Conversely, payment of kist made by a person who had obtained a decree for possession of certain lands may be recovered back by him, though the payment may have been made when he was not yet put into possession pending an appeal and a second appeal.[62] Similarly,

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compulsion arrears of revenue payable by the purchaser was not entitled to recover from the purchaser, cannot now be supported, having regard to the decisions in the above cases. *Cp.* note 44 above.

54 *Sambasiva* v. *Seethalakshmi* (1909) 19 Mad. L.J. 331.

55 *Pankhabati* v. *Nani Lal* (1914) 18 C.W.N. 778.

56 *Vaikuntam* v. *Kallapiram* (1900) 23 Mad. 512; (1902) 26 Mad. 497; *Acha Ranganaikammall* v. *Acha Ramanuja* (1911) 35 Mad. 728, 737.

57 *Somashastri* v. *Swamirao* (1918) 42 Bom. 93; 43 I.C. 482; *Chandra Deo* v. *Srinivasa* (1915) 38 Mad. 235, 239; 20 I.C. 445.

58 *Dakshina Mohun Roy* v. *Saroda Mohun Roy* (1893) 20 I.A. 160; 21 Cal. 142; same principle applied; *Nagendra Nath Roy* v. *Jugal Kishore Roy* (1925) 29 C.W.N. 1082; 90 I.C. 281; 1925 A.Cal. 1097; followed, *Siti Fakir* v. *Chand Bewa* (1928) 108 I.C. 46; 1928 A.Cal. 389; *Bohra Hazari Lal* v. *Bhora Saurang Lal* (1930) 123 I.C. 335; *Jaganath Prasad* v. *Chunni Lal* (1940) All. 580; 191 I.C. 647; 1940 A.A. 416; 20 I.A. 160, was followed in *Subbegowda* v. *Keshava Murthy*, 1950 A. Mys. 6, but distinguished in *Hriday Narain* v. *Haricharan*, 1952 A.P. 81 as the claimant had no interest in the property before he paid the money. *Sami Pillai* v. *Ramulu Naidu* (1972) A.M. 4,5.

59 21 Cal. 148. Where a debtor mortgaged property to the Government to secure a debt, the Government undertaking not to enforce the mortage so long as the debtor permitted it to deduct certain sums from his political pensions and *jagirs* towards the payment of the debt, and the Court of Wards which had assumed charge of his estate was allowed by the Government to make the deductions and to continue to pay off the debt therefrom, it was held that the debtor's heirs were bound to recoup the Court of wards and that it was immaterial that the pensions and the *jagirs* did not belong to the Court of Wards: *Qaisar Jaham Begam* v. *Court of Wards*, 1941 Lah. 88; 193 I.C. 829.

60 *Sami Pillai* v. *Ramulu Naidu* (1972) A.M. 4,5; *Rajkumar Lal* v. *Jaikarandas* (1920) A.P. 521 disting.

61 *Rajasthan Golden Transport Co. Ltd.* v. *India Fire & General Insurance Ltd.* (1980) A. Guj. 184, 189.

62 *Chinnasamy* v. *Rathnasabapathy* (1903) 27 Mad. 338.

moneys paid by a mortgagee of a *putni* tenure to save the tenure from sale for arrears of rent pending *bona fide* litigation between him and his mortgagor. relating to the amount of the mortgage debt may be recovered back under the provisions of this section, even though it may be eventually found by the Court that the whole of the mortgage debt was, as a matter of fact satisfied before the date of payment.[63] In a later case[64]

the plaintiff purchased a *putni taluk* at a sale held under Regulation VIII of 1819 at the instance of the *zamindar* for non-payment of rent by *putnidars*. The sale was set aside in May, 1894, in a suit brought by the *putnidars* for the purpose against the *zamindar* and the plaintiff. The *zamindar* alone appealed against the decision, and pending the appeal the *zamindar* called upon the plaintiff to pay rent that had accrued from April, 1894, to November, 1894. The plaintiff thereupon paid the rent.

and in a suit by him against the *putnidars* it was held that he was entitled to be reimbursed the amount by them. The fact that the decision of the first Court was in favour of the defaulting *putnidars* did not affect the plaintiff's right to pay the rent, as it was quite possible that decision might have been reversed on appeal. But a person in wrongful possession of land making payment of Government revenue is not interested within the meaning of this section.[65] *A* agrees to sell land to *B*. Subsequently *A*, in breach of the agreement, agrees to sell land to *C*. *B* sues *A* and *C* for specific performance. Pending the suit the land is sold in execution of a decree obtained by *A*'s creditor against *A*. *B* deposits in Court the amount required to be deposited under Order XXI, rule 89, of the Code of Civil Procedure, and the sale is thereupon set aside. *B*, having no title in the property and no possession of it at the time of the payment, was not interested in the payment and he is not entitled to recover it from *A* or *C*[66]

In *Ram Tuhul Singh* v. *Biseswar Lal*[67] the Privy Council, in dealing with the rights of parties making payments, observed:

"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a *voluntary* payment by *A* of *B*'s debt."

Thus a mortgagor who voluntarily pays the assessment on land mortgaged by him, forestalling the mortgagee in possession, who, it is found, was willing to pay the assessment as he had done for years past, is not entitled to recover from the mortgagee the amount so paid by him.[68] Similarly, payment made by a mortgagee to prevent the sale of the mortgaged property in execution of a decree against the mortgagor cannot be recovered from the mortgagor if the mortgage was *prior* to the execution proceedings.[69] A mortgagee even after a decree for sale has sufficient interest in the mortgaged property and is entitled to pay the revenue due to save the property from destruction or sale. He is entitled to recover the amount of revenue paid by him before the advertisement for sale.[70] A stranger without any interest in mortgaged property is not entitled to be reimbursed if he pays off the mortgage debt and takes possession but is dispossessed by the owner of equity of redemption by a suit.[71] The Allahabad High

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63 *Bindubashini Dassi* v. *Harendra Lal Roy* (1897) 25 Cal. 305; *Serafat Ali* v. *Sheikh Israr Ali* (1917) 22 C.W.N. 347; 42 I.C. 30; *Ma Mya May* v. *Ma Lon*, 1933 A.R. 112; 144 I.C. 392; *Shrivallabh Budrinath* v. *Laxman Vinayak* (1946) Nag. 630, 1947 A.N. 39 (payment by a mortgagee who had obtained a foreclosure decree); *Madangopal* v. *Shrinarayan* (1946) Nag. 297.

64 *Radha Madhub Samonta* v. *Shasti Ram Sen* (1899) 26 Cal. 826.

65 *Binda Kuar* v. *Bhonda Das* (1885) 7 All. 660.

66 *Nand Kishore* v. *Paraoo Mian* (1917) 2 Pat.L.J. 676; 42 I.C. 839. This decision must be deemed to be overruled by *Govindram Gordhandas Seksaria* v. *State of Gondal* (1950) 77 I.A. 156, 52 Bom L.R. 450, 1950 A.P.C. 99 (see *infra*). *Arulanandan Nadar* v. *Bhagvathi Pillai* (1972) A.M. 207.

67 (1875) 2 I.A. 131; 23 W.R. 305; 15 B.L.R. 208; *Panchkore* v. *Hari Das* (1916) 21 C.W.N. 394, 399; 34 I.C. 341; *Banwarilal* v. *Rajkishore* (1945) Nag. 820, 1946 A.N. 21 (a case of officious interference); *Gobind Ram* v. *Ram Kishore* (1952) Pat. 303, 1953 A.P. 145.

68 *Ramchandra Atmaram* v. *Damodar Ramchandra* (1899) 1 Bom.L.R. 371.

69 *Ram Prasad* v. *Salik Ram* (1882) All W.N. 210.

70 *Bhuneshwari Devi* v. *Sheogovindlal* (1963) A.P. 185; *Moti Chand* v. *Bajrang Sahai*, 16 C.L.J. 148; 17 I.C. 45 reld. on.

71 *Sarjug Devi* v. *Dulhin Kishori Kuer* (1960) A.P. 474; *Ram Tuhul Singh* v. *Bisheshwar Lal*, 2 I.A. 131, folld.

Court, differing from an earlier opinion of its own,[72] has held that "a person interested in making the payment" does not mean that the interest should be such as would stand the test of judicial trial; it is sufficient if the person who makes the payment honestly believes that his own interest requires that it should be made.[73]It is submitted that this is the correct view, at any rate if there are reasonable grounds for the belief, even though the belief itself may be unfounded. In a Privy Council case,[74] the plaintiffs had agreed to purchase certain mills, and to save the mills from sale they paid arrears of municipal dues. In allowing them to recover this sum from the vendors, their Lordships said:

"The learned judges of the High Court in appeal held that the appellant company could not establish a right under this section because it was not interested in the payment of the money that it paid. The view that it was not "interested" was based on the fact that at the date of the payment the company had no property interest in the mills in respect of which the taxes were claimed. And, in accordance with this view, the company's payment was described by the learned judges as a voluntary payment. To their Lordships it seems to have been very unlike a voluntary payment. The company had contracted to buy these mills, and they were imminently threatened with a forced sale which would, of course, defeat its purchase. Money had to be found for the taxes if the mills were to be saved. Neither the Maharaja nor the trustees showed any sign of paying the Municipality. So the appellant company paid. But to describe it in those circumstances as having made a voluntary payment appears to their Lordships to involve some misuse of language. Nor do they appreciate why it should not properly be described as interested in the payment. In any ordinary use of language the company was interested in the taxes being paid at the time when they were paid since only through the payment could it realize the fruit of the contract that it had entered into. The words themselves do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in the property in respect of which the payment is made. It is no doubt true that there have been decisions which have tested whether a person was interested in payment by ascertaining whether he had such a proprietary interest. It may be a good test in appropriate circumstances. But it would be a sad fallacy to deduce from the circumstance that a person may be interested in a payment because he has an interest in the property to which it relates the conclusion that no one who has not an interest in a property can be interested in a payment made in respect of that property. In truth, s. 69 invites no such judicial limitation. The section is part of a chapter of the Contract Act devoted to 'Quasi-Contract'. The phrase itself is no doubt taken from a familiar branch of the English common law, although there is no reason to suppose that the Indian Contract Act was intended to do more than to reproduce in compendious phrases the precise doctrines of the English law of contract. But the general purport of the section is reasonably clear: to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment against any other person who, rather than he, could have been made liable at law to make the payment. So interpreted, s. 69 appears to their Lordships to apply aptly to the payment made by the appellant company in this case."

R purchased properties *X* and *Y* which were subject to a usufructuary mortgage and the mortgage amount was left with *R*. He redeemed property *X* and sold the property *Y* to plaintiff free of mortgage incumbrance. To get possession, the plaintiff paid the balance of the mortgage amount and sued *R* for that amount.

Section 69 was held to apply and plaintiff was held entitled to reimbursement. There was no trust in favour of *R*.[75]Section 69 would apply to all liabilities for which the owners of land are under the revenue law liable, whether the liability be personal or not.[76] A person, holding adversely to the true owner, paid out of the sale of the property claimed by him a debt due by the true owner. He is entitled to be reimbursed under section 69 of the Contract Act because this was not a case where benefit was conferred officiously and if not reimbursed it would be a case of unjust enrichment.[77]

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72 *Sumar Singh* v. *Shib Lal* (1882) All. W.N. 149.

73 *Munni Bibi* v. *Triloki Nath* (1931) 54 All. 140. See also *Khushal Singh* v. *Khawani* (1906) All W.N. 282; *Tulsa Kunwar* v. *Jageshwar Prasad* (1906) 28 All. 563; *Bemasena Rao* v. *Narayana Rao,* 1927 A.M. 459; 99 I.C. 845; *Joy Chand* v. *Dole Bobinda,* 1944 A. Cal. 272; *Subbegowda* v. *Keshava Murthy,* 1950 A. Mys. 6; *Chaturbhujilal* v. *Girdharilal* (1948) Nag. 80, 1948 A.N. 390; *Harichand* v. *Gyaniram* (1944) Nag. 638, 1944 A.N. 282, *Bhagirathibai* v. *Digambar* (1945) Nag. 247, 1945 A.N. 179.

74 *Govindram Gordhandas Seksaria* v. *State of Gondal* (1950) 77 I.A. 156, 176-177, 52 Bom.L.R. 450, 1950 A.P.C. 99; *Bhagirathibai* v. *Digambar Ambadas* (1945) Nag. 247, 1945 A.N. 179; *Thirumalasubbu Chettiar* v. *Rajammal* (1961) A.M. 170.

75 *Thirumalasubbu Chettiar* v. *Rajammal* (1961) A.M. 170; *Govindram Sakseria* v. *State of Gondal,* 77 I.A. 156; (1950) A.P.C. 99, folld.

76 *Mariam* v. *Narayan* (1965) A.Ker. 55.

77 *Muppudathi Pillai* v. *Krishnaswami* (1960) A.M. 14 (F.B.); *Govindram Sakseria* v. *State of Gondal,* 77 I.A. 156; (1950) A.P.C. 99 folld.; American Re-statement of the Law, Ch. 1, s. 1, p. 12.

A mill belonging to a company in liquidation was purchased by the Government of Madras from the liquidator and the Government took possession of the mill and paid the purchase price. Later, the liquidator got a sale deed prepared by his legal adviser which was sent to the Government Pleader. The liquidator claimed the fees of his legal advisers for preparing the conveyance.

But the claim was rejected as the lawyer was working for the liquidator and there was no legal obligation on the buyer to get the conveyance, nor did the seller have any right to get the conveyance prepared or compel the buyer to have that conveyance executed.[78]

An employer paid compensation to one of its employee under the Workmen's Compensation Act for injuries caused on account of negligence of a third party and claimed to be reimbursed under section 69, Contract Act, against the third party for the amount paid but section 69 was held inapplicable as the payment by the employer was under a Statute and not merely because he was a "person interested".[79] A transferee (without the consent of other partners) of the share of a partner in the firm, paying a debt of the partnership without the consent of the partners, does not get a right to claim contribution from other partners, as he does not get the status of a partner and is not interested in the payment of the debt.[80].

Suit for contribution.—It has been assumed in a number of decisions that s. 69 applies to suits for contribution, that is, to cases where both plaintiff and defendant were liable for the money paid by the plaintiff. It was submitted by Sir Maurice Gwyer (contrary to the view expressed by the learned authors of this work) that s. 69 has no application to such cases. The section deals with reimbursement and not with contribution to all, for the person who is interested in the payment of money which another is bound by law to pay "must be a person who is not himself bound to pay the whole or any portion of the money" It was so held by the High Court of Madras thirty years ago in *Jagapatiraju* v. *Sadrusannama Arad*[81] and the contrary contention had been doubted in Calcutta even earlier.[82] A view similar to that which commended itself to the High Court of Madras was definitely accepted by the High Court of Calcutta in *Manindra* v. *Jamahir.*[83] and *Jinnah Ali* v. *Fateh Ali*[84] and has been re-affirmed in the same Court.[85] The Patna High Court has now held that this section does not apply to a suit for contribution.[86] Decisions which have been thought to sustain a different doctrine are, it is submitted incorrect.[87] In none of them does the point appear to have been fully argued or the authorities above mentioned to have been brought to the notice of the Court.[88]

Reimbursement and Contribution.—Difference between contribution under section 43 and reimbursement under section 69 is that the former is used in the case of joint promisors who were all liable to the promisee and one or more of them discharged the liability. They are entitled to sue the other co-promisors for contribution. Reimbursement arises where a person who has an interest in the matter discharges the liability which another person is under the law bound to pay but does not do so.[89]

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78 *Andhra Paper Mills* v. *Andhra* (1961) A.A.P. 57.
79 *Port Trust, Madras* v. *Bombay Company* (1967) A.M. 318.
80 *Ram Prasad* v. *Shivanandan* (1963) A.P. 149.
81 (1915) 39 Mad. 795, 1916 A.M. 980; *Ramaswami* v. *Viswanatha,* 1950 A.M. 343.
82 *Futteh Ali* v. *Gungannath Roy* (1881) 8 Cal. 113, at p. 116.
83 (1905) 32 Cal. 643, 9 C.W.N. 670.
84 (1911) 15 C.W.N. 332, 9 I.C. 219.
85 *Biraj Krishna* v. *Purna Chandra* (1939) 2 Cal. 226; 1939 A.Cal. 645; *Sudhangshu Kumar Roy* v. *Banamali Roy* (1946) A.Cal. 63, 223 I.C. 537.
86 *Gopinath* v. *Raghubansh Kumar,* 1949 A.P. 522; *Nandlal Singh* v. *Ram Kirit Singh* 1950 A.P. 212.
87 *Ram Lal* v. *Khiroda Mohini* (1913) 18 C.W.N. 113; *Prosunno Kumar* v. *Jamaluddin* (1913) 18 C.W.N. 327 (the head-note in this case does not correctly state the facts); *Bepat Singh* v. *Sham Lal* (1931) 10 Pat. 168; 132 I.C. 107; 1931 A.P. 234; *Ananda Kishore* v. *Panchu Kapali* (1934) 61 Cal. 864; 152 I.C. 510; 1934 A.Cal. 709.
88 This statement is not however wholly applicable to several cases decided at Nagpur: *Mst. Mula Bai* v. *Balakdas* (1939) Nag. 246; 178 I.C. 485; 1938 A.N. 459; *Amrit Waman* v. *Mahadeo,* 1940 A.N. 285; 190 I.C. 594; *Hari Chand* v. *Gyaniram* (1944) Nag. 638, 1944 A.N. 282. In the first of these cases some of the authorities were cited and the Court in a considered judgment accepted the view that a person may be interested in making the payment notwithstanding that he is also liable to pay. See also *Dori Lal* v. *Patti Ram* (1911) 8 All.L.J. 622; *Batuk Nath Mandal* v. *Bepin Behari Chaudhuri* (1912) 16 C.W.N. 975. There are undoubtedly two lines of decisions in India which await a final determination by a higher Court.
89 *Shankar Lal* v. *Moti Lal* (1957) A. Raj. 267.

A decree for costs was passed against *A*, a contesting defendant and *B* a non-contesting defendant. *A*'s property was attached in execution of the decree and he paid off the decretal amount and sued *B* for contribution,

but the court held that section 69 did not apply as *A* paid for his own benefit nor did section 70 apply.[90] But whether section 43 would in the circumstances apply was not decided. It was, however, held that as *A* had contested and *B* had not, there was no equity in favour of the former.[91]

A, *B* and *C* were joint judgment-debtors. *B* and *C* applied for debt relief and the debt of the decree-holder was discharged against *B* and *C*.

but he recovered from *A*. *A* then successfully sued for contribution from *B* and *C* as the discharge operated between the creditor and *B* and *C* and did not affect the rights of *A*.[92] Section 69 is not applicable to a case, where a plaintiff claims from his former partner contribution for penalty paid in an income-tax matter after the dissolution of partnership but referable to tax of the pre-dissolution period.[93] This case must be confined to its own facts.

It need hardly be said that a suit for contribution may lie in appropriate circumstances, even though s. 69 is not applicable. In many cases also s. 70 may be prayed in aid; see notes to s. 70 under the head "Compensation," below.[94]

Money which another is bound by law to pay".—In *Mothooranath* v. *Kristokumar,*[95] above cited, it was contended that this section applied only to cases where the person who is there called "the other" was personally liable for the debt, and that it did not apply where, as in that case, the liability attached to the land. The Court overruled this contention and said:

"It is clear from the illustration that that is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government; but the liability to pay revenue due to Government is not a personal liability of the *zamindar,* but a liability which is imposed upon the *zamindar's* land. It is therefore clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

"**Bound by law.**"—The liability for which payment may be made under this section need not be statutory. In a Calcutta case cited above[96] it was argued that the words "bound by law" restricted the section to liabilities created by some statute, such as liabilities to pay revenue, but excluded liabilities which arose out of contracts by parties. The Court declined to uphold this contention and observed:

"That would be putting on the section of too narrow a construction, because it was no doubt intended to include such a case as a lessee paying rent to the superior landlord for which the intermediate lessee was liable under a covenant."

"Bound by law" means that the defendant at the suit of any person might be compelled to pay.[97] Their Lordships of the Privy Council in *Govindram Gordhandas Seksaria* v. *State of Gondal*[98] expressed the view that the words extend to any obligation which is an effective bond in law, just as the common law gives a right of indemnity to one who has paid "under compulsion of law" against the true obligor without limiting the circumstances in which the latter's liability had arisen.

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90 *Baij Nath* v. *Bijadhar* (1961) A.P. 103.; *Governor-General* v. *Municipal Council, Madura,* 75 I.A. 213; (1949) A.P.C. 39 (about s. 70).

91 *Janakibai* v. *Rama Manaji* (1948) A.N. 292; (1947) Nag. 881; see also *Narendra Chandra* v. *Pashupati Nath* (1949) A.Cal. 242.

92 *Baij Nath* v. *Bijadhar* (1961) A.P. 103.

93 *Vedachala Mudaliar* v. *Rangaraju Naidu* (1960) A.M. 457.

94 As to contribution between joint promisors and co-sureties, see ss. 43 and 44, above.

95 (1878) 4 Cal. 369, followed in *Chandradaya* v. *Bhagaban* (1916) 23 Cal.L.J. 125; 32 I.C. 200; *Sarajubala Roy Chaudhurani* v. *Kamini Kumar Chaudhury,* 1926 A. Cal. 765; 94 I.C. 811; *Murlidhar* v. *Naunihal Singh,* 1932 A.O. 222; 138 I.C. 137; *Nandan Sahu* v. *Fateh Bahadur* (1940) All. 71; 185 I.C. 519; 1940 A.A. 104; *Joy Chand* v. *Dole Gobinda Das,* 1944 A. Cal. 272.

96 *Mothooranath* v. *Kristokumar* (1878) 4 Cal. 369, 373; *Angne Lal* v. *Sidh Gopal,* 1940 A.A. 214; (1940) All L.J. 320; 189, I.C. 60.

97 *Rasappa Pillai* v. *Doraisami Reddiar* (1925) 90 I.C. 545; 49 Mad.L.J. 88; 1925 A.M. 1041. It is not easy to understand how any other view could ever have been propounded in a Court of law.

98 *Govindram Gordhandas Seksaria* v. *State of Gondal* (1950) 77 I.A. 156, 177, 52 Bom.L.R. 450, 1950 A.P.C. 99.

An action to recover money paid is not maintainable under this section unless the person from whom it is sought to be recovered was bound by law to pay it. Thus revenue due on land owned by one who is not the registered holder is not money which such an owner is bound to pay under the Madras Revenue Recovery Act, 1864, though it may be to his interest to do so, and the registered holder voluntarily paying such revenue cannot recover it under this section.[99] The Calcutta Courts do not follow this Madras view, holding that if a *benamidar* is held liable for rent, and the real lessee is held not liable, the *benamidar,* having paid the decretal amount, can recover it from the real lessee, as the section covers not merely personal liabilities, but also indirect liabilities on property.[1] Payments made by a second mortgagee to save mortgaged property from sale in execution of a decree for rent obtained by the *zamindar* against the mortgagor under the Bengal Tenancy Act, 1885, cannot be recovered by him from the first mortgagee, as the latter is not bound under s. 69 of that Act to pay the rent due by the mortgagor to the *zamindar.*[2] And where the income-tax authorities assessed the widow of a deceased Hindu in respect of outstandings forming part of the estate of the deceased, notwithstanding remonstrances on her part that the outstandings had not come to her, but had been bequeathed under the will of the deceased to the defendants, and the widow paid the tax, it was held that she could not recover the amount from the defendants under this section, for the defendants, not being the parties assessed, were not "bound by law" to pay the tax[3]. Again, *A* mortgaged his interest in a *patni taluk* to *K*. *A* then sold his interest in the *taluk* to *B*, who got his name registered in the *zamindar's* books in place of *A*. Subsequently the *zamindar* threatened to sell the *taluk* of arrears of rent, whereupon *K* paid the amount to save his interest in the *taluk*. *K* then sued *B* to recover the amount from *B*. *B* contended that he was only a *benamidar* for *A*, and that he was not, therefore, bound to pay the rent. But this contention was overruled and it was held that, *B* having held himself out as purchaser, he was *prima facie* bound to pay the rent, and that *K* was entitled to recover the amount from him under this section.[4] *A* and *B* sold a property to *C*, *A* and *B* agreeing, since *B's* share was subject to attachment before judgment in a suit against *B*, to keep *C* indemnified. *B'* creditor obtained a decree against *B*, and to save the property *C* paid the decretal amount. In a suit against *A*, it was held that he was liable to repay *C* the whole amount.[5] Where the beneficiaries filed a suit against two *mutawallis* and obtained satisfaction of the decree from one of them who had the funds in his own hands, it was held that in the circumstances he was only paying what he himself was bound to pay and that he could not therefore claim contribution from his co-*mutawalli*.[6]

A Hindu father is not "bound by law" to get his minor daughter married, and therefore the mother who has incurred expense in getting her married cannot recover from the father under this section.[7] Notwithstanding Article 45, the State Government is under no obligation to impart free education nor is it bound to pay the teachers or to meet the expenses of private schools nor are the schools established or run for the Government nor for its benefit.[8]

Where a mortgagee in possession was in his interest made to pay the money payable by the mortgagor under a security bond in favour of Government, he is entitled to be reimbursed under the provisions of section 69 of the Contract Act. Even though such payments entitle the mortgagee to a charge, he is not bound to enforce it in view of section 35 of the Madras Revenue Recovery Act.[9]

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99 *Boja Sellappa Reddy* v. *Vridhachala Reddy* (1907) 30 Mad. 35; *Subramania* v. *Mahalingasami* (1909) 33 Mad. 41; *Puthempurayal* v. *Mangalasseri* (1912) 24 Mad. L.J. 548; 15 I.C. 262.

1 *Joy Chand* v. *Dole Gobinda Das,* 1944 A.Cal. 272; *Mothooranath* v. *Kristokumar* (1878) 4 Cal. 369.

2 *Gangadas* v. *Joggendra* (1907) 11 C.W.N. 403, So a person holding over in trespassory occupation of land after he has sold his interest therein is not "bound by law" to pay the *zamindar's* dues: *Payida Ramakrishnayya* v. *Barrey Nagarazu,* 1926 A.M. 182; 91 I.C. 608.

3 *Raghavan* v. *Alamelu Ammal* (1907) 31 Mad. 35.

4 *Umesh Chandra Banerjee* v. *Khulana Loan Company* (1907) 34 Cal. 92.

5 *Neni Kavur* v. *Ranganathan,* 1946 A.M. 244.

6 *Muhammad Qalikhan* v. *Mst. Mubarak,* 1935 A.A. 758; (1935) All.L.J. 503; 154 I.C. 716.

7 *Sundaramma* v. *Suryanarayana,* 1950 A.M. 274.

8 *Joseph Valamangalam* v. *State of Kerala* (1958) A. Ker. 290.

9 *Sami Pillai* v. *Ramulu Naidu* (1972) A.M. 4, 5.

One of the mortgagors paid the mortgagees half of the entire mortgage money and had his name expunged from the memo of appeal and a decree as to interest was passed against the other mortgagor who then sued for contribution from the mortgagor whose name was expunged.[10] He was held liable to contribute his share of the decree.

Purchase of property subject to payment of encumbrances.—A person purchasing property *subject* to a charge is alone liable to pay it off, and he is not therefore entitled to recover the amount paid by him from the person originally liable in respect thereof. Thus the purchaser of a *patni taluk* at a sale in execution of a decree against the holder thereof is bound by law to pay all arrears of rent due to the *zamindar* at the time of sale. If the purchaser pays the arrears to save the *taluk* from sale at the instance of the *zamindar,* he cannot recover the amount from the *patnidar,* though the *patnidar* enjoyed the profits of the *patni* during the period for which the rent had become due.[11] Similarly, a person who buys immovable property subject to a charge for maintenance in favour of a widow cannot recover from the vendor maintenance money paid by him to the widow to save the property from sale at the instance of the widow.[12] A *puisne* mortgagee who bought the mortgaged property in execution of his own decree and thereafter redeemed a prior mortgage cannot claim from the mortgagor the sum paid by way of redemption, since after the *puisne* mortgagee's purchase of the property, the mortgagor's interest was extinguished and he is therefore no longer a person "bound by law to pay".[13]

Payment must be to another person.—This section applies only where one person pays to *another* money which a third party is bound to pay. In *Secretary of State of India* v. *Fernandes,*[14] there was certain land in South Canara which was held by the Government at a certain rent as *mulgaindar* (permanent tenant) under a *mulgar* (landlord). Arrears of revenue were due from the *mulgar* to Government, and the Government, to prevent the land from being sold for the arrears, paid as *mulgaindar* or rather retained the arrears due to itself. It was held that, having made the payment to itself, the Government could not recover the sum from the *mulgar* under this section.

Remedies against wrong-doer.—Neither this section nor s. 70 refers in any way to remedies against wrong-doers.[15]

Other remedies.—It seems rather superfluous to add that they do not exclude any such claims to contribution as may arise out of express or tacit agreements for indemnity.[16]

Res judicata.—Where in a previous suit for partition and accounts the plaintiff had the right to also sue for money paid by him for liability on the joint properties or a portion thereof, he cannot because of the bar of *res judicata,* claim that sum under sections 69 & 70 Contract Act on the plea of its being a separate cause of action.[17]

Obligation of person enjoying benefit of non-gratuitous act.

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

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10 *Gyan Prakash* v. *Triloki Prasad* (1970) 2 All. 397, 401.
11 *Manindra Chandra Nandy* v. *Jamahir Kumari* (1905) 32 Cal. 643; *Kashi Nath* v. *Nil Ratan Saha,* 1947 A.Cal. 304, 51 C.W.N. 116. Compare *Kishan Lal* v. *Megh Singh* (1901) All.W.N. 37; *Ranglal Sahu* v. *Kali Shanker Sahai* (1923) 2 Pat. 890; 77 I.C. 73; 1924 A.P. 235.
12 *Mangalathammal* v. *Narayanaswami Aiyar* (1907) 17 Mad. L.J. 250; *Hriday Narain* v. *Haricharan,* 1952 A.P. 81 (in effect a case of property being sold subject to a charge).
13 *Nandan Sahu* v. *Fateh Bahadur* (1940) All. 71; 186 I.C. 519; 1940 A.A. 104.
14 (1907) 30 Mad. 375. This was not the only disputable point, but the case was disposed of on it.
15 *Kanhaya Lal* v. *National Bank of India* (1913) 40 I.A. 56, 66; 40 Cal. 598.
16 See *Bejoy Kumar Sen* v. *Kusum Kumari Debi* (1928) 33 C.W.N. 221, 1929 A.Cal. 315.
17 *Sarasbati Debi* v. *Satya Narayan Gupta* (1977) A.Cal. 99, 107.

Illustrations

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B* if the circumstances show that he intended to act gratuitously.

(*A* furnishes supplies for Government service to the order of an officer who has no authority for the purpose. The supplies are in fact accepted and used. *A* can recover the value from the Secretary of State according to the market rates: *Secy. of State* v. *G.T. Sarin & Co.* (1929) 11 Lah. 375. The facts were complicated but the point of law simple when the facts were ascertained. See *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876; (1962) A.SC. 779).

Non-gratuitous act done for another.—This section goes far beyond English law.[18] By the Common Law, if goods, work, or anything valuable be offered in the way of business and not as a gift, the acceptance of them is evidence of an agreement— a real, not a fictitious, agreement, though it need not be expressed in words—to pay what the consideration so given and taken is reasonably worth. A man is not bound to pay for that which he has not the option of refusing.[19] Under this section it would seem that whoever finds and restores lost property, apart from any question of a reward having been offered, is entitled to compensation for his trouble if he did not intend to act gratuitously. This is certainly not the Common Law rule. Illustration (b) is in accordance, no doubt, with English law, so far as the negative result goes; but the only real analogy is to be found in the maritime law of salvage and in some other very rare cases depending on the same principle. The case of illustration (a) would be decided in the same way, but not quite for the same reason. Either *B* has accepted the goods, in which case he cannot be heard to say that they were not intended for him.[20] or he has dealt with them as a mere trespasser, in which case he is liable for their value as damages. This does not apply to the rare but possible case of *B* honestly thinking that the goods came from *X*, of whom he intended to buy such goods, Such a case may well be within the present section, but by the Common Law *B* is not liable to *A* for the price of the goods,[21] in contract express or implied. It seems, however, that even in England there would be liability in quasi-contract (see cases on Salvage, *infra*). The rendering of services under a void agreement is a typical situation leading to a quasi-contractual remedy.[22] It is true that in the United States the Supreme Court of Massachusetts held in *Boston Ice Co.* v. *Potter,*[23] following *Boulton* v. *Jones,*[21]that there was no remedy in quasi-contract, but this point was never argued or considered in the English case. The American decision has been criticised.[24] In Massachusetts, a plaintiff is unable to recover in quasi-contract if his conduct is very reprehensible. Costigan doubts whether the conduct of the plaintiff in the *Boston Ice Case* fell into this category, but he did actively conceal the true position from the defendant, whereas Boulton informed Jones of the circumstances when he sent the invoice, although unfortunately Jones had already consumed the goods. The facts of the *Boston Ice Case* were that *P* had formerly supplied *D* with ice, but *D*, being dissatisfied terminated the contract, and turned to *X* for supply. *P* bought *X*'s business and continued to supply *D*. In the *Boulton Case* the circumstances were very different, the point being not that the plaintiff knew the defendant was unwilling to deal with him because of a blunt refusal to do so, but that the defendant had a set off against *O*, the original owner of the business, and although the plaintiff ought to have known of this as he had been *O*'s foreman, there was no evidence that he did know, and this conduct in failing to discover this fact could hardly be stigmatised as reprehensible.

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18 This was recognised in *Jarao Kumari* v. *Basanta Kumar Roy* (1905) 32 Cal. 374, 377; *Nellie Wapshare* v. *Pierce Leslie & Co.* (1960) A.M. 410; *Govindarajulu Naidu* v. *S.S. Naidu* (1958) 2 M.L.J. 118; *Golab Chand* v. *M.J.V. Miller* (1938) A.M. 960; *Nityananda Mudaliar* v. *Arunachalam Chettiar,* 71 M.L.W. 50; 1958 M.W.N. 238 refd. to.

19 *Sumpter* v. *Hedges* (1898) 1 Q.B. 673; *Munro* v. *Butt* (1858) 8 E. & B. 738; *Bradley* v. *Horner* (1957) D.L.R. (2nd) 446.

20 *Weatherby* v. *Banham* (1832) 5 C. & P. 228.

21 *Boulton* v. *Jones* (1857) 2 H. & N. 564; 115 R.R. 695.

22 *Craven-Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; Denning; 55 L.Q.R. 54, 61.

23 (1877) 123 Mass. 28.

24 See Costigan in 7 Col.L.R. 32.

Raised for the first time in special leave.—"The Supreme Court has held that if a claim of s. 70 is put up for the first time in a special leave case it is not precluded from applying that section provided the conditions for the application of that section are set out in the pleadings and proved.[25]

In the instant case the supplies were made by the Contractor Defendant No.2 and the Plaintiff as a financier had a power of attorney to collect the price from the Army Department, but he could not succeed in the absence of a case made in the plaint.[26]

S.70 enables a person who actually supplies goods or renders some service not intending to do so gratuitously to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability that arises on equitable grounds even though an express agreement or a contract is not proved. But in the absence of any case set up in the plaint, the plaintiff cannot fall back[27] on any liability under s. 70 when the supplies were not actually made by him the (plaintiff).

Unjust Enrichment.—There is good authority for saying that section 70 of Contract Act was framed in the present form with a view to avoid niceties of English Law on the subject of *quasi* contract.[28] The Indian Contract Act does not enable a party to contract to ignore the express covenants thereof and to claim payment of consideration for performance of the contract at the rates different from the stipulated rates on some vague plea of equity.[29] The section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment.[30] What section 70 prevents is unjust enrichment and it applies as much to corporations as to Governments. A Government is, therefore, not outside the operation of section 70; nor are corporations[31] S. 70 embodies the equitable principle of restitution and prevention of unjust enrichment and Government is also bound by it.[32] Where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain the money and the law will independently of express contract compel restitution or compensation.[33]

Section 70 and paragraph 3 of s. 73 are based on the doctrine of restitution which prevents unjust enrichment by retaining anything received by a party which does not belong to him and he must return it to the person from whom he received it and if action is not possible pay him in its money value.[34]

The principle underlying section 70 of the Contract Act makes the person who enjoys the benefit thereof liable to make compensation to the person who does something for the other not intending to do it gratuitously. They can have certain relationship resembling those created by contracts but as in the case of contracts of consent of the person who enjoys the benefit is presumed. Another fundamental principle which must be kept in mind is that the person who is tried to be held responsible must have had the opportunity or option to accept or not to accept the benefit, and in this connection passages at pages 424,427,430, 431 from Pollock & Mulla Contract Act (8th Ed.) were quoted with approval. From this it was

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25 *Hans Raj Gupta & Co.* v. *Union of India* (1973) A.SC. 2724, 2728; *Piloo Dhunjishaw Sidhwa* v. *Municipal Corpn. of the City of Poona* (1970) 3 SCR 415; (1970) A.SC. 1201 refd. to.

26 *Hansraj Gupta & Co.* v. *Union of India* (1973) A.SC. 2724, 2728.

27 *M/s. Hansraj Gupta & Co.* v. *Union of India* (1973) A.SC. 2724, 2728.

28 Per Sarkar J. in *State of West Bengal* v. *B.K. Mondal* (1962) 1 Supp. S.C.R 876, 912; (1962) A.SC. 779, 794 Pollock: On Contracts (13th Edn.) p. 10 refd. to. See *State of Punjab* v. *Hindustan Development Board* (1960) 2 Punj. 676; (1960) A. Punj. 585 (based on *quantum meruit* but admits of liberal interpretation).

29 Per Shah J. in *Alopi Prasad* v. *Union of India* (1960) A.S.C. 588, 593; (1960) 2 S.C.R. 793.

30 *Dominion of India* v. *Preety Kumar Ghosh* (1958) A.P. 203, 209.

31 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) A.SC. 779, 789; (1962) Supp. 1 S.C.R. 876; *State of Andhra Pradesh* v. *Jayalakshmi Rice Mills* (1959) A.AP. 352; *New Marine Coal Co. Ltd.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.SC. 152; *Ram Partap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153.

32 *State of U.P.* v. *Chandra Gupta & Co.* (1977) A.A. 28, 33; *State of West Bengal* v. *B.K. Mondal* (1962) Supp. 1 SCR 376; (1962) A.SC. 779. reld. on.

33 *Mathura Mohan* v. *Ram Kumar Saha*, 43, Cal. 740, 827; *Ramkin* v. *Emigh*, 218 U.S. 27; *Craven Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066.

34 *Great Eastern Shipping Co.* v. *Union of India* (1971) A.Cal. 150, 155.

concluded by the Gujarat High Court[35] that in a case where repairs were carried out in a premises by the tenant section 70 will not be applicable as the landlord had no option whatsoever to accept or reject the benefit at all.

Again the consent and intention to enjoy the benefit cannot and does not exist because of the very nature of the transaction namely the tenant actually carried out repairs against the wishes of the landlord.

If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another the law in England would as a general rule refuse him the right of indemnity. But if he could show that in the particular circumstances of the case there was some necessity which had led him to assume the obligation the law would grant him a right of reimbursement if in all the circumstances it was just and reasonable to do so. Since the plaintiff had acted behind the back of the defendant in order to oblige a third person and despite the protest of the defendant, it would not be just and equitable to grant him the right of reimbursement.[36]

The doctrine of unjust enrichment has received the support of Lords Wright,[37] Atkin[38] and Denning.[39] The doctrine has also been accepted by American Law,[40] Scottish Law,[41] French Law[42] and Roman Dutch Law.[43]

The claim cannot be said to be based on some rule of *aequum et bonam* by virtue of which a man must not be allowed to enrich himself unjustly at the expense of another, i.e. to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. They are called *quasi* contract or restitution.[44] Lord Wright dealing with unjust enrichment said:

> "Such remedies in English law are generally different from remedies in contract or in tort and are now recognised within a third category of the Common law which has been called *quasi* contract or restitution."[45]

Erroneous accounts.—Where accounts are shown to be erroneous or are drawn up and assented to by parties under a common mistake as to their rights and obligations, the accounts may be directed to be reopened. The law implies an obligation to repay the money, which was an unjust enrichment.

And, therefore, in a suit for recovery of money due on the basis of an acknowledgment, the Court can on the basis of evidence and documents specify that the amount given in the acknowledgment had not been correctly calculated and can correct the same.[46]

Excess price paid by a buyer because of wrong weight and wrong calculation given in the invoice is refundable to the buyer as no person can enrich himself unjustly due to a mistake wanton or otherwise.[47]

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35 *Jhala Umedsinghji Merubhabhai* v. *Indumati Markandray Trivedi,* (1971) A. Guj. 214, 220.
36 *Owen* v. *Tate* (1975) 2 All E.R. 129, 134.
37 *Brooks Wharf & Bull Wharf Ltd.* v. *Goodman Brothers* (1937) 1 K.B. 534, 545; (1936) 3 All E.R. 696; 707; *Fibrosa Spolka* v. *Fairburn Lawson C.B. Ltd.* (1943) A.C. 32, 61-64; (1942) 2 All E.R. 122.
38 *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-29.
39 *Nelson* v. *Larholt* (1948) 1 K.B. 339, 343; *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192, 204-5.
40 *Restatement of the Law of Restitution, Quasi Contract & Constructive Trusts,* Art. I.
41 Encyclopaedia of the Laws of Scotland, Vol. XII, pp. 342 *et seq.,* (538 *et seq.)* 572 *et seq.;* Gloag & Henderson, Introduction to the Laws of Scotland (6th Edn.) pp. 130-134.
42 Gutteridge & David, 5 Camb.L.J. 204.
43 *Hussainbai* v. *Muhammad Muheeth* (1960) A.C. 592.
44 Per Lord Wright in *Fibrosa Spolka* v. *Fairbairn Lawson* (1943) A.C. 32; (1942) 2 All E.R. 122. *Cf.* per Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-9; (1940) 4 All E.R. 20 at pp. 35-37. See also *Metropolitan Police Distt. Receiver* v. *Croydon Corpn.* (1957) 1 All E.R. 78; (1957) 2 Q.B. 154 (explaining what is unjust enrichment).
45 *Fibrosa Spolka* v. *Fairbairn Lawson Combe B. Ltd.* (1943) A.C. 32, 61; (1942) 2 All E.R. 122, 135.
46 *Thomas Abraham* v. *The National Tyre & Rubber Co, of India Ltd.* (1974) A.SC. 602, 606; *Williamson* v. *Barbour* (1877) 9 Ch. D. 529, 533 and Halsbury Laws of England Vol. 26 (3rd Ed.) para 1725 p. 927 appld.
47 *Nankchand Shadurain* v. *Tinnevelli Tuticorn Electric Supply Co. Ltd.* (1975) A.M. 103, 104.

The theory of unjust enrichment or unjust benefit as a basis of *quasi* contract seems to be controversial. It may be added that tendency in England and in America is to include *quasi* contract in the doctrine of "constructive trust."[48]

A case of *Reading*[49] was this:

A sergeant in the Army illegally received at Cairo illegal gratification from a civilian. This money was on one occasion seized by the military authorities and it was held that a position which helped a servant to earn money by its use gave the master the right to receive the money so earned even though earned by a criminal act. This is based on the implied promise by the servant to account to his master for any moneys he may receive by reason of his employment and he cannot set up his own wrong as a defence to his master's claim.

The principle of unjust enrichment falls under sections 69 and 70. But these sections are wider in scope than the doctrine as applied in England and go far beyond it.[50] The rule in the case of heirs of a deceased debtor from whom the debt is realised under s. 52 C.P.C. is that the paying heirs are entitled to contribution from the non-paying co-heirs on the principle that "in *acquali jure* the law requires equality: one shall not bear the burden in case of the rest". The principle is universal "that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract".[51]

"Certainly, there may be difficulties in applying a rule stated in such wide terms as is that expressed in section 70. According to the section it is not essential that the act shall have been necessary, in the sense that it has been done under circumstances of pressing emergency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases in which no question of salvage enters. It is not limited to persons standing in particular relations to one another, and, except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done".[52] The terms of (this section) are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations created by contract".[53] The section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered.[54] The section applies only when the defendant voluntarily accepts the thing or enjoys the benefit. In other words, the person sought to be made liable should have the option to accept or reject the benefit. It does not apply to officious interference by one in the affairs of another.[55] Thus a person who starts litigation for the appointment of a guardian to a minor is not entitled to the expenses of such litigation from the minor or his estate.[56] Payment of land tax by the plaintiff to support his own claim to the land

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48 See Lord Porter in *Reading* v. *A.G.* (1951) A.C. 507, 513; (1951) 1 All E.R. 617, 619-620. Cheshire & Fifoot: Law of Contract (6th Edn.) p. 550, (9th Edn.) pp. 635-636,

49 *Reading* v. *Attorney General* (1951) A.C. 507; (1951) 1 All E.R. 617.

50 *Nellie Wapshare* v. *Pierce Leslie & Co.* (1960) A.M. 410; *Govindarajulu Naidu* v. *S.S. Naidu* (1958) 2 M.L.J. 118; *Golab Chand* v. *M.J.V. Miller* (1938) A.M. 960; and *Nityananda Mudaliar* v. *Arunachalam Chettiar,* 71 M.L.W. 50; 1958 M.W.N. 238 refd. to; *Cf. A.R.G. Krishnamurthi & Co.* v. *Sitaramayya* (1958) A.AP. 427, 436 (a case dealing with restitution under s. 65).

51 *Kazim Ali* v. *Sadiq Ali,* 65 I.A. 219; (1938) A.P.C. referring to; *Deering* v. *Earl of Winchelsea* (1787) 2 Bos. & Pal. 270; 126 E.R. 1276; *Ramskill* v. *Edwards* (1885) 31 Ch.D. 100; *Rambux Chittangeo* v. *Modhusudan Paul* (1867) 7 W.R. 377; *Nityananda Bakshy* v. *Banamali Bakshy* (1962) A. Or. 1.

52 *Damodar Mudaliar* v. *Secretary of State for India* (1894) 18 Mad. 88, 91.

53 *Suchand* v. *Balaram* (1910) 38 Cal. 1; 6 I.C. 810; quoted with approval in *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. S.C.R. 876; (1962) A.SC. 779, 790.

54 *Damodara Mudaliar* v. *Secretary of State for India* (1894) 18 Mad. 88, at p. 93; *Muthu Raman* v. *Chinna Vellayan* (1916) 39 Mad. 965, 970; 33 I.C. 508; *Muthayya Chetti* v. *Narayanan Chetti* (1927) 109 I.C. 101. See also on "Gratuitously" *Ajudhia Prasad* v. *Bakar Sajjad* (1883) 5 All. 400; *Bama Sundari Dasi* v. *Adhar Chunder Sarkar* (1894) 22 Cal. 28; *Nathu* v. *Balwantrao* (1903) 27 Bom. 390, 393; *Suraj Bahu* v. *Hashmi Begam* (1918) 40 All 555; 47 I.C. 903; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 892; (1962) A.SC. 779, 788.

55 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 892, (1962) A.S.C. 779, 788; *Mariam* v. *Narayanan* (1965) A. Ker. 55; see under *Quantum Meruit* and under *Quasi Contract Sumpter* v. *Hedges* (1898) 1 Q.B. 673; *Munro* v. *Butt* (1858) E. & B. 738; *Forman & Co. (Pty) Ltd.* v. *Ship Littledale* (1900) A.C. 190; *Bradley* v. *Horner* (1957) 10 D.L.R. (2nd) 446.

56 *Ram Das* v. *Ram Babu,* 1936 A.P. 194; 158 I.C. 25.

rather than to benefit the defendant is not recoverable.[57] But its application is not excluded merely because the thing done was for the plaintiff's benefit as well as the defendant's.[58]

A purely voluntary payment may be recovered if only it has been induced by a mistake regarded by the court as sufficiently serious in character.[59]

A minor is not liable to a suit under s. 70. The reason for this has been stated to be that, if he cannot be sued on an express contract, neither can he be sued on an implied one; and s. 70 is one of the fasciculus of sections dealing with what the Act calls "certain relations resembling those created by contract." Apart from this, it is clear that any other construction would make, s. 68 redundant and s. 11 to a great extent nugatory. So a Full Bench of the High Court of Patna have held in *Bankey Behari* v. *Mahendra Prasad.*[60]

An equitable principle resembling that of this section is recognised in the English law of partnership and companies. Where money has been borrowed by one partner in the name of the firm, but without the authority of his co-partners, and applied in paying debts of the firm, the lender is entitled to call on the firm for repayment of the amount so applied.[61] The rule is treated as somewhat peculiar and is not likely to be extended.

The rule laid down in this section was suggested by the notes to *Lampleigh* v. *Brathwait,*[62] and perhaps indirectly by the Roman law[63] (see Whitely Stokes Introduction to Contract Act, at p. 533).

It is superfluous to add that the section does not apply where an act is done by one person at the *express* request of another. It (s. 70) will not apply where the goods are supplied pursuant to a request. A contrary view was taken in a Bombay case which it is submitted is erroneous.[64] An alternative claim under sections 65 and 70 becomes nugatory as soon as the court finds a valid arbitration clause in a contract covering the subject-matter of dispute.[65] In *Moselle Solomon* v. *Martin & Co.* Lort Williams J. held that the terms of section 70 are very wide and it is applicable even when the plaintiff can sue upon the contract express or implied. Jack J. held the contrary, i.e. it is not applicable where there is an express contract, which it is submitted is the correct view. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this section, but becomes the request implies a promise to pay such remuneration.[67] Section 70 applies where the contract is invalid for want of form or authority under Art. 299(1) provided the conditions of s. 70 are complied with.[68] In *Mulamchand's case,* the Supreme Court held that a claim made by one person against another under s.70 is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such cases is not founded upon any contract or tort but upon a third category of law, namely

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57 *Mariam* v. *Narayan* (1965) A. Ker. 55.

58 *Meenakshisundara* v. *Veerappa* (1925) 92 I.C. 838; (1926) Mad. W.N. 4 (repair of irrigation channel, after notice, by one of two riparian owners); but see *Tangya Fala* v. *Trimbak Daga* (1916) 40 Bom. 646; 35 I.C. 794.

59 *Morgan* v. *Ashcroft* (1938) 1 K.B. 49; (1937) All E.R. 92.

60 (1940) 19 Pat. 739; 189 I.C. 772; 1940 A.P. 324.

61 Lindley, Partnership 11th ed. 263; *cp.* Partnership Act, 1890, s. 24, sub-s. 2.

62 1 Sm. L.C. (13th Ed.); (613) Hob. 105.

63 Per Cur. in *Damodara Mudaliar* v. *Secretary of State for India* (1894) 18 Mad. 88, 91.

64 *B.N. Elias & Co.* v. *State of West Bengal* (1959) A. Cal. 247; *Union of India* v. *Ram Nagina Singh,* 89 Cal. L.J. 342 reld. on; contra *Ramakrishna* v. *Rangoobai* (1959) A.B. 519.

65 *Shalimar Paints* v. *Omprokash* (1967) A. Cal. 372; *Rungta Sons (P) Ltd.* v. *Jugometal Trg. Republike,* 63 C.W.N. 527; (1959) A. Cal. 423; *Anderson Wright Ltd.* v. *Moran & Co.* (1955) A.S.C. 53; (1955) 1 S.C.R. 862 refd. to.

66 62 Cal. 612, 621 (Lord Williams J.)

67 *Sibkisor Ghose* v. *Manik Chandra* (1915) 21 Cal. L.J. 618; 29 I.C. 453. The decision in *Nathmal* v. *Sanitation Panchayat Committee,* 1935 A.N. 242; 160 I.C. 301, cannot be correct. See *Ratanlal Hiralal* v. *Chandradutt,* 1951 A.N. 431.

68 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 912; (1962) A.SC. 779, 786-9; *New Marine Coal Co.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.SC. 152; *Subramanyam* v. *Thayappa* (1961) 3 S.C.R. 663; (1966) A.SC. 984 (not a case under s. 175(3)). *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218, (1968) 3 S.C.R. 214.

quasi-contract or restitution.[69] The Calcutta High Court has based compensation on implied conduct of the parties, namely the supply of goods by the plaintiff, accepted by the defendant poration has no right to retain[70] The section is to affirm and not to disaffirm the illegal contract,[71] The Lahore High Court has also based the award of compensation on section 70 i.e., compensation for goods supplied and used by Government.[72]

Where the plaintiff clearly pleaded supply of goods by the plaintiff on its own account; acceptance by the defendant of the goods as such; part payment to the plaintiff and the balance remaining due, the case pleaded was one of an implied contract brought about by the conduct of the parties namely the supply of goods by the plaintiff, accepted by the defendant and a balance of price remaining due, the plaintiff was entitled to the recovery of the balance.[73] This was really a case of direct contract of sale between the plaintiff and the defendant.

Where the claim of the plaintiff was that the defendant did not deliver vacant possession in accordance with the contract and therefore was liable for mesne profits, the Court found[74] that there was no enforceable contract and the plaintiff was not entitled to rely on it.

Compensation.—By this section three conditions are required to establish a right of action at the suit of a person who does anything for another: (1) the thing must be done lawfully; (2) it must be done by a person not intending to act gratuitously; and (3) the person for whom the act is done must enjoy the benefit of it.[75] The Kerala High Court has observed thus: The principle of unlawful enrichment presupposes three things: (1) that the defendant has been enriched by the receipt of benefit (ii) he must be so enriched at the plaintiff's expense and (iii) it would be unjust to allow him to keep the benefit.[76]

A contract violative of the Constitution cannot be enforced—but any benefit received under it cannot be retained.[77] The basis of compensation under section 70 would be in proportion to the benefit enjoyed by the authority and is not the same as on contractual rights.[78] It is only where the three ingredients are alleged in the plaint that a cause of action is constituted within s.70. Where the plaintiff merely alleged that goods were not supplied gratuitously and not the other ingredients also, the Court commits an error in allowing the trial to proceed. But as the case had proceeded in spite of these defects, compensation for goods supplied was upheld.[79] But even though no alternative case was set out in the plaint entitling the plaintiff to get compensation under section 70 of the Contract Act, still the plaintiff cannot be non-suited on that ground if the

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69 *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218, 1222; sec. n. 33, p. 498; *Keshab Kishore* v. *State of Bihar* (1971) A.P. 99; *Bhikhraj Jaipuria* v. *State of Bihar* (1962) 2 S.C.R. 880; (1962) A.SC. 113 reld. on

70 *Mathura Mohan Saha* v. *Ram Kumar Saha,* 43 Cal. 790, 827; *Pallonjee Eduljee* v. *Lonavala City Municipality* (1937) Bom. 782, 787. The observations of Straight J. in *Chhedilal* v. *Bhagwandas,* 11 All. 234 appd. in *Punjabbhai* v. *Bhagwandas,* 53 Bom. 309 diffd. from.

71 *Central Transport Co.* v. *Pullman Palace Car Co.* (1931) U.S. 24 reld. on. See also *infra* under Art. 299(1) & S. 175(3), Government of India Act.

72 *Secretary of State* v. *G.T. Sarin,* 11 Lah. 375; (1930) A.L. 364; *Municipal Committee, Lahore* v. *Miran Baksh,* 13 Lah. 561; (1933) A.L. 15; (a case of compensation for use and occupation, in absence of lease deed); *Municipal Committee, Gujaranwala* v. *Fazal Din* (1926) 11 Lah. 121; (1929) A.L. 742; *Ram Chand & Sons* v. *Municipal Committee, Lahore* (1933) A.L. 14; *Bhandari Bros.* v. Municipal Committee (1931) A.L. 457.

73 *Haji Mohammed Ishaq* v. *Mohamed Iqbal & Mohamed Ali & Co.* (1978) A.SC. 798, 801.

74 *Devi Sahai* v. *Union of India* (1977) A.SC. 2082.

75 *Damodara Mudaliar* v. *Secretary of State for India, supra,* note 48a; *Ranjani Kant* v. *Rama Nath* (1914) 19 C.W.N. 458, 460, 27 I.C. 56; *Dominion of India* v. *Preety Kumar Ghosh* (1958) A.P. 203, 209; *Khader Khan Sahib* v. *Doraiswami Chettiar* (1974) A.M. 371; *Mulamchand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; (1968) 3 SCR 214; *Bengal Coal Co.* v. *Union of India* (1971) A. Cal. 219, 220; *The State of Mysore* v. *Tarachand Venkatachand Shaha* (1973) A. Mys. 333, 334; *Keshab Kishore Narain Saraswati* v. *State of Bihar* (1971) A.P. 99, 101; *Manoharlal Radhakrishna* v. *The Union of India* (1974) A.P. 56; *Union of India* v. *Sitaram Jaiswal* (1977) A.SC. 329; *State of M.P.* v. *Jhankar Singh* (1973) A.MP. 274, 277.

76 *Annamma* v. *Ouseph Tressiamma* (1975) A. Ker. 185, 188.

77 *M/s. Malik Abdul Ahad Shah* v. *State of J&K* (1982) A. J&K 16.

78 *Pallonjee Eduljee* v. *Lonavala City Municipality* (1937) Bom. 782, 790.

79 *Union of India* v. *Sitaram Jaiswal* (1977) A.SC. 329, 331; *Devi Sahai* v. *Union of India* (1977) A.SC. 2082 (case under s.70 cannot proceed in the absence of allegations in the plant).

record shows that the contractor was entitled to the benefit of that provision.[80] Thus in *Damodara Mudaliar* v. *Secretary of State for India*[81] eleven villages were irrigated by a certain tank, some of which were *zamindari* villages, and others were held under Government. The Government effected certain repairs necessary for the preservation of the tank, and it was found that they did not intend to do so gratuitously for the *zamindars,* and that the latter had enjoyed the benefit thereof. The *zamindars* were under the circumstances held liable to contribute to the expenses of the repairs[82] Similarly, where a notice was issued upon the owners of a *hat* by the municipality to effect certain improvements, intimating that failure to comply with the notice would lead to a withdrawal of the license granted for holding the *hat*, and one of the co-sharers effected the required improvements, it was held that he was entitled to compensation from the other co-sharers.[83] Upon the same principle, where a mortgagee threatened to sell the land mortgaged to him, and one of the co-sharers paid up the mortgage debt to prevent the property from being sold, it was held that he was entitled to compensation from the other co-sharers[84] A mortgagee of immovable property can recover from the mortgagor payments made by him for road and public works ceases payable by the mortgagor.[85] And so where the holder of an *inam* within a *zamindari* takes for his benefit Government water, and the *zamindar,* who is liable in the first instance to pay to the Government the cess for the water so taken, pays the same, he can recover the amount of cess so paid from the *inamdar.*[86] Similarly when one of two joint tenants pays the whole rent to the landlord, he is entitled to compensation from his co-tenants[87] So also where persons have a *raiyati* holding and pay the decretal amount against the tenure holders in order to save the property from sale, they are entitled to compensation from the tenure holders.[88] And where one of the two mortgagors paid off the mortgage amount to save the property from sale, he was held entitled to compensation from his co-mortgagor.[89] Cost of repairs to common property is recoverable under section 70.[90]

So also water rate payable by an owner is recoverable by an occupier who pays it to avoid disconnecting of water by the municipality. There being more than one occupier, the owner was deemed to be the occupier for purposes of charge for excess water used.[91] But where the plaintiff had a seven-eights share in the property and the defendant only one-sixteenth and the plaintiff had incurred expenses for repairs without consulting the defendant it was held that he was not entitled to compensation in the absence of proof that the defendant was in a position, after the execution of the repair works, to exercise the option whether or not to avail himself of the benefit.[92] Work done by an optician in treating a wife's eye for cataract cannot be said to be a benefit enjoyed by her husband, especially where there is no evidence that she has been cured.[93]

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80 *Union of India* v. *Sahab Singh* (1977) A.A. 277, 278.

81 *Supra,* n. 48a.

82 It was not found in the case that there was any request express or implied on the part of the *zamindars* to the Government to execute the repairs, though the Court expressed the opinion that if the facts were properly ascertained a request might have been implied: see 18 Mad. 88, at p. 90. See also *Saptharishi* v. *Secretary of State for India* (1915) 28 Mad. L.J. 384, and *Sriram Raja* v. *The Province of Madras* (1943) Mad. W.N. 6. See commentary on the section under "For another person", below.

83 *Jarao Kumari* v. *Basanta Kumar Roy* (1905) 32 Cal. 374.

84 *Khairat Husain* v. *Haidri Begam* (1888) All W.N. 10. It is, however, different, if the person depositing the amount has no interest in the property at all: *Yogambal* v. *Naina Pillai* (1909) 33 Mad. 15.

85 *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (1903) 30 Cal. 794.

86 *Rajah of Venkatagiri* v. *Vudutha Subbarayudu* (1907) 30 Mad. 277.

87 *Nirdosh* v. *Jakaria* (1914) 20 Cal. L.J, 492; 27 I.C. 334.

88 *Abdul Aziz* v. *Rahimullah,* 1934 A. Cal. 667; 38 C.W.N. 554; 152 I.C. 167.

89 *Babu Bhagwati* v. *Maiyan Murat* (1931) 10 Pat. 528; 134 I.C. 139; 1931 A.P. 394; a closely reasoned judgment, in which the authorities are discussed at length.

90 *Veeriah* v. *Lakshmikantamma* (1965) A.A.P. 322; *Ganga Saran* v. *Narayan Das,* (1971) A.A. 43; *Gujarat Electricity Board* v. *Jais & Co.* (1972) A. Guj. 192, 203; *Puran Lal* v. *State of U.P.* (1971) A.SC. 712, 715; *State of Orissa* v. *Kalinga Construction Co.* (1971) A.SC. 1646; (1970) 2 SCC 801; *Brodie* v. *Corporation of Cardiff* (1919) AC 337; refd. to; *V.R. Subramanyam* v. *B. Thayyappa* (1966) A.SC. 106.

91 *H.C. Mukerji* v. *K.P. Goswami* (1961) A.A. 195.

92 *Lakshmanan* v. *Arunachalam,* 1932 A.M. 151; 135 I.C. 590.

93 *Kanhayalal* v. *Inderchandji* (1947) Nag. 154, 227 I.C. 58, 1947 A.N. 84.

If a party to a building contract has done additional construction for another not intending to do it gratuitously and such other has obtained benefit, the former is entitled to compensation for the additional work, not covered by the contract. If an oral agreement is pleaded which is not proved, he will be entitled to compensation under section 70.[94]

An inadmissible promissory note.—Where a promissory note contains all the terms of a contract is hit by s. 35, Stamp Act, and s. 91, Evidence Act, no compensation can be allowed under section 70, Contract Act, on the theories of implied promise, money had and received, quasi contract, unjust enrichment or any other equitable doctrine.[95] But where the promissory note is given as a collateral security and it is inadmissible for want of a stamp other evidence can be allowed to prove the debt.[96]

Neither this section nor s. 69 affects the claim for contribution under s. 82 of the Transfer of Property Act, 1882.[97]

Execution of Sale—no title.—The plaintiff in the execution of his decree against B & C purchased property which was under charge for the plaintiff's debt. Before delivery of possession of the property was given the wife of 'C' filed a suit claiming the property to be her's as a purchaser from 'B'. The plaintiff then brought a suit against 'B' for the return of purchase price on the ground of total failure of consideration in the Court sale occasioned by the fraud of the defendant and collusion. This suit was held to be unmaintainable[98] because such a suit cannot succeed by merely showing that one person has lost and another has gained. The right must be founded on the principle of unlawful enrichment.

"Lawfully".—In s. 70 three situations are contemplated: doing anything, giving anything, and enjoyment of the benefits thereof by the other party and "lawfully" is used in the case of the first of such situations. It has been held that by the use of the word "lawfully" in this section the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person the person doing the act was entitled to look for compensation to the person for whom it was done.[99] But this view has been criticised as reading so much into the word as to render the rest of the section tautologous.[1] Where a person managed the estate of his wife and his sister-in-law and was under the impression that he would receive remuneration for his services, he was entitled to claim reasonable compensation.[2] The word "lawfully" in this section is not mere surplusage. On the contrary, it is submitted that it is of the essence of the section. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it; if not, the payment cannot be said to have been made lawfully.[3] The word "lawfully" in section 70 would be applicable to work done for or goods received by Government because such acceptance or enjoyment which gives rise to claim for compensation is not forbidden by section 175(3) of the Government of India Act.[4]

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94 *Subramaniyam* v. *Thayappa* (1961) 3 S.C.R. 663; (1966) A.S.C. 1034; *Gangapathi Pillai* v. *Irudayaswamy Nadar* (1962) A.M. 345.

95 *Lothamasu Sambasiva Rao* v. *Thadwarthi Balakotiah* (1973) A.AP. 342; *Perumal Chettiar* v. *Kamakshi Ammal* (1938) Mad. 933; (1938) A.M. 785 (F.B.) folld.

96 *Khitish Chandra Sahu* v. *Rajkishore Sahu* (1980) A.Or. 10,15; (1976) Cut. 634 reversed.

97 *Jagapatiraju* v. *Sadrusannama Arad* (1916) 39 Mad. 795; *Kunchithapatham* v. *Palamalai* (1917) 32 Mad. L.J. 347, 352.

98 *Annamma* v. *Ouseph Tressiamma* (1975) A. Ker. 185.

99 *Chedi Lal* v. *Bhagwan Das* (1888) 11 All. 234, 243; see *Gordhanlal* v. *Durbar Sri Surajmalji* (1902) 26 Bom. 504, 518; *Raghunath Abaji* v. *Lahanu,* 1931 A.B. 39; 32 Bom. L.R. 1376; 128 I.C. 907; *Banwarilal* v. *Rajkishore* (1945) Nag. 820, 1946 A.N. 21.

1 *Pallonjee & Sons* v. *Lonavala Municipality* (1937) Bom. 782, 786, per Tyabji J.

2 *Palanivelu* v. *Neelavathi,* 1937 A.P.C. 50; 39 Bom. L.R. 720; 167 I.C. 5.

3 *Panchkore* v. *Hari Das* (1916) 21 C.W.N. 394, 399; 34 I.C. 341. A reversioner expectant on the death of a Hindu widow has no such interest; *Gopeshwar Banerjee* v. *Brojo Sundari Devi* (1922) 49 Cal. 470; 67 I.C. 470.

4 *State of West Bengal* v. *B.K. Mondal* (1962) Supp. 1 S.C.R. 876, 895; (1962) A.S.C. 779, 788. Test of Straight J. in *Chedi Lal* v. *Bhagwandas,* 11 All. 234 disapp. & overd.

The Calcutta High Court has held[5] that the term lawfully qualifies "does" and not "delivers". According to Andhra Pradesh High Court[6] he word "lawfully" refers to both "does" & "delivers" anything and does not extend the applicability of s.70 to unlawful contracts. Hence to lay a successful claim under section 70 the contract found to be void must not be one which has an illegal consideration or is illegal. So where paddy is delivered in contravention of the price control order, the acceptance by the other party will not create a lawful relationship between the parties so as to contract s. 70, Contract Act.

Between a person claiming compensation and person against whom it is claimed there must subsist some lawful relationship for that is the implication of the word "lawfully" in section 70 but that relationship must arise not because the party claiming something has done something for the party against whom compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said relationship which gives rise to the claim for compensation.[7] Therefore, if a contract is void because of the want of formalities under section 175(3) of the Government of India Act, compensation can be claimed under section 70 of the Contract Act if the conditions therein prescribed are complied with.[8] A payment made by a person fraudulently and dishonestly with the intention of manufacturing evidence of title to land which belonged to the defendant, and to which he knew he had no claim, is not lawful within the meaning of this section.[9] In such a case it is clear that the payment could also not be regarded as having been made *for* the defendant. Again, a payment made even in good faith as part of a transaction the other party was not competent to authorise is not lawfully made for this purpose.[10] Similarly, where a purchaser of property, the sale being fictitious and so found by the Court in previous litigation, paid the amount of a decree obtained by a third party against the vendor to prevent the property from being sold in execution, it was held that the payment was not "lawfully" made, and that the purchaser could not recover it from the vendor.[11] A payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made "lawfully" within the meaning of this section.[12] By a compromise decree one of the parties agreed to build a wall ac-

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5 *Bengal Coal Co. Ltd.* v. *Union of India* (1971) A. Cal. 219. But see *State of W. Bengal* v. *B.K. Mondal* (1962) A.SC. 779,788.

6 *R. Manikyam* v. *M. Satyanarayana* (1972) A.AP. 367, 369; *State of West Bengal* v. *Mondal & Sons* (1962) 2 S.C.A. 375; (1962) A.SC. 779 explained; *Sivaramakrishnayya* v. *Narhari Rao,* (1960) A.AP. 186 dist.

7 *State of West Bengal* v. *B.K. Mondal* (1962) A.SC. 779, 788; (1962) Supp. 1 S.C.R. 876, 896; *Chedi Lal* v. *Bhagwandas,* 11 All. 234, overruled; observations of Jenkins C.J. in *Suchand Ghosal* v. *Balarama Mardana,* 38 Cal. 1, quoted with approval; *Venkataswami* v. *Narasayya* (1965) A.AP. 191, 195; *Dhubei Charan* v. *Official Liquidator* (1963) A.Or. 220; *Contra Hyderabad State Bank* v. *Raghunath* (1958) A.AP. 605; *Panchkore Ghose* v. *Haridas,* 21 C.W.N. 394; (1916) A. Cal. 497; and *Baikuntha Nath Dey* v. *Uday Chand* (1905) 2 C.L.J. 311. These cases must now be taken to be wrongly decided.

8 *State of West Bengal* v. *B.K. Mondal & Bros.* (1962) Supp. 1 S.C.R. 876, 896; (1962) A.S.C. 779, 789; *New Marine Coal Co. Ltd.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.S.C. 152; *Ram Partap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153; *Bhikhraj* v. *State of Bihar* (1964) A.P. 555.

9 *Desai Himatsingji* v. *Bhavabhai* (1880) 4 Bom. 643, 653. See also *Jinnat Ali* v. *Fateh Ali* (1911) 15 C.W.N. 332, 334, 335. Where a person gained possession of property under a forged will and while so holding it made several payments, such payments were held not to be lawful; *Saradamba* v. *Pattabhiramayya* (1930) 53 Mad. 952; 129 I.C. 463; 1931 A.M. 207; *Gobind Ram* v. *Ram Kishore* (1952) Pat. 303, 1953 A.P. 145.

10 In other words, this section cannot be used to hold the promisor in a void agreement liable as on a quasi-contract, see *Punjabhai* v. *Bhagwandas* (1928) 53 Bom. 309; 117 I.C. 518.

11 *Janki Prasad Singh* v. *Baldeo Prasad* (1908) 30 All. 167. In this case the Court thought that the payment was possibly made with some sinister object; *Panchkori* v. *Haridas* (1916) 21 C.W.N. 394; 34 I.C. 341; Contrast *Murlidhar* v. *Bhikhi* (1885) All. W.N. 219; *Mohar Singh* v. *Sher Singh* (1883) Punj. Rec. No. 42. A later case of this class is *Mukat Nath* v. *Shyam Sunder Lal* (1929) All. L.J. 801 (payment off of incumbrance as part of transaction otherwise invalid, facts not clearly given); cp. *Kundan Lal* v. *Bhikhari Das* (1929) All. L.J. 333 (*hundis* not properly stamped). In an Allahabad case it has been held that a decree-holder who has purchased the *zamindari* shares of the judgment-debtor in execution of a decree and who pays arrears of revenue due under the United Provinces Land Revenue Act, 1901 is not entitled to reimbursement from the judgment-debtor, as under s. 142 of that Act the purchaser is not bound to pay the arrears: *Chedi Lal* v. *Insar Begam,* 1934 A.A. 712; 151 I.C. 351.

12 *Serafat Ali* v. *Issan Ali* (1918) 45 Cal. 691: 42 I.C. 30.

cording to specification. That not having been done according to the specifications, the plaintiff built the wall and was held entitled to recover under section 70[13]

The plaintiff lawfully carried a cargo of coal and delivered it to the defendant, the Union, The correspondence showed that the plaintiff did not intend to do it gratuitously and the defendant had accepted the cargo and thus the defendant became liable to pay compensation to the plaintiff under s. 70 and the third paragraph of s. 73 of the Contract Act.[14] A grantee of leases of minor minerals is entitled to recover by way of compensation various amounts deposited by him in pursuance of the grant of the lease in the event of cancellation of the lease.[15]

Remuneration at discretion of another.—An agreement between *A & B* whereby *A* agrees to render service at such remuneration as is fixed by *B* and the contract leaves it to *B*'s discretion whether to pay or not to pay any remuneration, the contract is void for uncertainty.[16] An auctioneer was appointed for a period of time to conduct sales of evacuee property at such commission as the Government may fix. This contract is void for uncertainty if the interpretation is that he may be paid something or nothing.[17] But if the contract means that the service was not to be gratuitous and meant that *B* should fix the remuneration which should be just, fair and reasonable, the contract is valid and the court in an action on a *quantum meruit* might ascertain, what the obligee acting *bona fide,* would be awarded.[18] The principle in such cases is this: Is there an unqualified contract to give something or is the option of giving anything at all left to be discretion of the proposed donor; if the former, the contract is enforceable and if the latter, the contract is void.[19]

Persons incompetent to contract.—This section does not apply to persons who are incompetent to contract. The section refers to circumstances in which the law implies a promise to pay, and where there could not have been a legally binding contract, a promise to pay cannot be implied.[20]

"Does".—This expression includes payment of money. It must not be supposed that because s. 69 provides for the case of payment of money, therefore the present section excludes that case. There may be cases in which a person who is bound to pay a certain sum of money would not necessarily be benefited by its payment by another. Those cases would fall under s. 69, for benefit received by the payment of money is one of the conditions necessary to the application of this section.[21] A debt advanced to a company by its Managing Director even though outside his authority is recoverable by him under section 70 if the terms of the section are complied with[22] In a Full Bench case in the Allahabad High Court, a contrary view has been taken and it has been held that the words "lawfully does anything" do not mean payment of money.[23]

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13 *Pannalal* v. *Mahachandi* (1961) A.M.P. 107.

14 *Great Eastern Shipping Co.* v. *Union of India* (1971) A Cal. 150, 155.

15 *State of Rajasthan* v. *Raghunath Singh* (1974) A. Raj. 4; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 2 SCR 876; (1962) A.SC. 779 reld. on.

16 *S. Rajam* v. *Union of India* (1966) 2 Mad. 44; (1966) A.M. 235..

17 *Taylor* v. *Brewer* (1813) 1 M. & S. 290 (such remuneration as would be deemed right); *Roberts* v. *Smith* (1859) 157 E.R. 861 (any remuneration that you may think as deserving of as your means can afford); *Ramaswami* v. *Rajagopala,* 11 Mad. 200 (whatever rent the landlord may impose).

18 *S. Rajam* v. *Union of India* (1966) 2 Mad. 44; (1966) A.M. 235; *Bryant* v. *Flight* (1839) 151 E.R. 49; *Way* v. *Latilla* (1937) 3 All.E.R. 759 (Reasonable remuneration implied) H.L.; *Powell* v. *Braun* (1954) 1 All E.R. 484 (Reasonable amount of bonus); *Veilayam Chettiar* v. *Kulandavelappa Chetti,* 29 M.L.-J. 749; (1915) A.M. 931.

19 *S. Rajam* v. *Union of India* (1966) 2 Mad. 44; (1966) A.M. 235.

20 *Shahbaz Khan* v. *Bhangi Khan,* 1931 A.L. 344; 135 I.C. 177; *Nathibai* v. *Wailaja* (1937) Nag. 111; 169 I.C. 675; 1937 A.N. 330; *Bankey Behari* v. *Mahendra Prasad* (1940) 19 Pat. 739; 188 J.C. 772; 1940 A.P. 324 (F.B.); *In re Ambica Textiles,* 1950 A. Cal. 491, 54 C.W.N. 157. As to the position of corporations, see notes under s. 65; *Church* v. *Imperial Gas Co.* (1837) 6 Ad. & El. 846, 861; *Ludlow, Mayor of* v. *Charlton* (1840) 6 M. & W. 815, 822; *Young & Co.* v. *Mayor of Corporation Royal Leamington Spa* (1883) 8 App. Cas. 517; reld. on *Gonda Municipality* v. *Bachchu* (1952) 1 All. 825; (1951) A.A. 736,742; see *Mohree Bibi* v. *Dharmodas,* 30 I.A. 114; 30 Cal. 539; *Supra* under s. 65; *cf. Harnath Kuar Inder Bahadur Singh,* 50 I.A. 69.

21 *Smith* v. *Dinonath* (1885) 12 Cal. 213, 217; *Desai Himatsinghji* v. *Bhavabhai* (1880) 4 Bom. 643; *Nath Prasad* v. *Baij Nath* (1880) 3 All 66; *Nobin Krishna Bose* v. *Mon Mohun Bose* (1881) 7 Cal. 573.

22 *Dhubei Charan Sahu* v. *Official Liquidator* (1963) A. Or. 220.

23 *Sheo Nath Prasad* v. *Sarjoo Nonia* (1943) All.L.J. 189, 1943 A.A. 220; (1943) All 610.

"For another person."—The principle underlying this section was adopted in a Calcutta case[24] decided in 1881, but without any reference to the Contract Act. In that case the plaintiffs, *bona fide* believing that they were the owners of a four annas share and that the defendants were the owners of the remaining twelve annas share in a *putni* paid to the *zamindars* their share of the revenue. In a suit between the parties it was declared that the plaintiffs had no share in the *putni,* and that the defendants were entitled to the whole of it. Subsequently, the defendants paid to the *zamindars* the revenue on the twelve annas share only, availing themselves of the payment by the plaintiffs. It was held that upon those facts the plaintiffs were entitled to recover from the defendants the amount paid by them, on the principle that "where a payment is made by one person for the benefit of another, and that other afterwards adopts that payment and avails himself of it, the sum becomes money paid for his use." But payment made against the will of the defendant and in the course of a transaction which in one event would have turned out highly profitable to the plaintiff and extremely detrimental to the defendant could not be said to have been made *for* the defendant, though in the event which took place it may have proved beneficial to him.[25] Where a person having no interest in the land allows an *ex parte* decree to be passed against him for rent and pays, such payment is not "lawfully made"[26] Similarly, payment of revenue by the plaintiff while in wrongful possession of the defendant's land and for his own benefit and his own account could not be recovered under this section.[27] And it has been held that if *A* is assessed by the income-tax authorities and protests that *B* is the party properly liable, but pays the tax, *A* cannot recover the amount from *B*, for *A* cannot be said to have made the payment "for" *B*.[28] An equity of redemption sold for recovery of income-tax does not affect the rights of the mortgagee. The payment of the income-tax by the mortgagee is for a gratuitous nature and does not fall within section 70.[29] It is quite clear that where the object of the payment is to benefit the palintiff himself, the payment cannot be said to have been made "for" the defendant[30] Where the defendant derives no benefit from the work done, clearly there is no room for the application of s. 70.[31] Thus where money is deposited under s. 14A of Regulation VIII of 1819 by the holder of a *mourusi mokarari* tenure under the *patni,* it cannot be said that such deposit is for the benefit of the former *patnidar,* as by the *patni* sale he lost his interest in the *patni.*[32] Where the payment by the bankers was neither voluntary nor for the customer, the defendant, but was the consequence of their own mistake, the defendant was held not liable.[33]

It does not seem to have been appreciated in later cases that the decision of the Madras High Court in *Damodara Mudaliar* v. *Secretary of State for India*[34] does not lay down any general rule to the effect that, if two persons are interested in a certain thing being done and one of them does it, he can recover under s. 70 the proportionate share of the expenses incurred in its performance from the other who has benefited by it. The question whether the act is done for another is one of fact in each case: *Sampath* v. *Rajah of Venkatagiri*[35]. In a later Madras case it was laid down by Munro and Sankaran Nair JJ. that s. 70 does not apply when the party sought to be made liable for compensation had no option but to enjoy the benefit: *Yogambal* v. *Naina Pillai,*[36] followed in *Chengalroya Reddi* v. *Udai Kavour*[37] This decision

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24 *Nobin Krishna Bose* v. *Mon Mohun Bose* (1881) 7 Cal. 573; *Smith* v. *Dinonath* (1885) 12 Cal. 213; *Upendra Chundra* v. *Tara Prosanna* (1903) 30 Cal. 794.
25 *Ram Tuhul Singh* v. *Biseswar Lal* (1875) 23 W.R. 305; 15 B.L.R. 208; L.R. 2 I.A. 131.
26 *Appayya* v. *Chandra Ayya,* 1950 A.M. 817.
27 *Binda Kuar* v. *Bhonda Das* (1885) 7 All. 660.
28 *Raghavan* v. *Alamelu Ammal* (1907) 31 Mad. 35.
29 *George* v. *South Indian Bank Ltd.* (1959) A.Ker. 294.
30 *Tangya Fala* v. *Trimbak Daga* (1916) 40 Bom. 646, 651; 35 I.C. 794; *Banwarilal* v. *Rajkishore* (1945) Nag. 820, 1946 A.N. 21; *Ramaswami* v. *Viswanatha,* 1950 A.M. 343; *Mariam* v. *Narayan* (1965) A. Ker. 55.
31 *Radhakrishna Iyer* v. *Secretary of State,* 1936 A.M. 930; *Muthuswami Ayyar* v. *Velammal,* 1947 A.M. 117, 230 I.C. 259 (a case in which the defendant was denied the benefit by the plaintiff); *In re Ambica Textiles Ltd.,* 1950 A.Cal. 491, 54 C.W.N. 157.
32 *Kashi Nath* v. *Nil Ratan Saha,* 1947 A.Cal. 304, 51 C.W.N. 116.
33 *Hyderabad State Bank* v. *Rangnath Rathi* (1958) A.AP. 605.
34 (1894) 18 Mad. 88.
35 1931 A.M. 51; 129 I.C. 828.
36 (1910) 33 Mad. 15, 3 I.C. 110.
37 1936 A.M. 752.

has been dissented from by the High Court of Calcutta in *Jog Narain* v. *Badri Das*[38] and the *High Court of Allahabad in Dori Lal* v. *Patti Ram*[39] and even by the High Court of Madras in two later decisions: *Chandna Deo* v. *Srinivasacharlu*[40] and *Saptharishi* v. *Secretary of State of India.*[41] It has also been dissented from by the High Court of Patna.[42] There thus appear to be two distinct lines of decisions on the point, one in favour of accepting the view that the word "enjoys" used in the section must be construed as "accepts and enjoys", and the other holding that such a construction is not warranted by the language of the section and that the courts in India should not import into it restrictions taken from English decisions. The trend of the later Madras decisions,[43] however, seems to be in favour of the first of these interpretations, though in *Srirama Raja* v. *The Province of Madras,*[44] a Full Bench of the High Court did not attempt to decide between them, and being of opinion that the facts in the case were indistinguishable from *Saptharishi* v. *Secretary of State for India* followed the decision in that case leaving the broader issue still in doubt. It is respectfully submitted the first line of decisions indicated above embody the more correct view. S. 70 deals with cases where a person does a thing for another but not intending to act gratuitously and the other enjoys it. When a thing is delivered or done by one person, it must be open to the other person to reject it. Therefore the acceptance and enjoyment of the thing done or delivered must be voluntary.[45]

The expression "another person" includes a caste. Thus where property belonging to a caste is attached in execution of a decree, and a member of the caste pays to the decree-holder the amount due to him under the decree to save the property from sale in execution, he is entitled to be reimbursed out of the caste property.[46]

Contract.—R. 37(1) (b) of the Mines Concession Rules has no application where a financier gives financial aid to the lessee because it does not prohibit financial agreements.

(ii) The expression "to a substantial extent" does not refer to the amount of loan borrowed without reference to the needs of the undertaking. It has reference to the total financial requirements of the lessee. Its breach does not affect the rights of the financier.[47]

Benefit.—The benefit must be direct and not indirect. Where certain works done by a railway company benefited owners of land and buildings, it could not be said that the Municipality benefited merely because it recovered taxes from the owners or occupiers of the property.[47A] Electric connection was cut off for non-payment of charges due before the tenancy began. The tenant paid off the charges but was not allowed to recover from the landlord under section 70 as the Landlord did not derive any benefit from this payment.[48] Benefit arising from change in trade policy of Government is not act of plaintiff. *Srinivas & Co.* v. *Inden Biselers.* (1971) A.S.C. 2224.

Surety.—The expression 'benefit' under section 70 should be understood as referring to a benefit directly derived by the person against whom the claim is made. Therefore, the case of a

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38 (1912) 16 Cal. L.J. 156; 13 I.C. 144.
39 (1911) 8 All L.J. 622.
40 (1915) 38 Mad. 235, 1915 A.M: 95.
41 (1915) 28 Mad. L.J. 384.
42 *Gopinath* v. *Raghubansh Kumar,* 1949 A.P. 522.
43 *Raja of Pithapuram* v. *Secretary of State for India* (1914) 25 I.C. 738; *Sampath* v. *Rajah of Venkatagiri,* 1931 A.M. 51; 129 I.C. 828; *Lakshmanan* v. *Arunachalam,* 1932 A.M. 151; 1351 I.C. 590; *Appayya* v. *Chandra Ayya,* 1950 A.M. 817.
44 (1943) Mad. W.N. 6.
45 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 892; (1962) A.SC. 779, 788. See also notes 41 & 42, p. 499, *Supra.*
46 *Bhicoobai* v. *Hariba* (1918) 42 Bom. 556; 42 I.C. 9.
47 *Sushil Kumar Somani* v. *Baidyanath Mondal* (1972) 2 Cal. 122.
47A *South Indian Railway* v. *Madura Municipality* (1946) Mad. 333, 1945 A.M. 427, affirmed on this point in *Governor-General in Council* v. *Madura Municipality* (1948) 75 I.A. 213, (1949) Mad. 529; 1949 A.P.C. 39. See *Kanhayalal* v. *Inderchandji* (1947) Nag. 154, 227 I.C. 58, 1947 A.N. 84, where it was argued without success that an eye specialist had benefited a husband by treating his wife's eyes for cataract. See also *Appayya* v. *Chandra Ayya, 1950 A.M. 817; Srinivas & Co.* v. *Inder Biselers,* (1971) A.S.C. 2224 (Benefit arising from change in trade policy by Government is not act of plaintiff).
48 *Bansidhar* v. *Chandra Kumar* (1964) A.A. 348.

person who is merely a surety does not derive any benefit under the transaction would not fall within the scope of section 70.[49]

The maintenance of a widow was, by a decree of court passed in a partition suit between two brothers *X & Y*, made a charge on two series of properties *A & B* falling to the shares of the two brothers. The arrears of maintenance were recovered by the sale of properties *A* and were purchased by third parties. For the balance, execution was levied against properties in series *B* and *X* paid off the amount and then sued for contribution and in the alternative for compensation under section 70 on the ground that he discharged a liability which would have fallen on the properties purchased by third parties.

But the contention was repelled as the properties were not liable under section 82 of the Transfer of Property Act and consequently section 70 was inapplicable the purchasers having derived no benefit.[50] The Government does not become the owner of a hospital because it gives a grant to the hospital and its sanction is required for employment of that money but the construction is not carried out under its supervision. Section 70 is not applicable because it cannot be said to have received the benefit of the contracts.[51]

Benefits obtained by retaining property.—The Union of India, entered into a contract with the respondent to manufacture biscuits for the Union. The component material was to be supplied by the Union which it did in containers. After the supply of the biscuits the respondent was called upon to return the containers which the respondent failed to do. The Union deducted the amount from the security deposit and other sums due to the respondent. The respondent brought a suit for the recovery of the amounts deducted. In appeal it was held that the property in the raw material supplied by the Union of India never passed to the respondent but always remained in the Unioin and so also the property in containers. As the Union did not intend to supply the respondents the containers gratuitously and the respondent had received benefit in that it did not have to supply its own contaners. S. 70 Contract Act applied and the respondent had to give compensation.[52]

A father agreed to transfer to his son certain shares but did not do so. The Company went into liquidation and the father was made to pay certain calls on the shares.

The son was held not liable to the father as son got no benefit, the shares were not in his name and the value of the share was nil.[53]

Compensation for work without request.—A request when accepted becomes an agreement but s. 70 does not postulate any agreement between the parties. A request may be by a wholly unauthorised person or the request may be wholly invalid in law yet a defendant cannot plead lack of liability to pay compensation for want of request when he had received the benefit of the work done for him by the plaintiff not intending to do so gratuitously—the amount of compensation being market value of the work by which the defendant benefited.[54]

Liability as between two innocent persons:—The principle laid down by Ashhurst J. in *Lickborrow* v. *Mason*[55] that "whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it" and approved by the Privy Council in *Commonwealth Trust Ltd.* v. *Akotey*[56] was, as it was so broadly stated, doubted by the Privy Council in a later case: *Mercantile Bank Ltd.* v. *The Central Bank of India Ltd.*[57] It was described as "broad and unqualified proposition" in *New Mercantile Coal Co. Ltd.* v. *Union of India.*[58]

Remedies against wrong-doer—Neither this section nor s. 69 refers in any way to remedies against wrong-doers.[59]

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49 *The State of Mysore* v. *Tarachand Venkatachand Shaha* (1973) A.Mys. 333,335.
50 *Naganna Naidu* v. *Rangarao* (1959) A.A.P. 622.
51 *State of Bombay* v. *Pannalal* (1959) A.B. 56.
52 *Union of India* v. *Modi Sugar Mills Ltd.* (1970) 2 Del. 92,96.
53 *Suryanarayan Murthy* v. *Ayappa Sastri* (1960) A.A.P. 146.
54 *Union of India* v. *Kewal Kumar Goswami* (1974) A. Cal. 231; (1973) 1 Cal. 421.
55 2 T.R. 63,70.
56 (1926) A.C. 72.
57 65 I.A. 75, 86; (1938) A.PC. 52, 56; see also Lord Lindley in *Farquharson Bros.* v. *King & Co.* (1902) A.C. 325 (It was too wide); and *R.E. Jones Ltd.* v. *Waving & Gilbow Ltd.* (1926) A.C. 670.
58 (1964) 2 S.C.R. 859, 875; (1964) A.S.C. 152.
59 *Kanhaya Lal* v. *National Bank of India Ltd.*, (1913) 40 I.A. 56, 66; 40 Cal. 598; 18 I.C. 949.

Illegal contract.—In the case of sale of controlled goods by an authorised dealer to a non-permit holder in contravention of the provisions of the Iron & Steel Control Order—the former cannot sue for the unpaid price of goods supplied to the latter, as no court will lend its and to enforce rights founded on an illegal act.[60] Money paid by the plaintiff at the instance of the defendant to the Panchayat to have the latter's outcaste disqualification removed is recoverable as the defendant must be taken to have acted as agent of the defendant and the money was neither paid for a wrongful purpose nor was the plaintiff a party to a wrongful act.[61]

Contracts with Government.—The object of restrictive provisions, e.g. s. 175(3) and Art. 299(1) and similar provisions governing contracts with corporations is that terms of contracts and the very necessity to enter into them should not be made without that degree of consideration and deliberation which is supposed to be ensured by the formalities required in the execution of instruments of contracts.[62] The Constitution intends to safeguard the revenues of the State and to guard against venality, inefficiency and deliberate non-observance.[63]

S. 175(3) and Art. 299(1) mandatory.—The provisions of s. 175(3) are mandatory. The object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and hence it was provided that the contracts must show on their face that they were made by the Governor General and executed on his behalf in the manner prescribed and by the person authorised.[66] S. 175(3) does not prescribe any particular mode in which authority to enter into contract must be conferred. Normally it is by notification in the Gazette but authority can be conferred *ad hoc* on any person.[67] No formal document is necessary. It may be by correspondence or by tender and acceptance.[68] The Assam High Court has held that in the absence of a specific contract in writing, the contract and terms thereof can be ascertained from other documents as no particular form is prescribed under that section.[69] The case, it is submitted was decided on the pleadings of the parties.[70] A contract between the Government and a private individual not in the manner prescribed by s. 175(3) of the Government of India Act, 1935, or by Article 299(1) of the Constitution is not valid and is unenforceabe.[71] But in such a case the officer entering into the contract could be sued under s.

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60 *Ajodhya Prasad* v. *Narain Prasad* (1963) A.P. 326; *Kedar Nath Motani* v. *Prahlad Rai* (1961) 1 S.C.R. 861; (1960) A.S.C. 213.

61 *Hazarimal* v. *Khan Chand* (1962) A.Raj. 86; *Kishanlal* v. *Bhanwarlal* (1954) A.S.C. 500 reld. on.

62 See *Brooks Jenkins & Co.* v. *Torquay Corporation* (1902) 1 K.B. 601, 608.

63 See also Stoljar: The Law of Quasi Contract (1964) p. 206.

64 *State of Mysore* v. *Tara Chand Venkatachand Shaha* (1973) A. Mys. 333; *State of West Bengal* v. *K.B. Mondal* (1962) Supp. 1 SCR 876; (1962) A.SC. 779.

65 *Keshab Kishore Narain* v. *State of Bihar* (1971) A.P. 99,101; *Bhikhraj Jaipuria* v. *Union of India* (1962) 2 SCR 880 (1962) A.SC. 113 disting; *Ram Swarup Maru* v. *State of Bihar* (1969) A.P. 340 folld., *Manoharlal Radhakrishna* v. *The Union of India* (1974) A.P. 56, 59.

66 *Seth Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880; (1962) A.SC. 113; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) A.SC. 779; (1962) Supp. 1 S.C.R. 876; *H. Young & Co.* v. *The Mayor & Corporation of Lamington Spa* (1882-3) 8 App. Cas. 511, 517; *Liverpool Borough Bank* v. *Turner* (1860) 30 L.J.Ch. 379 (Courts must try to get the real intention of the parties by carefully attending to the whole scope of the statute); *J&K Glass Manufacturing Co. Ltd.* v. *Emp.* (1947) F.C.R. 141 dist: *Hind Construction Co.* v. *State of Bihar* (1963) A.P. 254; *State of Bihar* v. *Karam Chand Thapar & Bros. Ltd.* (1962) 1 S.C.R. 827; (1962) A.SC. 110; *Seth Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880; (1962) A.SC. 113; *Karamshi* v. *State of Bombay* (1964) A.SC. 1714; (1964) 6 S.C.R. 984; *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; (1968) 3 S.C.R. 214; *State of U.P.* v. *Mumtaz Hussain* (1979) A.A. 174,180 (mandatory).

67 *State of Bihar* v. *Karamchand Thapar & Co.* (1962) 1 S.C.R. 827, 834; (1962) A.SC. 110; *Seth Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880, 889; (1962) A.SC. 113.

68 *Namayya* v. *Union of India* (1958) A.AP. 533; *Devi Prasad* v. *Secretary of State*, 1941 All. 741; (1941) A.All. 377; *secretary of State* v. *Bhagwandas* (1938) A.Bom. 168; *Secretary of State* v. *Yadavgir*, 60 Bom. 42; 1936 Bom. 19: *Contra:* formal document necessary.

69 *Bhattacharjee & Co.* v. *Union of India* (1957) A.Asm. 159.

70 But see *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.SC. 236.

71 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; *State of Bihar* v. *Karamchand Thapar & Bros. Ltd.* (1962) 1 S.C.R. 827, 835; (1962) A.SC. 110; *Seth Bhikrai* v. *State of Bihar* (1962) 2 S.C.R. 880; (1962) A.SC. 113; *Karamshi* v. *State of Bombay* (1964) 6 S.C.R. 984; (1964) A.SC. 1714; *New Churulia Coal Co. Ltd.* v. *Union of India* (1956) A.Cal. 138; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) A.SC. 779; (1962) Supp. 1 S.C.R. 876; *Sankaran* v. *State of Kerala* (1963) A.Ker. 278 (F.B.); *Chatturbhuj Vithaldas* v. *Moreshwar* (1954) A.SC. 236; (1954) S.C.R. 817 (dist.); *Union of India* v. *Gangadhar Mimoraj* (1962) A.P. 372; *State of Bombay* v. *Pannalal* (1959) A.B. 56; see

230(3) of the Contract Act.[72] But this must be taken to be subject to the provisions of Art. 299(2) where liability in certain cases is excluded. Mere hardship is no ground for allowing a departure from a provision which is mandatory and also statutory.[73] But s. 175(3) is not complied with if the concluded agreement is between a Superintending Engineer acting under the orders of the Minister of Public Works as such and the other party. He cannot be held to be by a person duly authorised or to be in the name of the Governor.[74] The facts in *Bhikraj Jaipuria's case* were these:

The appellant entered into an agreement with Divisional Superintendent of East India Railway to supply foodgrains to Railway employees at different Railway Stations. He supplied certain quantities but was unable to supply the full quantities. In spite of a notice directing him to fulfil his contract by a particular date the appellant was unable to do so. The Railway then declined to accept any delivery after that date. The appellant sold the goods lying with him and brought a suit for the difference between the price realized and the contract price.

The suit was held unsustainable in view of s. 175(3) of the Government of India Act.[75] *Thapar''s case* was this:

Thapar entered into a contract with the Government of India for construction of certain buildings. Disputes having arisen between the two parties the matter was referred to an arbitrator and Thapar applied for a decree on the basis of the award. The Government challenged the award on the ground that the original agreement was not only by a person authorised and the Secretary signing the arbitration agreement was also not authorised to do so.

These pleas were negative and it was held that the Executive Engineer who entered into the original agreement and the Secretary who joined in the arbitration were both authorised by the Governor and the agreements were valid under s. 175(3) of the Government of India Act.[76]

In *Mulam Chand's case*

the appellant claimed the return of the deposit of Rs. 10,000 made by him for the right to collect *lac* and the amount deposited by him for collecting *tendu* leaves; the latter on the ground of his having already acquired the right to collect and his having to deposit Rs. 3,000 again in order to prevent the Deputy Commissioner from selling the right to others and the former because the contract was void under s. 175(3) of the Government of India Act.

The Court held that rights about *tendu* leaves had ceased to have effect because of the Abolition of Proprietary Rights Act and in the case of *lac* collecting rights, the plaintiff had been collecting *lac* and had voluntarily abandoned it.[77]

A contract provided for an alteration by the Engineer-in-charge in the specifications in a works contract and the rates of payment consequent thereon, and in case of dispute by the Superintending Engineer whose decision was to be final. Alterations were made in the rates without change of specifications at a conference of officers including Engineer-in-charge, the Superintending Engineer and the Contractor. It was held that alteration in rates not consequent upon change in specifications and at a meeting of officers as above were both *de hors* the contract and hence it was a new contract requiring fresh compliance with s. 175(3).[78]

In *Kessoram Poddar* v. *Secretary of State*[79] it was held that a contract not in accordance with s. 175(3) is void and merely because payments were made in such contracts on some previous occasions is no ground for holding that in all such contracts payment should be made. So also if coal was received by the Government, it is bound to make compensation under section 70, Indian Contract Act.[80]

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also *Chiranji Lal* v. *Union of India* (1963) A. Punj 372; *Harnath Kuer* v. *Inder Bahadur Singh,* 50 I.A. 69; (1945) All. 179, 184; *Dharmeshwar Kalita* v. *Union of India* (1955) A.Asm. 66.

72 *Chatturbhuj Vithaldas* v. *Moreshwar Parashram* (1954) S.C.R. 817, 836; (1954) A.SC. 236, 243; *Cf. State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 906; (1962) A.SC. 779, 792 (per Sarkar J.). But see "Implied Contract", p. 511.

73 *Seth Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880, 895; (1962) A.SC. 122, 122, see *Union of India* v. *Anglo Afghan Agencies* (1968) A.SC. 718 where the Court held that in enforcing his rights to entitled quota under the export promotion scheme the importer is seeking to enforce an equity arising in his favour and is not enforcing a contractual obligation in contravention of Art. 299.

74 *Karamshi* v. *State of Bombay* (1964) 6 S.C.R. 984; (1964) A.SC. 1714,

75 *Bhikraj Jaipuria* v. *Union of India* (1962) 2 S.C.R. 880; (1962) A.SC. 113.

76 *Union of India* v. *Karamchand Thapar & Bros.* (1962) 1 S.C.R. 827; (1962) A.SC. 110.

77 *Mulamchand* v. *State of Madhya Pradesh,* 1968 A.SC. 1218.

78 *Surjit Singh* v. *Union of India* (1965) A.Cal. 191.

79 54 Cal. 460.

80 *New Marine Coal Co.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.S.C. 152; 65 C.W.N. 441 revd.; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876; (1962) A.S.C. 779

The Government entered into a contract with a miller for milling paddy and delivering rice according to its orders. The delivery made by the miller was short. The contract was not in accordance with section 175(3). The Government brought a suit for recovery of price of rice not supplied.

The contract being void, section 70 was held applicable and Government was entitled to compensation.[81] But section 70 was held inapplicable where an agent not appointed under section 175(3) of Government of India Act was advanced money to purchase foodgrains and money was due from him after giving him credit for the supplies made.[82] Merely because the military authorities have not paid the bills of a contractor whose contract is void for contravention of Article 299(1) does not prevent the applicability of section 70 and the military claiming compensation for use of military vehicles by the contractor.[83] After a works contract in writing was executed between the plaintiff and the Governor, there was an increase in labour rates which the Government Engineer orally promised to pay to the plaintiff. This was held recoverable under section 70. It is not really a case under section 70 and must be confined to its own facts.[84]

Hard coke was supplied to a jute mill belonging to the Defence Department but was rejected as not being according to specifications. The Controller then made an order for its disposal under his statutory powers and pay its price to the supplier. But before it could be sold the supplier brought a suit for price of coke.

and it was held that section 70 of Contract Act does not apply as the order of the Controller was under his statutory powers.[85]

The plaintiff took a 3 years' lease for collection of bridge and ferry tolls but no lease was executed under section 175(3) and after the collections had gone on for some months, the lease for bridge tolls was cancelled. The plaintiff claimed the estimated earning for 3 years, i.e. Rs. 45,000 and damages.

Section 70 was held not applicable as it was not a claim for something done or given but for future profits and therefore for breach of contract.[86]

In the *State of West Bengal* v. *B.K. Mondal & Sons,*[87] the earlier case *Chaturbhuj* v. *Moreshwar*[88] was explained thus that the contract not being in accordance with section 175(3) was invalid and when it was said that it could be ratified if it was for the benefit of the Government it meant that it was void in the technical sense. It did not mean that it was not invalid.

A contract for the supply of goods does not terminate if the supply of goods is fully executed it continues till the price is paid and there is discharge on both sides.[89]

"It would in our opinion be disatrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document concluded in a particular form."[90]

Chaturbhuj v. *Moreshwar*[91] was an election case in which there was a contract between the Union Government and a firm of which Chatturbhuj was a partner though the contract was not in the form prescribed by Article 299 of the Constitution and the question was whether he was disqualified from standing because he had an interest or a share in a contract for supply of goods to the Government. The supply had been made but the price still remained to be paid.

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reld. on; *Karamshi* v. *State of Bombay* (1964) 6 S.C.R. 984; (1964) A.S.C. 1714; *Great Eastern Shipping Co.* v. *Union of India* (1971) A. Cal. 150, 155.

81 *Ram Partap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153; *Great Eastern Shipping Co.* v. *Union of India* (1971) A. Cal. 150 (carriage for goods, not carried gratuitously, is claimable).

82 *Bhikraj* v. *State of Bihar* (1964) A.P. 555; *Ram Partap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153 dist.

83 *B.D. Naithani* v. *State of U.P.* (1966) A.A. 507.

84 *State of Bihar* v. *Thawardas Pherumal* (1964) A.P. 225; *Hindustan Construction Co.* v. *State of Bihar* 41, Pat. 292; (1962) A.P. 336 (F.B.) (was a case dealing with section 175(3) of Government of India Act not being complied with and services rendered and accepted by Government).

85 *Union of India* v. *Dhansar Coal Co. Ltd.* (1959) A.P. 347.

86 *Darab Kuar* v. *State of Bihar* (1962) A.P. 485.

87 (1962) A.S.C. 779, 783-4; (1962) Supp. 1 S.C.R. 876.

88 (1954) S.C.R. 817; (1954) A.S.C. 236.

89 *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817, 832; *O'Carroll* v. *Hastings* (1905) 2 I.R. 590, 608; *Satyendra Kumar Das* v. *Chairman Municipal Commissioners,* 58 Cal. 180, 193 *et seq.*

90 Per Bose J. in *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817, 835.

91 (1954) S.C.R. 817.

It was held that a contract subsisted on the crucial date and he was thus disqualified.

Where a contract is not in accordance with Art. 299(1) of the Constitution, the performance of the contract and benefits accepted by the defendant thereunder will entitle the plaintiff to relief under section 70 of the Contract Act.[92]

Thus where a tenancy was constituted with the owner by the State without observing the formalities of Art. 299 of the Constitution, the owner will be entitled to the payment of rent on default of payment on the principle of just restitution. And where "a thing" is delivered to the state without observance of the provisions of Art. 299 the owner is entitled to the redelivery of the "thing" even without a lawful contract between the parties. But no compensation is, in such a case, claimable.[93]

Contract not in the name of Governor-General—A contract executed by an authorised officer but not in the name of the Governor-General and therefore not in the form mandatory under the statute is not enforceable and the Dominion could not be sued for compensation for breach of contract.[94] The Supreme Court has held that s. 70 would be applicable in such cases and compensation allowable thereunder provided the conditions therein prescribed are complied with.[95] This is based on the doctrine of *quasi* contract or restitution.[96] The fields covered by section 175(3) of the Government of India Act and section 70 of the Contract Act are different. The former deals with the formation of contracts and the latter deals with cases where there is no valid contract and provides for compensation if the three conditions there specified are fulfilled. Section 70 should be read as supplementing the provisions of section 175(3) of the Government of India Act and not in conflict with each other.[97]

Government and Corporations—The Supreme Court has held that State Governments are not outside the scope of s. 70 and that preponderance of judicial opinion is in favour of s. 70 becoming operative in the case of contracts which are invalid owing to non-observance of formalities and the Governments get the benefit of performance of contracts by other parties.[98] The High Courts of Patna[99] and Madras[1] held sections 65 and 70 applicable in cases of

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92 *Union of India* v. *Saheb* (1977) A.A. 277, 278; *Madasami Nadar* v. *Virudhunagar Municipality* (1977) A.M. 147; *New Marina Coal Co. (Bengal) Pvt. Ltd.* v. *Union of India* (1964) A.SC. 152 folld.

93 *Rowat Hardeo Singh* v. *State of Rajasthan* (1981) A. Raj. 280, 282.

94 *Seth Bhikraj* v. *Union of India* (1962) 2 S.C.R. 888, 903; (1962) A.SC. 113, 122; *Municipal Corporation of Bombay* v. *Secretary of State* (1905) 29 Bom. 580; *Kessoram Poddar & Co.* v. *Secretary of State for India* (1927) 54 Cal. 460 appd.; *Chatturbhuj Vithaldas Jasani* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.SC. 236 (dist.); Maxwell on Interpretation (10th Ed.)., 376; *Liverpool Borough Bank* v. *Turner* (1861) L.J.Ch. 379 referred to.

95 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) A.SC. 779, 786, 789; (1962) 1 Supp. S.C.R. 876; 912; *New Marine Coal Co.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.SC. 152; *Subramanyam* v. *Thayappa* (1961) 3 S.C.R. 663; (1966) A.SC. 1034 (additional work done and accepted by the other party; not a case under s. 175(3); *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; *Ram Partap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153; *Bhikraj* v. *State of Bihar* (1964) A.P. 555.

96 *Hindustan Construction Co.* v. *State of Bihar* (1962) A.P. 336; *Fibrosa* v. *Fairburn* (1943) A.C. 32; (1942) 2 All E.R. 122; *Nelson* v. *Larholt* (1948) 1 K.B. 339, 343; (1947) 2 All E.R. 751; *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218.

97 *State of West Bengal* v. *B.K. Mondal* (1962) A.SC. 779, 788-789; (1962) Supp. 1 S.C.R. 876, 898; *State of Bihar* v. *Thawardas Pherumal* (1964) A.P. 225.

98 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 901; see also Sarkar J. p. 912; (1962) A.SC. 779, 789; *Keshub Kishore* v. *State of Bihar* (1971) A.P. 99; and *Pilloo Sidhwa* v. *Municipal Corporation of Poona,* (1970) A.SC. 1201 (For goods not delivered gratuitously compensation payable and not fair price).

99 *Dominion of India* v. *Preety Kumar* (1958) A.P. 203; *Harnath Kuer* v. *Inder Bahadur Singh,* 50 I.A. 69 reld. on; *Mathura Mohan Saha* v. *Ram Kumar,* 43 Cal. 790 & *Ram Nagina Singh* v. *Governor-General* (1952) A. Cal. 306, refd. to; *Hindustan Construction Co.* v. *State of Bihar* (1963) A.P. 254 following *State of West Bengal* v. *B.K Mondal & Sons* (1962) Supp. 1 S.C.R. 876; (1962) A.SC. 779 and relying on; *Ramdas* v. *Rambabu* (1936) A.P. 194; *Contra Gobindram* v. *Ram Kishore,* 31 Pat. 303; (1953) A.P. 145.

1 *State of Madras* v. *Periaswami Gounder* (1963) A.M. 154; *Dominion of India* v. *Preety Kumar,* 37 Pat. 113; (1958) A.P. 203 folld.; *Madhura Municipality* v. *Alagirisami* (1939) Mad. 929; (1939) A.M.

contracts not in accordance with s. 175(3) and where the other party had received benefit and Kerala applied s. 65 to such cases.[2] Other High Courts have also largely taken the same view.[3]

S. 70 applies to individuals, corporations and Government alike.[4]

Implied Contract—Quasi Contract.—Section 175(3) of the Government of India Act and Article 299 of the Constitution do not prevent a contract with the Government being implied or the Government incurring an obligation under a *quasi* contract.[5] Section 175(3) of the Government of India Act does not prevent a contract with Government being implied or Government from incurring an obligation under a *quasi* contract. A *quasi* contract or a contract implied in law is not a real contract; or, as it is called, a consensual contract and section 175(3) is concerned only with such contracts.[6] In a later case, the Supreme Court held that under s. 70, claim for compensation is not on the basis of any subsisting contract but on a different kind of obligation, not on contract or tort but on a third category of law, i.e., *quasi* contract or restitution. Compensation under s. 70 is allowable if conditions of the section are complied with.[7] If money is deposited, if goods are supplied or if services are rendered in terms of the void contract, s. 70 may be applicable if the conditions of that section are complied with.[8] In such cases there is no contract and there can be no decree for specific performance or claim for damages for breach of contract. The claim is based not on contract or tort but a third kind of relationship, i.e. *quasi* contract.[9]

Salvage—Quasi Contract.—Where a person rescues a ship from peril and the owners of the rescued ship or the cargo owners incur a liability to pay compensation there arises a genuine *quasi* contract because the elements of a contract may not exist. But cases where there

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957; *Arunachala* v. *Srivilliputtur M.C.*, 58 Mad. 65; (1934) M. 480; *Zulaing* v. *Yamethin District Council*, 10 Rang. 522; (1932) A.R. 176; *Damodar Mudaliar* v. *Secretary of State*, 18 Mad. 88; Corporation of Madras v. *Kothandapani*, 1955 A.M. 82; *Yogambal Boyee Ammani Ammal* v. *Pillai Markayar*, 33 Mad. 15.

2 *Sankaran* v. *State of Kerala* (1963) A. Ker. 278 (F.B.).

3 *Pallonjee Eduljee* v. *Lonavala City Municipality*, 1937 Bom. 782, 787; (1937) A.B. 417; observations in *Bhagwandas* v. *Chhedilal*, 11 All. 234; apparently approved in *Punjab Bhai* v. *Bhagwandas*, 53 Bom. 309 differed from *Mathura Mohan Saha* v. *Ram Kumar Saha*, 43 Cal. 790, 827; following *Rankin* v. *Emigh*, 218 U.S. 27; (1910) (law independently of contract will compel restitution or compensation); and *Central Transport Co.* v. *Pullman Palace Car Co.*, 139 U.S. 24 (to maintain such an action is not to affirm but disaffirm illegal contract); *Secretary of State* v. *G.T. Sarin*, 11 Lah. 375; (1930) A.L. 364; *Municipal Committee Gujranwala* v. *Fazal Din*, 11 Lah. 121; (1929) A.L. 742; *Municipal Committee, Lahore* v. *Miran Baksh*, 13 Lah. 561; (1933) A.L. 15; *Ram Chand & Sons* v. *M.C. Lahore* (1933) A.L. 14; *Bhandari Bros.* v. *Municipal Committee* (1931) A.L. 457; *Mathura Mohan Saha* v. *Ram Kumar Saha*, 43 Cal. 790, 827; *Ram Nagina Singh* v. *G.G.-in-Council* (1952) A. Cal. 306, on app. 89 C.L.J. 342; *Contra Anatha Bandhu Deb.* v. *Dominion of India*, 97 C.L.J. 9; (1955) A. Cal. 626; and *Union of India* v. *New Marine Coal Co.* 65 C.W.N. 441, 450, 464, revd. on app. (1964) 2 S.C.R. 859; (1964) A.SC. 752; on another point; *Great Eastern Shipping Co. Ltd.* v. *Union of India* (1971) A. Cal. 150, 155 (Art. 299 not complied with).

4 *Keshab Kishore Narain Saraswati* v. *State of Bihar and another*. (1971) A.P. 99, 101; *State of West Bengal* v. *K.B. Mondal* (1962) Supp. 1 SCR 876 (1962) A.SC. 779; *Gujarat E. Board* v. *S.A. Jain & Co.* (1972) A. Guj. 192, 202, *State of U.P.* v. *Chandra Gupta & Co.* (1977) A.A. 28, 33 (Government bound).

5 *State of West Bengal* v. *B.K. Mondal* (1962) 1 Supp. S.C.R. 876, 912; (1962) A.S.C. 779, 794. (But at p. 906, Sarkar J. made some reservation about compensation being awardable); but see *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218.

6 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 2 S.C.R. 876, 912; (1962) A.SC. 779, 794 (minority view); *Ram Nagina Singh* v. *Governor-General in Council* (1952) A.Cal. 307. On app. 89 Cal.L.J. 342.

7 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; *Fibrosa* v. *Fairburn* (1943) A.C. 32, 61; (1942) 2 All E.R. 122; and *Nelson* v. *Larholt* (1948) 1 K.B. 330, 343; (1947) 2 All E.R. 751. Restatement of the Law of Restitution (1937 Ed.) p. 634 applied.

8 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; see *Craven Ellis* v. *Canons Ltd.* (1936) 2 K.B. 403; (1936) 2 All E.R. 1066 (*Quantum Meruit* appd.).

9 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218, 1222; *Fibrosa* v. *Fairburn, etc.* (1943) A.C. 32, 61; (1942) 2 All E.R. 122 reld. upon; *Nelson* v. *Larholt* (1948) 1 K.B. 330, 343, refd. to.

may be an opportunity to bargain for it may be possible.[10] In the *In The Troilus*[11] it was pointed out that in salvage an obligation is imposed by law irrespective of any contract express or implied as distinguished from towage which only arises from a contract, express or implied. Usually services are rendered and the question of salvers' compensation arises later. It was observed by Sir James Hannen P. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit on him, notwithstanding that he has not entered any contract on the subject.[12]

In the case of saving of life a shipowner is compelled to pay in the interest of humanity although he himself received no benefit.[13]

Services performed in an Emergency.—In a Canadian case a surgeon who intended to charge his fees made an unsuccessful attempt to save the life of a suicide. He was held entitled to reasonable remuneration for his professional services.[14]

Restitution.—A person seeking restitution has a duty to account to the other party for what he has received; in other words an accounting by the plaintiff is a condition of restitution from the defendant.[15]

The principle of restitution is not primarily based on the loss suffered by the plaintiff but the benefit enjoyed by the defendant at the cost of the plaintiff which is wholly unjustified for the defendant to retain. The compensation must be reasonable at the time when the works were done or goods were delivered.[16]

Ratification and Estoppel.—Section 175(3) of the Government of India Act and Art. 299(1) of the Constitution are not for the mere sake of form. They have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied on the ground of public policy, i.e., for the protection of the general public, and the formalities cannot be waived or dispensed with. If ratification or estoppel were allowed, that would mean the repeal of the constitutional provision intended for protection of the general public.[17] The doctrine of estoppel of ratification are not therefore applicable.[18] In *Mulamchand's case* Shah J. observed:

"There is no question of estoppel or ratification in such a case. The reason is that the provisions of section 175(3) of the Government of India Act and the corresponding provisions of Art. 299(1) of the Constitution have not been enacted for the sake of mere form by they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in s. 175(3) of the Government of India Act and Art. 299(1) of the Constitution on the ground of public policy—on the ground of protection of general public—and these formalities cannot be waived or dispensed with. If the plea of the

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10 Chitty: On Contracts 24th Ed. Para 1896.
11 (1950) P. 92; (1950) 1 All E.R. 103.
12 *The Five Steel Barges* (1890) 15 P.D. 142, 146.
13 Chitty: On Contracts (24th) Ed. Para 1896 citing Kennedy: Civil Salvage (4th Ed.) PP 12-13.
14 *Matheson* v. *Smiley* (1932) 2 D.L.R. 78. See also Chitty: On Contracts (24th Ed.) paragraphs 1879 & 1897.
15 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; American "Restatement of the Law of Restitution" (1937 Ed.) p. 634.
16 *Great Eastern Shipping Co.* v. *Union of India* (1971) A. Cal. 150, 155; *Piloo Dhanjibhoy Sidhwan* v. *Municipal Corporation Poona* (1970) A.SC. 1201 reld. on.
17 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; *Cf. State of West Bengal* v. *B.K. Mondal* (1962) 1 Supp. S.C.R. 872, 912; (1962) A.SC. 779, 794. (Sarkar J. a contract can be implied or liability arises under quasi contract); *Dr. H.S. Rikhy* v. *New Delhi Municipal Committee* (1962) 3 S.C.R. 604, 621; (1962) A.SC. 554; see also *Bhikraj* v. *Union of India* (1962) 2 S.C.R. 880, 903; (1962) A.SC. 113, 122; see under s. 65 "Subnomine ratification & estoppel" *supra.*
18 *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218, 1222 (per Shah J.); *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875) 7 H.L. Cas. 65 (Ratification); Ex. p. Watson (1888) 21 Q.B.D. 301; and *Great N.W. Central Railway* v. *Charlebois* (estoppel by deed or otherwise). *Smt. Raj Kumari* v. *State of U.P.* (1972) A.H.P.; *State of U.P.* v. *Murarilal Bros* (1971) 2210-2212.

respondent regarding estoppel or ratification is admitted, that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public."[19]

A contract which is void under S. 175(3) of the Government of India Act cannot be ratified or waived.[20]

Arbitration agreement not in accordance with s. 175(3).—An arbitration agreement not in accordance with s. 175(3) is not binding on the Government even if it has taken part in the proceedings.[21]

Ratification of an invalid contract.—Lord Cairns said in *Ashbury Railway Co.* v. *Riche:*[22]

"Every court whether of law or equity is bound to treat that a contract entered into contrary to the enactments, I will not say illegal, but as *extra vires* and wholly null and void, and to hold also that a contract wholly void cannot be ratified."

Government not a minor.—The position of the Government in cases of contracts not in accordance with section 173(3) of the Government of India Act is not that of a minor because section 175(1) recognises the power of the Province to purchase or acquire property and a minor is excluded from the operation of section 70 of Contract Act because of section 68.[23]

The argument based on the observation of the Privy Council in *Mohori Bibee* v. *Dhurmodos Ghose*[24] was not accepted by the Supreme Court on the ground that the State is not in the position of a minor and that in case of minor s. 70 is excluded because of s. 68.[25]

In *Mondal's case*[26] the Supreme Court did not apply *Young's case*[27] because the question raised had to be decided according to s. 70 and *Young's case* was obsolete of statutory changes in England. The argument of circumvention s. 175(3) was not accepted by the Supreme Court in *Mondal's case* as the cause of action there was based on there being no contract due to its ineffectiveness and on work done by the plaintiff having been accepted by the State.[28]

Constitutional limitations and protections, it is submitted, cannot be bypassed by cleverness of pleadings.

In the seventh edition at pp. 353-4 the learned editor restated the opinion of the learned authors and said:

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19 But in *Union of India* v. *Anglo-Afghan Agencies* (1968) A.SC. 718, observations of Denning J. in *Robertson* v. *Minister of Pensions* (1941) 1 K.B. 227 that Crown is bound by an estoppel were quoted with approval. But see *Howell* v. *Falmouth Boat Construction Co.* (1951) A.C. 837 ; (1951) 2 All E.R. 278; (H.L.); see also *Comrs. of Crown Land* v. *Page* (1960) 2 Q.B. 274, 291.

20 *Hindustan Construction Co.* v. *State of Bihar* (1962) A.P. 336 (F.B.); *Bhikraj Jaipuria* v. *State of Bihar* (1964) A.P. 555; *Ashbury Railway Carriage Co.* v. *Riche* (1875) 7 H.L. 653. See *State of West Bengal* v. *B.K. Mondal & Sons* (1962) 1 Supp. S.C.R. 876; (1962) A.SC. 779; *Mulam Chand* v. *State* of Madhya Pradesh (S.C.) (1968) A.SC. 1218. But see *Collector of Musulipatnam* v. *Cavaly Vencata Narainapah,* 8 M.I.A. 529, 554, reld. on; *Chaturbhuj* v. *Moreshwar* (1954) S.C.R. 817, 836; (1954) A.SC. 236, 243 (capable of being ratified if for the benefit of Government) *Contra U.P. Government* v. *Nanhoomal* (1960) A.A. 426.

21 *Union of India* v. *A.L. Rallia Ram* (1963) A.SC. 1685; folld. in *Debi Prasad Khandelwal & Sons* v. *Union of India* (1969) A.B. 163; *S.K. Sen* v. *State of Bihar* (1960) A.P. 159.

22 (1874-5) 7 H.L. Cas. 653, 673.

23 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 2 S.C.R. 876, 900: (1962) A.SC. 779; *Union of India* v. *New Marine Coal Co.,* 65 C.W.N. 441, revd. on app. (1964) 2 S.C.R. 859; (1964) A.S.C. 152 on another point.

24 30 I.A. 114; 30 Cal. 539.

25 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 900; (1962) A.SC. 779.

26 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 887-893; (1962) A.SC. 779, 784-786.

27 *H. Young & Co.* v. *Royal Leamington Spa Corporation* (1883) 8 App. Cas. 517.

28 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 894; (1962) 778, 787. See also *Pallonjee Eduljee* v. *Lonavala City Municipality* (1937) Bom. 782, 787; (1937) A.B. 417.

"It is respectfully submitted that neither s.70 nor s.65 can have any application to such cases S.70" (i.e. cases of contracts with corporations). "S.70 refers to a set of circumstances in which there could have been a contract."[29] "S. 65 also has no application for it has already been decided by the Privy Council in *Mohori Bibee's case*[30] that this section does not apply where one of the parties is incompetent on contract. The parties incompetent to contract are referred to in s. 11 of the Act. If the Act under which the corporation exists is mandatory and requires the contract to be under seal, the corporation has no capacity to contract except under seal."

For the applicability of ss.65 and 70 therefore one of the requirements is the capacity to make a contract and without compliance with the provisions of s. 175(3) of the Government of India Act or Art. 299(1) that capacity is lacking as the Governments can contract only in the manner prescribed, e.g. by a person authorised and with the formalities required.[31]

The Supreme Court has now pronounced on the applicability of s.70 to contracts governed by s.175(3) of the Government of India Act, 1935, or Article 299(1) of the Constitution which are not in the form prescribed or in accordance with formalities required. Such contracts, it was held, are not enforceable; but if one party has performed his part of the contract and the other party has accepted the advantage arising therefrom an obligation will arise under a *quasi* contract.[32] Therefore compensation is claimable where the party claiming has done anything for the other party or has delivered anything to him which that party has accepted and enjoyed. This would also prevent unjust enrichment.[33] In view of these decisions it would serve no useful purpose to discuss the matter any further and it is now the accepted law of the land that ss. 65 and 70 would be applicable to cases of Contracts of Government under s.175(3) or Art. 299(1) but within the limits of the decisions of the Supreme Court.

Burden of proof.—In a suit for damages for use and occupation of premises, the onus is on the plaintiff to show that the user was not gratuitous in cases where s. 70 is sought to be applied.[34] A contract of sale of forest products with the plaintiff was void for non-compliance with Art. 299(1) and therefore the plaintiff was entitled to the refund of the instalments paid minus the profits he had made on the transaction—the burden of proof of which was on the plaintiff all the accounts being with him. The three conditions necessary for application of s. 70 were emphasised.[35] It is for the plaintiff to establish that the defendant received any benefit which he is bound to restore to the plaintiff. Thus where the defendant got the vending of toddy licence from the State it was held that the burden was on the State to prove the amount of benefit derived by the defendant and if that is not proved the State cannot recover any compensation from the defendant in case the contract is found void.[36] But if there is sufficient material or evidence to show the extent of the benefit received by the defendant, the claim of the plaintiff should to that extent be allowed. For the application of the principles of s.70, Contract Act, a strict and technical view of the plaint cannot be taken.[37]

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29 *Bankey Bihari* v. *Mahendra* (1940) 19 Pat. 739; (1940) A.P. 324.

30 *Mohori Bibee* v. *Dharmodas Ghose*, 30 I.A. 114; 30 Cal. 539; *Cf. Harnath Kuar* v. *Indar Bahadur Singh*, 50 I.A. 69. (S. 65 applied where agreement was void but there was no lack of capacity.).

31 *Church* v. *Imperial Gas Co.* (1837) 6 Ad. & El. 846, 861; *Ludlow, Mayor of* v. *Charlton* (1840) 6 M. & W. 815, 822; *Young & Company* v. *Mayor of Corporation Royal Lamington Spa* (1883) 8 App. Cas. 517; reld on in *Gonda Municipality* v. *Bachchu* (1952) 1 All. 825; (1951) A.A. 736, 742. See *Mohori Bibee* v. *Dharmodas*, 30 I.A. 114; 30 Cal. 539; *supra* under s. 65.

32 *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 S.C.R. 876, 912; (1962) A.S.C. 779, 786, 789; *Great Eastern Shipping Co. Ltd.* v. *Union of India* (1971) A. Cal. 150, 155 (Art. 299 not complied with).

33 *New Marine Coal Co. Ltd.* v. *Union of India* (1964) 2 S.C.R. 859; (1964) A.SC. 1522; *Subramanyam* v. *Thayappa* (1961) 3 S.C.R. 663; (1966) A.SC. 1034 (not a case of s. 175(3): *Mulam Chand* v. *State of Madhya Pradesh* (1968) A.SC. 1218; *Ram Pratap Kamalia Mills* v. *State of Bihar* (1963) A.P. 153; *Bhikraj* v. *State of Bihar* (1964) A.P. 555.

34 *Bhagwandas Krishnadas* v. *P.S. Sama Iyer* (1972) A. Ker. 259, 262; *Giri Narain Chatterji* v. *Modhu Sudan Mukerji*, 18 I.C. 751 disting.

35 *State of M.P.* v. *Jhankar Singh* (1973) A. MP. 274, 277; *Murguesan Pillai* v. *Ghana Sambandha Pandara Sannadhi* 44 I.A. 98; (1917) A.PC. 6; *Gopal Krishnaji* v. *Mohd Haji Latif* (1968) 3 SCR 362; (1968) A.SC. 1413 refd. to.

36 *Channabyre Gowda* v. *State of Mysore* (1974) A. Knt. 136, 139; *Govindram Seksaria* v. *Edward Radbone* (1948) A. PC. 56 reld. on; *Panna Lal* v. *Dy. Commissioner* (1973) A.SC. 1174 disting.

37 *Keshab Kishore Narain* v. *State of Bihar* (1971) A.P. 94, 101.

Extras.—The term 'extras' is generally used in relation to the works which are not expressly or impliedly included in the original contract price provided the work is within the framework of the original contract. Whether a particular work is extra or not will depend upon the terms and conditions of the contract and other documents connected therewith.[38]

Responsibility of finder of goods.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

Criminal Liability of finder.—The position of a finder in English law, especially with regard to the possibility of his stealing the thing found, has been the subect of many and subtle distinctions. It does not appear useful or desirable to say anything of them here, as it was plainly the object both of the Penal Code and of the Contract Act to get rid of them. Any one who is curious in the matter may be referred to the late Mr. Justice Wright's full discussion of it in relation to the law of theft.[39]

The Indian Penal Code (s. 403, *Explanation* 2) provides as follows:—

"A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined (criminal misappropriation of property), if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

"What are reasonable means or what is a reasonable time in such a case, is a question of fact.

"It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found."

Civil Liability of finder.—In English Law, once a finder accepts responsibility for the goods his liability is that of gratuitous bailee. In *Newman* v. *Bourne & Hollngsworth,*[40] *P,* a customer in *D*'s shop, puts down a broach with her coat, and forgot to pick it up. One of *D*'s assistants found it, and it was placed in a drawer over the week-end. On Monday it was missing. *D* was held liable to *P* in view of the absence of that ordinary care which in the circumstances a prudent man would have taken.[41]

In English Law[42] the finding of lost chattel is not really a bailment but the finder is treated as a gratuitous bailee for some purposes on the basis of an implied request from the owner to take the chattel into possession on behalf of the owner.

As to the definition of "bailee" see s. 148, below.

Agency.—Goods booked for Quetta before the partition of the country were found to be missing when the wagon containing the goods was received at New Delhi Railway Station. The owner sued the East Punjab Railway which was handling the wagon from Indo-Pakistan Border into India. The East Punjab Railway was held to be an agent of the receiving railway and a bailee with the implied authority of the consignor by force of section 194 of Contract Act.[43] In such a case, section 71 would also have been applicable.[44] Plaintiff's timber was lying

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38 *State of U.P.* v. *Chandra Gupta & Co.* (1977) A.A. 28, 32.
39 Pollock and Wright on Possession, 171 sqq.
40 (1915) 31 T.L.R. 209.
41 For a discussion of the extent of the liability of a gratuitous bailee, see *infra* commentary on s. 151
42 Chitty: On Contracts (24th Ed.) Para 2212 (Vol. II). See also Pollock & Wright: Possession in Common Law (4th Ed.) Vol. II Paras 1511-1514.
43 *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75; (1960) A.S.C. 233; *De Bussche* v. *Alt* (1878) Ch.D. 286, 310, refd. to.
44 *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75, 84; (1960) A.S.C. 233.

on the piece of land which was subsequently leased out to the defendant. The latter gave notice to the owners of the timber to remove it but it was not removed. The defendant then cleared the site and the timber was "damaged" or "removed". The plaintiff's claim under section 71 of Contract Act was dismissed as the defendant had not taken the goods into his custody.[45]

Liability of person to whom money is paid or thing delivered, by mistake or under coercion.

72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

29 Bom. L.R. 1167; 104 I.C. 378. *Anrudh Kumar* v. *Lachmi Chand* (1928) 50 All 818; 115 I.C. 114; 1928 A.A. 500.

Money had and received—Doctrine of.—Money paid under a mistake or on a consideration which has wholly failed or under duress falls under the general head of money "had and received."[46] An action for money "had and received" is an action "founded on simple contract" which has been called *quasi* contract or restitution.[47] A person, paying money under a mistake of fact, which, if true, would make him legally liable to pay, can recover from that other the money paid.[48] In *Norwich Union Fire Insurance Society Ltd.*[48] this principle was applied and it was pointed out that the mistake must be fundamental or basic in that it prevents the payer from forming that intention which the law regards as essential to the agreement; e.g. insurance company paying in the mistaken belief that the cargo had perished. According to Greene M.R., the claim for money had and received is a claim to recover money which, in the eye of the law, the defendant is liable to repay to the plaintiff. The claim cannot be said to be based on some rule of *aequum et bonum* by virtue of which a man must not be allowed to enrich himself unjustly at the expense of another and the claim is based upon an imputed promise to repay.[50] The following statement of Lord Mansfield in *Moses* v. *Macferlane,* (1760) 2 Burr. 1005, 1008, 1012, has been the basis of the modern law of quasi contract:

"It lies for money paid by mistake; or upon a consideration which happens to fail, or for money got through imposition (express or implied); or extortion; or oppression or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money (p. 1012)."

Lord Mansfield prefaced the pronouncement by observations at page 1008 thus:[51]

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45 *Union of India* v. *Mohammad Khan* (1959) A. Or. 103.
46 55 L.Q.R. 54, 65. *Cf.* section 72 of Contract Act.
47 *Chesworth* v. *Farrar* (1966) 2 All E.R. 107, 113; *Re Diplock Estate* (1948) Ch. 465, 514; (1948) 2 All E.R. 318, 343; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Ltd.* (1943) A.C. 32, 61; (1942) 2 All E.R. 122, 135.
48 See Winfield; 59 L.Q.R. 327; Denning; 65 L.Q.R. 37; *Kelly* v. *Solari* (1841) 9 M. & W. 54; (1835-42) All E.R. 320.
49 (1934) A.C. 455; (1934) All E.R. 352 (P.C.) reld. on and quoted in *Morgan* v. *Ashcroft* (1938) 1 K.B. 49; (1937) 3 All E.R. 92, 98.
50 *Morgan* v. *Ashcroft* (1938) 1 K.B. 49; (1937) 3 All E.R. 92, 95 (per Greene M.R.). (Case of a claim for refund of money paid in excess in account of gaming transactions). Lord Sumner in *Sinclair* v. *Brougham* (1914) A.C. 398, 452, quoted. But see *Mohammad Akbar Khan* v. *Province of West Pakistan* (1961) 3 P.S.C.R. 111; P.L.D. (1961) 1 S.C. 23 (Pak) (refund *ex acquo et bono*).
51 *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Ltd.* (1943) A.C. 32, 62; (1942) 2 All E.R. 122, 136.

"If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt, and gives this action (*sc. indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (*'quasi ex contractu'* as the Roman Law expresses it").[52] There is a controversy about this statement both among academic writers and also in judicial opinion[53] but the latest view is in support of Lord Mansfield opinion. Lord Wright in *Fibrosa case*[54] has pointed out that Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact he denies that there is a contract. The obligation is as efficacious as if it were upon a contract. Such remedies are *quasi* contract or restitution and theory of unjust enrichment has not been closed in English Law.

All monies lost to one and gained by another cannot be said to be recoverable on the basis of the principle of money had and received. The rights must be founded on the principle of unlawful enrichment. It is not every gain or enrichment that is unlawful. That principle presupposes three things (1) that the defendant has been enriched by the receipt of benefit. (2) he must have been so enriched at the plaintiff's expense and (3) it would be unjust to allow him to keep the benefit.[55]

For a suit for money had and received to lie the law requires that there must be in the hands of the third party of accruing to him either a sum of money or a monetary liability over which the transferor had a right of disposal. It is immaterial whence the liability arose. It can include a debt for money lent or goods sold or services rendered or debt of any other kind and it may be of a temporary nature, provided that it exists at the time of the transfer and of the debtor's promise to pay the transferee.[56]

The Supreme Court of Pakistan has held that an action analogous to that for "money had and received" is maintainable where the defendant has received money which *ex acquo et bono* he ought to refund. Such a suit need not be based on a contract express or implied as seems to be the requirement of English Law. Therefore money received by Government on the sale of a liquor licensee's stocks at the expiry of his licence and excess licence fees paid fall under this category.[57]

An action for money had and received is a practical and useful instrument to prevent an unjust enrichment. The law implies an obligation to repay the money which is an unjust benefit.[58]

Payment under mistake of fact or mistake of law.—The rule of the Common Law is that "money paid under mistake or ignorance of fact may be recovered back where the supposed state of fact is such as to create a liability to pay the money, which in reality is not due," but a payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore as regards the motive of the party is voluntary, cannot be recovered back".[59] In other words, the mistake is material only so far as it leads to the payment being

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52 (1942) 2 All E.R. 122 at page 136 (H.L.); (1943) A.C. 32, 62 (Lord Wright agreed with Lord Mansfield). But see Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-29; (1940) 4 All E.R. 20, 35-37.

53 See Lord Sumner in *Sinclair* v. *Brougham* (1914) A.C. 398, 452, 415 (Lord Haldane); Greene M. R. in *Morgan* v. *Ashfort* (1938) 1 K.B. 49, 62; (1937) 3 All E.R. 92, 96 (cannot now be accepted as true foundation): *Holt* v. *Markham* (1923) 1 K.B. 504, 513 (now discarded doctrine of Lord Mansfield). But see Lord Wright in *Fibrosa case* (1942) 2 All E.R. 122, 136; (1943) A.C. 32, 62.

54 *Fibrosa Spolka* v. *Fairbairn Lawson* (1943) A.C. 32, 61; (1942) 2 All E.R. 122, 136.

55 *Annamma* v. *Ouseph Tressiamma* (1975) A. Ker. 185, 188.

56 *Shamia* v. *Joory* (1958) 2 W.L.R. 84, 90; (1958) 1 Q.B. 448; (1958) 1 All E.R. 111, 114; *Griffin* v. *Weatherby* (1868) 3 Q.B. 753; *Walker* v. *Rostron* (1842) 9 M. & W. 411; *Hamilton* v. *Spottiswoode* (1849) 4 Ex. 200.

57 *Mohammad Akbar Khan* v. *Province of West Pakistan* (1961) 3 P.C.S.R. 111; P.L.D. (1961) 1 S.C. 17, 23 (Pak.); *John* v. *Dodwell & Co.* (1918) A.P.C. 241 (from Ceylon) reld. on. But see *Sinclair* v. *Brougham* (1914) A.C. 398; (1914-15) All E.R. 622.

58 *Thomas Abraham* v. *The National Tyre & Rubber Co. of India Ltd.* (1974) A.SC. 602, 606. (1973) 3 S.C.C. 458.

59 Leake, 8th ed., pp, 68, 69. See *Adaikappa* v. *Thomas Cook & Son,* 1933 A.P.C. 78; 64 Mad. L.J.

made without consideration, and a wrong reason not affecting the substance of the transaction itself is not a failure of consideration.[60] This statement of the law, which is based upon a *dictum* of Bramwell *B* in *Aiken* v. *Short*,[61] was followed by the Court of Appeal in *Morgan* v. *Ashcroft*.[62] Nevertheless Greene M.R. was inclined to question the rule.[63] On this ground a book-maker, who by mistake overpaid a successful punter, could not recover the excess as the whole debt was void. The Court, however, refused to regard the *dictum* as an exhaustive statement of the law, and considered that it must be confined to cases where the only mistake is as to the nature of the transaction. The case was primarily decided upon the ground that the court cannot re-open accounts of betting transactions.[64] Thus it would not apply to *error in persona*, so that if *A* makes a voluntary payment to *B*, mistaking *B* for *C* "it may well be that *A* can recover it".[65] Probably this holds in India.[66]

Indian law and law in other countries.—In England,[67] America[68] and Australia[69] the law is that money paid voluntarily, without compulsion or extortion or undue influence and with a knowledge of all the facts, cannot be recovered although paid without consideration. But that is not the law in India;[70] The law in India being codified is governed by statute—section 72. The true principle is that if one party whether under a mistake of law or fact pays to another money which is not due by contract or otherwise that money must be repaid. When there is a clear and unambiguous position of law which entitles a party to the relief claimed by him, equitable considerations could scarcely be imported,[70] in absence of circumstances like estoppel, waiver, limitation and the like.[71]

In English law a distinction has been drawn between the right of plaintiff to recover money where the payment was under a mistake of fact and where the mistake was one of law; it being recoverable in the former case and not in the latter.

The plaintiffs acting as Government agents paid gratuity to a demobilized soldier without appreciating the fact that under a certain regulation he was entitled to a lower gratuity.

This was held to be a mistake of law and therefore the excess was not recoverable.[72]

A company paid duty on betting to the Crown under the opinion it was payable. In a later but a different case the House of Lord's decided that duty was not payable.

The petition of right of the company failed on the ground that it had acted under a mistake of law.[73] Similarly a payment under a mistake as to the effect of the Rent Acts cannot

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184; 142 I.C. 660, per Lord Atkin; *Norwich Union* v. *W.H. Price*, 1934 A.P.C. 171; 151 I.C. 548. Cf. *Bell* v. *Lever Bros.* (1932) A.C. 161.

60 *Balfour* v. *Sea Fire Assurance* (1857) 3 C.B.N.S. 300; 111 R.R. 663.

61 (1856) 1 H. & N. 210, 215. 62. (1938) 1 K.B. 49.

63 *Morgan* v. *Ashcroft* (1938) 1 K.B. 49, 66; (1937) 3 All. E.R. 92, 97.

64 *Morgan* v. *Ashcroft* (1937) 3 All E.R. 92; (1938) 1 K.B. 49; see per Bramwell B. in *Aikan* v. *Short* (1856) 1 H. & N. 210, 215.

65 *Ibid.* at pp. 63-4, 73-4. See generally Winfield on Quasi-Contracts (1952 edn.) 44-48. See also *Larner* v. *L.C.C.* (1949) 2 K.B. 683 (C.A.); See Mistake *inter praesentes*, p. 128.

66 Where a lessee, on the lessor's death, pays rent to the lessor's widow, erroneously believing that the rent was payable to her, and he was to pay the rent over again to the lessor's executors, he is entitled to a refund of the amount paid by him to the widow: *Ram Kishen* v. *Rani Bhagwan Kaur* (1906) Punj. Rec. No. 131. In *Badr-un-nisa* v. *Muhammad Jan* (1880) 2 All 671, 674, it was held that a claim under s. 72 was one sounding in damages on the ground that a duty is imposed to make compensation, refusal to perform which is a proper basis for an action for damages. The point may sometimes be of importance on a question of jurisdiction.

67 *Rogers* v. *Ingham* (1876) 3 Ch.D. 351, 356; *Twyford* v. *Manchester Corporation* (1946) 1 All E.R. 621, 627; (1946) Ch. 236, 241; but see *Kiri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192, 204 (A.C.); *National Pari-Mutual Association Ltd.* v. *The King*, 47 T.L.R. 110.

68 Willoughby on the Constitution of the United States, Vol. 1, page 12.

69 *Werrin* v. *The Commonwealth*, 59 C.L.R. 150.

70 *Sales Tax Officer, Benaras* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350, 1356; (1959) A.S.C. 135, 141, on app. from (1956) A.A. 383 *Shibba Pd. Singh* v. *Sirish Chandra* 76 I.A. 244, (1949) A.PC. 297; *Corporation of Calcutta* v. *Hindustan Construction Ltd.* (1972) A. Cal. 420, 426; *Caltex (India) Ltd.* v. *Assistant Comm. S.T.* (1971) A.MP. 162, 164; *United Bank of India* v. *Ali Hussein & Co.* (1978) A. Cal. 169, 173.

71 *Corporation of Calcutta* v. *Hindustan Const. Co. Ltd.* (1972) A. Cal. 420, 426; *United Bank of India* v. *A.T. Ali Hussain & Co.* (1978) A. Cal. 169.

72 *Holt* v. *Markham* (1923) 1 K.B. 504; (1922) All E.R. Rep. 134.

73 *National Pari-Mutuel Association Ltd.* v. *R.* (1930) 47 T.L.R. 110. But see *Sales Tax Officer, Benaras* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350; (1959) A.S.C. 135 (for Indian law).

be recovered.[74] But the Privy Council has held that the plaintiff may recover even when payment is under a mistake of law provided that he is not *in pari delicto* with the defendant.[75]

Right of the Crown to recover wages paid to civil servant.—Action *per quod servitium amisit* must be confined to the case of menial servants and not in the case of civil servants.[76] Therefore the Crown is not entitled to recover the full pay paid to an officer of the Inland Revenue who was injured by the defendant's negligence and thereby causing an accident. Similarly the Crown is not entitled to recover wages and compensation paid to an injured and disabled policeman as he holds a public office and is not the realm of domestic relations. A constable's service relations with the Crown is not distinguishable from that of a soldier.[77] An authority responsible for payment of wages of a policeman during his absence from duty due to injury by negligence of defendant is not entitled to sue for wages so paid as principle of unjust enrichment does not apply to such a case.[78]

Building Contract.—There is no implication that a builder invited to tender for certain work will be paid for the work involved in arriving at the price, which also applies to amendments of the original tender necessitated by *bona fide* alterations. If no contract results, the tenderer is without a remedy.[79]

But if the builder is led to believe that the contract will be given to him and he performs other incidental services at the request of the owner and no contract supervenes, the law will imply a reasonable payment for those services. The court will try to ascertain whether a promise to pay should be implied irrespective of the views or intention of the parties.[80]

Quasi Contract—Fire Brigade of another District.—A farmer summoned a fire brigade of a fire district believing that his farm was in that district and the fire brigade also rendered services under the same belief and therefore gratuitous services; the fire brigade would, nevertheless, be entitled to be paid for services under an implied contract to pay for its services because when the true facts are known the law implies a contract to pay, regardless of the actual intention of the parties at the time.[81] The claim is based on an imputed promise to repay.[82]

Right and fair not a good test.—Money deposited with a building society not empowered to do banking business is not recoverable as money had and received. "There is no ground left for suggesting as a recognisable 'equity' the right to recover money in *personam* merely because it would be the right and fair thing that it should be refunded to the payee."[83] Such moneys are not moneys had and received by the society but by its officers and receipt by the society is essential.[84]

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74 *Sharp Bros & Knight* v. *Chant* (1917) 1 K.B. 771; *Sawyer & Vincent* v. *Window-Brace Ltd.* (1943) 1 K.B. 32; (1942) 2 All E.R. 669.

75 *Kiriri Cotton Co. Ltd.* v. *Dewani* (1960) A.C. 192; (1960) All E.R. 177 (P.C.). But the previous rule of *Bilbie* v. *Lumley* was restated as being correct by Prof. Winfield: Pollock on Contracts (13th Edn.) 378; See *Bilbie* v. *Lumley* (1802) 2 East 469; *Winfield:* 59 L.Q.R. 327.

76 *Inland Revenue Comrs.* v. *Hembrooks* (1956) 2 All E.R. 338; Dictum of Viscount Simonds in *A.G. for New South Wales* v. *Perpetual Trustee Co. Ltd.* (1955) 1 All E.R. 846, 858; (1955) A.C. 457 (P.C.) appd.

77 *A.G. for New South Wales* v. *Perpetual Trustee Co.* (1956) A.C. 457; (1955) 1 All E.R. 846.

78 *Metropolitian Police Receiver* v. *Croydon Corporation* (1957) 1 All E.R. 78. (Lynskey J.'s view in *Monmouthshire County Council* v. *Smith* (1956) 2 All E.R. 809, a case of pension accepted).

79 *William Lacey (Hounslow)* Ltd. v. *Davis* (1957) 1 W.L.R. 932.

80 *William Lacey Ltd.* v. *Davis* (1957) 1 W.L.R. 932, 936.

81 *Upton on Severn Rural Distt. Council* v. *Powell* (1942) 1 All E.R. 220; *Landiess* v. *Wilson* (1880) 8 R (ct. of Sess) 289 contra.

82 55 L.Q.R. 54, 65; *Sinclair* v. *Brougham* (1914) A.C. 398. But see the observations of Lord Wright about *Sinclairs* case in *Fibrosa Spolka* v. *Fairbairn Lawson C.B. Ltd.* (1943) A.C. 32, 61, 64 and of Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-9; (1940) 4 All E.R. 20, 35-37; *In re Diplock, Diplock* v. *Wintle* (1948) Ch. 465, 480-1; (1948) 2 All E.R. 318, 326 (C.A.); (1951) A.C. 251; (1950) 2 All E.R. 1137 (H.L.).

83 *Sinclair* v. *Brougham* (1914) A.C. 398, 456; (1914-15) All E.R. 622; *Holt* v. *Markham* (1923) 1 K.B. 504 (Scrutton L.J.) *Morgan* v. *Ashcroft* (1938) 1 K.B. 49, 62; (1937) 3 All E.R. 92, 96. But see *Mohammad Akbar Khan* v. *Province of West Pakistan* (1961) 3 P.S.C.R. 111 P.L.D. (1961) 1 S.C. 17, 23 (Pak).

84 *Prince* v. *Oriental Bank Corporation* (1873) 3 App. Cas. 325; *Sinclair* v. *Brougham* (1914) A.C. 398, 452. But see *Fibrosa Spolka* v. *Fairbairn* (1943) A.C. 32, 61; (1942) 2 All E.R. 122, 135.

Sale of land and business—Difference between.—The principle of *McDonald* v. *Dennys Lascelles Ltd.*,[85] that no rescission of a contract for sale of land the vendor cannot have the land and the amount of instalments out of the price already paid, does not apply to sale of business[86] where different considerations prevail.

The plaintiff entered into a contract for the purchase of a motor garage business and agreed to pay £5,500 as the price out of which £2,000 was payable forthwith and the balance was payable by monthly instalments. The purchaser entered into the premises and carried on business but finding himself unable to pay the instalments, declined to execute the documents and complete the transaction and the vendor rescinded the contract. The vendee sued to recover the amount paid on account of purchase. He was held not entitled to recover as money had and received to his use.[87]

Subpoena.—Where money is paid to a witness and he does nothing in pursuance of the subpoena the money is recoverable as money had and received. The money is paid for defraying expenses of the witness's journey and if there is no journey there is no expense and the consideration fails; and then action lies for money had and received.[88]

Reimbursement.—The prospective tenants, during negotiations for a lease, requested the landlords to make alterations before entering into occupation. The negotiations fell through before the alterations were completed. The landlords paid the contractor who made the alterations and brought an action against the prospective tenants. The defendants' liability was held to be in *quasi* contract for money paid at their request. It made no difference that the negotiations went off without default of either party.[89] The doctrine of money had and received or of failure of consideration does not apply to an execution sale in which there is no covenant of title.[90] The word "mistake" as used in section 72 is wide enough to cover not only mistake of fact but also mistake of law.[91]

Sections 72 and 21 and 22—Difference between.—There is no conflict between the provisions of section 72 on the one hand and those of sections 21 and 22 on the other; and the true principle enunciated in section 72 is that if one party under a mistake whether of fact or law pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money was due when in fact it was not. If the mistake is established the money is recoverable from the person who received it.[92] Section 21 does not deal with a payment under a mistake of law but under a contract caused by a mistake of law.[93] A contract entered into under a mistake of law of both parties falls under section 21 of Contract Act and not section 72. In the Orissa case the parties were under a misconception as to whether the tenants could be compelled to sell *tendu* leaves.[94]

Mistake of law is not excluded by the words of this section and no distinction is made between mistake of law and mistake of fact. Although s. 21 does make such a distinction, this

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85 (1933) 48 C.L.R. 457.
86 *Shaw* v. *Ball* (1963) S.R. (N.S.W.) 910, 917.
87 *Shaw* v. *Ball* (1963) S.R. (N.S.W.) 910.
88 *Martin* v. *Andrews* (1856) 7 E.L. & B.L. 1; 119 E.R 1148.
89 *Brewer St. Investments Ltd.* v. *Barclay's Woollen Co. Ltd.* (1954) 1 Q.B. 428, 435; (1953) 2 All E.R. 1330; *Gebhardt* v. *Saunders* (1892) 2 Q.B. 452.
90 *Suryakaantamma* v. *Dorayya* (1965) A.A.P. 239.
91 *Sales Tax Officer* v. *Kanhaiyalal Mukhandlal Saraf* (1959) S.C.R. 1350, 1361; (1959) A.S.C. 135, 140; *Shiba Prasad Singh* v. *Srish Chandra Nandi*, 76 I.A. 244; (1949) A.P.C. 297; *Venkataraju* v. *Raghavayya* (1958) A.A.P. 593; *Indian Steel & Wire Products Ltd.* v. *Superintendent of Commercial Taxes* (1957) A.P. 113; *Mohammad Hanifa* v. *Narayani Pillai* (1967) A. Ker. 190.
92 *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350, 1361; (1959) A.S.C. 135, 141; *Shiba Prasad Singh* v. *Srish Chandra Nandi* (1949) 76 I.A. 244; (1949) A.P.C. 297 reld on.
93 *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350, 1361; (1959) A.S.C. 135, 141; (1959) 22 S.C.J. 53, 58; *Shiba Prasad Singh* v. *Maharaja Srish Chandra Nandi*, 76 I.A. 244 refd. to; - *Jagdish Prasad Pannalal* v. *Produce Exchange Corporation Ltd.* (1946) A. Cal. 245; appd.; *Wolf & Sons* v. *Dadyba Khimji & Co.* 44 Bom. 631, 649; and *Appavoo Chettiar* v. *South India Railway* (1929) A.M. 177; not appd.
94 *State of Orissa* v. *Mohammad Khan* (1961) A. Or. 75; *Shiba Prasad* v. *Srish Chandra*, 28 Pat. 913 (P.C.); (1949) A.P.C. 297; 76 I.A. 244 folld.

cannot affect the construction of s. 72. Their Lordships of the Privy Council have said: "If a mistake of law has led to the formation of a contract, s. 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that the money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment 'by mistake' in s. 72 must refer to a payment which was not legally due and which could not have been enforced: the 'mistake' is thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover if the argument based on inconsistency with s. 21 were valid, a similar argument based on inconsistency with s. 22 would be valid and would lead to the conclusion that s. 72 does not even apply to mistake of fact. The argument submitted to their Lordships was that s. 72 applies only if there is no subsisting contract between the person making the payment and the payee and that the Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so limiting the scope of Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due.[95]

Refund of Tax.—The facts of the case of *Kanhaiyalal Mukandlal Saraf*[96] were these:

Tax was paid in respect of forward transactions in pursuance of assessment orders for 1949-51 but in 1952 the levy was held to be *ultra vires* by the High Court and subsequently by the Supreme Court on appeal in *Sales Tax Officer* v. *Budh Prakash*[97] (another assessee's case) and the assessee filed a writ for quashing the assessment orders for refund.

It was held that section 72 was applicable and the tax was refundable.[96] Under the Indian law, a voluntary payment of tax liability is not by itself sufficient to preclude the tax-payer recovering the amount paid, once it is established that the payments were under a mistake of law.[98]

Tax paid under a mistake.—A building contractor paid Sales Tax which was not exigible but he was reimbursed by payments from the owner of the works under construction (Calcutta Corporation). The Corporation recovered the payment of the Sales Tax from the Contractor by a suit on the plea that it was not payable. The contractor then filed a petition under Art. 226 against the Taxing Authority and refund alleging that the tax was paid under a mistake of law. The Court held[99] that the contractor was entitled to recover and that his petition had not been unnecessarily delayed after the decree in the Corporation's suit.

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95 *Sir Shiba Prasad* v. *Maharaja Srish Chandra* (1949) 76 I.A. 244, 52 Bom.L.R. 17, 1949 A.P.C. 297; approving *Jagadish Prasad Pannanlal* v. *Produce Exchange Corporation* (1945) 2 Cal. 41, 1946 A.Cal. 245; *Sales Tax Officer* v. *Kanhaylal Saraf* (1959) S.C.R. 1350; (1959) A.SC. 135, on app. from *U.P.* v. *Kanhaiya Lal* (1956) A.A. 383; *Joseph* v. *Union of India* (1957) A. Ker. 3; *State of Orissa* v. *Mohammad Khan* (1961) A. Or. 75.

96 *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350; (1959) A.SC. 135; *Karamchand Thapar* v. *Sales Tax Officer* (1963) A. Raj. 51. But see *National Pari Mutual Association Ltd.* v. *R.*, 47 T.L.R. 110; and *Rogers* v. *Ingham* (1876) 3 Ch.D. 351, 356; and Pollock On Contract (13th Ed.) pp. 367 &374 not applied; see *Trilokchand* v. *Munshi* (1970) A.SC. 898.

97 *Sales Tax Officer* v. *Budh Prakash* (1955) 1 S.C.R. 243; (1954) A.SC. 44.

98 *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350, 1364; (1959) A.S.C. 135; *Shiba Prasad Singh* v. *Srish Chandra* 76 I.A. 244; (1949) A.P.C. 297; *D. Cawasji & Co.* v. *State* (1969) A. My. 23 (Mysore Excise Act). But see under English law—*National Pari-Mutual Association Ltd.* v. *R.* (1930) 47 T.L.R. 110.

99 *Hindustan Construction Co. Ltd.* v. *State of West Bengal*, 78 C.W.N. 168, 171; *Sales Tax Officer Benares* v. *Kanhyalal*, 9 S.T.C. 747, S.C. 747; (1959) A.SC. 185; (1959) S.CR. 1350 reld. on

Where the petitioner had collected Sales Tax from the consumers the Court refused to order[1] refund from the Sales Tax Authority to the assessee under s.72 Contract Act in the extraordinary justification under Art. 26.

The Kerala High Court has held[2] that where an assessee who paid as excess of sales tax under various orders ending with July 1965 and the Supreme Court declared the law in 1967 and the petition under Art. 226 was filed in 1969 within three years of the knowledge but long after the assessment order became final, the Court can give relief.

Tax paid under a mistake—Art. 226 when applicable.—In cases of petitions under Art. 226 praying for refund of taxes paid under a mistake of law, it has been held that the petitioner is not entitled to relief as a matter of course. Before granting relief the Court has to consider whether the petitioner is or is not precluded on grounds of unreasonable delay, alternate remedy, estoppel, waiver, limitation, validity and correctness of payments. The Courts[3] will also take into consideration whether the petitioner has collected Sales Tax, if it is that very tax, from his customers. In such cases refund would be given to an individual at the expense of a State which will be defeating the ends of justice. Therefore relief in these cases will be refused.

Mistake under s.72 may be one of fact or law or concerning payment of tax. Limitation for recovery of tax paid under a mistake begins from the date of the discovery of the mistake, the plaintiff having acted diligently.[4]

The fact that the party (State in this case) receving money paid under a mistake no longer has the money with it but has spent it in the ordinary course of business of the State would not make any difference.[5]

Thus, payment made by *A* to *B* upon a misconstruction of the terms of a lease, or misunderstandng of an official scale of charges, or under the mistaken belief that he is liable in respect of a municipal tax can be recovered back, and decisions to the contrary[6] are no longer law. Deliberate disregard of law is not, however, mistake of law.[7]

Tax paid under a mistake of law.—Sales tax paid by a dealer which is declared illegal is tax paid under a mistake under section 72 and the Government must repay it. The High Court can give consequential relief. Sales Tax on tobacco leaves and manufactured tobacco used for manufacture of bidis was declared unconstitutional under Act. 301.[8]

Any tax which is not exigible under the law or the law under which it is imposed is declared unconstitutional, is a payment under a mistake of law and the word 'mistake' in section 72 of the Contract Act includes a mistake of law and the assessee paying the tax would be entitled to sue for refund.[9] This would apply even to a case where the taxes are compounded

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1 *Gourram Sceraurcelu & Co.* v. *State of Andhra Pradesh* (1972) Tax L.R. 2027.

2 *N. Athar Rowther* v. *State of Kerala* (1971) Tax L.R. 1317.

3 *Gurram Sriramube Corporation & Co.* v. *State of Andhra Pradesh* (1972) Tax. L.R. 2027; *Sales Tax Officer* v. *Kanhaiya Lal Mukandlal* (1959) S.CR. 1350; (1959) A.SC. 135 (paid under mistake); *State of Madhya Pradesh* v. *Bhailal Bhai* (1964) A.SC. 1004 (unreasonable delay—more than limitation period); *State of Kerala* v. *Aluminium Industries Ltd* (1965) 16 STC 689 (SC) (Common mistake—no estoppel—bar of limitation); *Challa Apparao & Co.* v. *Commercial Officer* (1969) And. Pra. 418 (within period of limitation) reld. on; *Kamala Mills* v. *Sales Tax Officer Bombay* (1965) A.SC. 1942; (1963) 1 SCR 64.

4 *Ramnathapuram Marketing Committee* v. *East India Corporation* (1976) A.M. 323, 329; *Sales Tax Officer* v. *Kanhaiyalal Mukandlal* (1959) SCR. 1350; (1959) A.SC. 135 folld.

5 *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1959) S.C.R. 1350; (1959) A.S.C. 135; *Nagarao* v. *G.G. in Council* (1951) Nag. 372, 374, disappd; *Larners Case* (1949) 2 K.B. 683.

6 *Wolf & Sons* v. *Dadyba Khimii & Co.* (1920) 44 Bom. 631, 648, 666; 58 I.C. 465; *Bishambhar Das* v. *Katha Singh* 1933 A.L. 523; 147 I.C. 755; *Khozan Sing* v. *The Secretary of State* (1878) Punj. Rec. No. 33; *Appavoo Chettiar* v. *S.I.R Co.* (1928) 114 I.C. 358; (1928) Mad. W.N. 385; 1929 A.M. 177; *Ramjee Rao* v. *Masulipatam Municipality* (1940) 2 Mad.L.J. 469, 1940 A.M. 956.

7 *Anath Bandhu* v. *Dominion of India,* 1955 A. Cal. 626 (also held that ignorance of law is not mistake of law—*sed qu.*).

8 *State of Madhya Pradesh* v. *Bhailal Bhai* (1964) A.S.C. 1006; (1964) 6 S.C.R. 261; *Sales Tax Officer* v. *Kanhaiyalal Mukandlal Saraf* (1956) S.C.R. 1350; (1959) A.S.C. 135; *Caltex (India) Ltd.* v. *Assistant Commissioner, Sales Tax* (1971) A.M.P. 162.

9 *Indian Steel & Wire Products* v. *Superintendent of Commercial Taxes* (1957) A.P. 112; 35 Pat. 1055; *Hooper* v. *Exeter Corporation,* 56 L.J. Q.B. 457; *Steele* v. *Williams,* 155 E.R. 1502 reld. on; *Ballabhdas* v. *M.C, Malkapur* (1970) A.SC. 1002; 1004.

and paid because the amount of tax paid by way of compounding does not shed its character as a tax.[10] But where the assessment order was not set aside, section 72 was held not applicable by the High Court of Kerala.[11] Opposite view was taken by Orissa High Court where the refund was not barred by limitation.[12] The Orissa case was this:

> The assessees' right to claim refund was rejected because of the amendment in the taxing staute giving the right to claim the refund to the actual payers of the tax; the purchasers from the assessees. The amounts wrongly collected by the assessees primarily belonged to the actual payers and the amount when paid to the Government was a deposit in which the assessees, the dealers, had no beneficial interest and they could not be allowed to make profit out of the tax collected which was in reality not exigible. And under the statute, the dealer could not claim it from the State.[13]

It is submitted, that Article 226 will be applicable even where there is no review asked for under the appellate or under the revisional provisions of a taxing statute, and consequently the assessment order is not set aside thereby. The High Court has the power to order refund, if the tax is not exigible under the law or is unconstitutional. The former is, however, discretionary and will ordinarily be exercised if the claim is not barred by limitation.[14] But a suit for recovery of such tax is not entertainable if there is a provision in the statute prohibiting such suits.[15] But an assessee paying fees for making a reference under section 8(5) of Taxation of Income (Investigation Commission) Act is not entitled to its refund where the order of assessment itself is quashed by the Supreme Court. This is neither a case of coercion nor of unjust enrichment.[16]

Tax collected by dealer illegally.—Tax collected by a dealer from his customers illegally is not payable to the State but must be returned to the customers under section 72.[17] In *Abdul Quader* v. *Sales Tax Officer*[18] a case not of refund but of demand by the State, sales tax which was not exigible was collected by a dealer but contrary to the Act he did not pay it over to the State. The Supreme Court held that a provision for payment of amounts collected, even though they could not amount to tax, was unconstitutional. But it did not go into the question of not amount to tax, was unconstitutional. But it did not go into the question of agency or unfair enrichment. Amounts collected by a dealer by way of tax were not ordered to be paid to the State. It is submitted that the correct position is that dealer collected the money by way of tax as if an agent of the State and as such the State can recover from the dealer even if the tax is not exigible as being illegal. Otherwise, it will be unjust enrichment of or unjust benefit to the dealer.[19] The amount of the sales tax was either received as agent of the State or as money had and received for the State in which the dealer had no beneficial interest. There is really a conflict of interests. The dealer is the assessee and has to pay the sales tax to the

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10 *State of Andhra Pradesh* v. *Somasankara* (1963) A.A.P. 140; *Sainik Motors Jodhpur* v. *State of Rajasthan* (1962) 1 S.C.R. 517; (1961) A.S.C. 1480 refd. to.

11 *Dharamaraja Iyer* v. *State of Kerala* (1960) A.Ker. 287.

12 *Orient Paper Mills Ltd.* v. *State of Orissa* (1957) A. Or. 749; 8 S.T.C. 749; see on App. (1962) 1 S.C.R. 549; (1961) A.S.C. 1438, decided on another point; *Sarwan Singh* v. *State of Orissa* (1962) A. Or. 136; *Karam Chand Thappar Bros.* v. *Sales Tax Officer* (1963) A. Raj. 51 (alternative remedy no bar to relief under Article 226 of the Constitution).

13 *Orient Paper Mills Ltd.* v. *State of Orissa* (1962) 1 S.C.R. 549, 554; (1961) A.S.C. 1438, 1440.

14 *State of Madhya Pradesh* v. *Bhailal Bhai* (1964) A.S.C. 1006; *F. Mehtab Majid* v. *State of Madras* (1963) A.S.C. 928; *Karam Chand Thappar* v. *Sales Tax Officer* (1963) A. Raj. 51; see also *Sales Tax Officer* v. *Kanhaiyalal Saraf* (1959) S.C.R. 1350; (1959) A.SC. 135.

15 *State of Andhra Pradesh* v. *Subhayya Chetty* (1961) A.A.P. 512; *Venkataraman & Co. Ltd.* v. *State of Madras* (1961) A.M. 322; *Raleigh Investment & Co. Ltd.* v. *Governor-General* (1947) A.P.C. 78; *State of Tripura* v. *Province of East Bengal* (1951) S.C.R. 1, 14 dist.

16 *M.Ct. Muthiah* v. *C.I.T.* (1958) A.M. 479; (1958) 33 I.T.R. 569.

17 *Hurdit Roy Motilal Mills Ltd.* v. *State of Bihar* (1957) A.P. 1, upheld on appeal on the question of constitutionality (1960) 2 S.C.R. 331; *Tata Iron & Steel Co. Ltd.* v. *State of Madras* (1954) 5 S.T.C. 382; (1955) 1 M.L.J. 346. See *Abdul Quader* v. *Sales Tax Officer, Hyderabad* (1964) 6 S.C.R. 867 (a case dealing with the constitutionality of a provision for paying taxes collected by dealers, even if illegal, to the State).

18 (1964) 6 S.C.R. 867; *Indian Aluminium Co.* v. *State of Madras* (1962) 13 S.T.C. 967 not appd.; folld. in *Kantilal Babulal & Bros.* v. *H.C. Patel* (1968) 1 S.C.R. 735; (1968) A.SC. 445.

19 See Chitty: On Contract (23rd Edn.) 1676-1684 (24th Edn.) 1787. Bowstead on Agency, Art. 47, Halsbury's Laws of England (3rd Edn.) vol. 1, p. 188. See *Kantilal Babulal Bros* v. *State of Gujarat* (1965) 16 S.T.C. 973, 1005, but this was reversed on appeal on the question of constitutionality (1968 A.SC. 445; (1968) 1 S.C.R. 735).

State whether he realises from his customers or not. But when he collects it from his customers, he is doing so for on behalf of the State and, therefore, if he has realised the amount of the tax from his customers, he cannot be allowed to retain it.[20]

Allahabad High Court, however, has held that the money paid by a dealer as sales tax is his own money even though realised by him from his customers. If such money was not legally due from him and he receives it back from the Government he receives it as his own money and there cannot, therefore, be an offence of misappropriation under section 403, I.P.C., in regard to that money.[21] But in *Orient Paper Mill's case* it was held that the amount of tax collected primarily belonged to the payers.[20]

Property tax on rent basis.—Property tax paid on the basis of the actual rent paid cannot be claimed by way of refund if by a subsequent order of court a lower rent is fixed as fair rent with retrospective effect because there is neither mistake nor coercion.[22] Nor can rent in excess of fair rent be subsequently claimed by way of refund after the fair rent is fixed. The payment is neither under mistake nor coercion.[23]

Other cases.—Madras Agriculturists Relief Act does not purport to interfere with contracts entered into subsequent to the commencement of the Act but prevents the creditor from recovering interest at a rate higher than interest prescribed therein. Such interest is not illegal. There could be no mistake in law if such interest is voluntarily paid by the debtor and section 72 is inapplicable and the excess cannot be recovered.[24]

A party, who is ultimately injured by failure to discharge a liability under section 72, has a right to enforce that liability against a person who is guilty of default in the performance of an obligation.[25] Section 72 is applicable regardless of the doctrine of privity of contract. It is based on the doctrine of equity of repairing a mistake. And liability under section 72 is not dependent on the existence of a contract but arises out of an advantage taken by another either on mistake or coercion.[26]

Excess rates charged without proper sanction by route agents from shippers engaging country crafts are recoverable under section 72.[27] A Government servant who continued to receive salary after the termination of the period of his service is liable in equity to pay interest.[28] Similarly in *Larner's case*[29] Where the facts were these:

The defendants the London County Council resolved to pay all employees who joined up during the war the difference between their service pay and civilian pay. The plaintiff received this difference. He had undertaken to inform the Council of any change in his service pay which he neglected to do. The defendants deducted from his wages the over-payments and were held entitled to reclaim the extra payments as they were not mere volunteers but where "in honour bound" to fulfil their promise to the employees.

Every sum paid under mistake is not necessarily recoverable under all circumstances. There may in a particular case be circumstances which disentitle a plaintiff from recovering on grounds of estoppel or otherwise.[30] Similarly where *A* pays money to *B* who, *A* knows, is

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20 See *Orient Paper Mills Ltd.* v. *State of Orissa* (1962) 1 S.C.R. 549; (1961) A.S.C. 1438—Money primarily belongs to the customers who paid it.
21 *Babulal* v. *State of U.P.* (1966) A.A. 204.
22 *Madurai Municipality* v. *Kamakshisundaram* (1956) A.M. 49.
23 *Globe Theatres Ltd.* v. *Abdul Ghani* (1956) A.My. 57.
24 *Chellammal* v. *Abdul Ghaffoor* (1962) A.M. 1 (F.B.); *Narasimham* v. *Mahbubunnessa Begum* (1963) A.A.P. 24; *Muthuswami* v. *Savarimuthu* (1963) A.M. 249 (F.B.); *Contra Nainamal* v. *Subbarao* (1957) A.A.P. 546 (F.B.).
25 *Dhan Singh* v. *Badri Parshad* (1963) A. Raj. 198.
26 *Dhan Singh* v. *Badri Parshad* (1963) A. Raj. 198.
27 *P.S. Machada* v. *Venkatarama* (1963) A.M. 231.
28 *Joseph* v. *Union of India* (1957) A. Ker. 3.
29 *Larner* v. *London County Council* (1949) 2 K.B. 683; (1949) 1 All E.R. 964 (a hybrid obligation half way between law and morality); see also *National Association of Local Government Officers* v. *Bolton Corporation* (1943) A.C. 166, 180, 187; (1942) 2 All E.R. 425, 430, 434.
30 *Sir Shiba Prasad* v. *Maharaja Srish Chandra* (1949) 76 I.A. 244, 254, 52 Bom.L.R. 17, 1949 A.P.C. 297; *Nagorao* v. *Governor-General in Council,* 1951 A.N. 372.

C's agent under a mistake. *A* is not entitled to recover the money from *B*, if before demand made upon *B*, *B* has paid the amount to *C*, or, if he has not, has yet done some act to his own detriment as regards his principal.[31] It has been so held by the High Court of Bombay, in accordance with English law.[32] Misdescription by inadvertence of the account on which a payment is made may be deemed a mistake of fact (provided of course that the payee could not be honestly misled by it).[33] Similarly, misdescription of parcels in an auction sale may be relieved against in a proper case even if the sale was through the intervention of the Court.[34]

A person falsely representing himself to be the owner of a house mortgaged the house to *A* for Rs. 2,000 and subsequently by a second mortgage to *B* for Rs. 3,500, and it was agreed between *B* and the mortgagor that out of this sum *B* should pay off *A*'s mortgage. This was done, and the fraud being afterwards discovered, *B* sued *A* under s. 72 to recover the Rs. 2,000 so paid. It was held that the action must succeed.[35] Leach C.J. expressed the opinion that it was not necessary to show privity between *A* and *B* in order to make s. 72 applicable, though in his view privity in fact existed between them. He adopted the language of Parke, *B* in *Kelly* v. *Solari*[36]

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.....If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

This passage was later cited with approval by Lord Shaw in the House of Lords in *R. E. Jones* v. *Waring & Gillow,*[37] but it has been held that it does not give a true picture of the law of India, according to which the plaintiff may be disentitled to recover on the ground of estoppel,[38] or because no more blame attaches to the defendant than to him and the defendant no longer retains the money.[39] The payment must be made by mistake in order to attract the provisions of s. 72. In *Jagadish Prasad Pannalal* v. *Produce Exchange Corporation Ltd.,*[40] the plaintiff agreed on 16th September, 1943, to buy certain goods from the defendant at Rs. 77/-*per* cwt., f.o.r. On the 3rd January, 1944, the plaintiff paid the price, the railway receipt was endorsed in his favour and he took delivery. Meanwhile on the 16th December, 1943, the Government of India by order fixed the maximum price for all such goods to be delivered after the 1st January, 1944, at Rs. 40/- *per* cwt. The plaintiff sued to recover the balance between the contract price and that fixed by Government. It was held that s. 72 did not apply, as to hold otherwise would be tantamount to enforcing a new contract.[41]

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31 *Solomon Jacob* v. *The National Bank of India* (1918) 42 Bom. 16, 32-35, 48: 42 I.C. 869. See also *K.M.P.R. Firm* v. *The Official Assignee of Madras* (1922) 43 Mad.L.J. 142; 70 I.C. 751; 1923 A.M. 17.

32 In an earlier Allahabad case, it was held that an agent for collection who had innocently presented to the treasury a forged draft and received payment of money was liable to repay the money though he had handed it over to his principal. The Court purported to follow *Tugman* v. *Hopkins* (1842) 4 Man. & G. 389, which was not a case of payment by mistake, but of an unlawful taking by the defendant of money found lying in a room, and expressly decided on the ground that he was a trespasser. The Allahabad decision, it is submitted, is wrong, and was rightly dissented from by the High Court of Bombay; *Shugan Chand* v. *The Government of North Western Provinces* (1875) 1 All 79.

33 *Ramaswami Naicker* v. *Narayanaswami Naicker* (1925) 90 I.C. 906; 1925 A.M. 762. Here the defendant took advantage of a mistake which must have been apparent to him; *cp.* James L.J.'s remarks in *Tamplin* v. *James* (1880) 15 Ch.D. 221.

34 *Uzir Ali* v. *Nasimannessa Bibi,* 116 I.C. 634; 1928 A.Cal. 865.

35 *Sowdra Bai* v. *Saraswati,* 1942 A.M. 590; (1942) 1 Mad.L.J. 441 (1942) Mad. 669; *Suryanarayana* v. *Purnachandra Row* (1946) Mad. 531 224 I.C. 340, 1946 A.M. 150. See cases under s. 20 mistake of fact.

36 (1841) 9 M. & W. 54.

37 (1926) A.C. 670, at p. 688.

38 *Sir Shiba Prasad* v. *Maharaj Srish Chandra* (1949) 76 I.A. 244, 254.

39 *Nagorao* v. *Governor-General in Council,* 1951 A.N. 372.

40 (1945) 2 Cal. 41, 1946 A.Cal. 245.

41 See also *Lakshmanprasad* v. *Achutan Nair,* 1955 A.M. 662.

Payments to bank under a mistake.—Section 72 applies when one person pays to another under a mistake or under coercion. It has no application to a case where a person pays to a bank money for credit of a constituent; the money so paid is money of the constituent and the bank is an agent, for the purpose; and even if it is paid under a mistake, e.g. of a double payment, the bank cannot reverse the entry without the consent of the constituent.[42] But any mistake by the bank in making a wrong entry, e.g. crediting one constituent's money in the account of another, can always be corrected.[43]

Waiver of tort.—If a person is deprived of his money by the commission of some sort of tort against him e.g. trover and trespass or deceit, the party aggrieved may instead of suing in tort proceed in money had and received. This is known as the doctrine of "waiver of tort".[44]

The appellants made out a cheque for payment of a debt. One of their servants who was director of another company endorsed it to the company and the respondent bank collected it on behalf of the company. The appellant brought an action against the company for money had and received. But before the judgment the company went into liquidation. The appellant then brought an action against the respondent bank for conversion of the cheque. The Bank pleaded waiver of tort.

which succeed in the Court of Appeal but was not accepted in the House of Lords which held that the choice of *quasi* contractual remedy did not mean that the appellants could not sue in tort at any rate not till judgment was applied for.[45]

Coercion.—The Privy Council has laid down that the word "coercion" in this section is used in its general and ordinary sense and its meaning is not controlled by the definition of "coercion" in s. 15. Accordingly where *A* who had obtained a decree against *B* obtained an attachment against *C*'s property, and took possession of it to obtain satisfaction for the amount of the decree, and *C* on being ousted from his property paid the sum claimed under protest, *C* was held entitled to recover the sum as money paid under "coercion" within the meaning of this section.[46] It was formerly held in India that "coercion" in this section meant the same being as "coercion" in s. 15, and therefore no act was "coercion" unless it was done "with the intention of causing any person to enter into an agreement" as required by the definition in that section; nevertheless, where the defendant had received money which in justice and equity belonged to the plaintiff under circumstances which rendered the payment involuntary, and the receipt by the defendant to the use of the plaintiff, the plaintiff could recover the money, but the case was not within the present section.[47] This view is now superseded; as the action is maintainable under s. 72, it is immaterial whether the language used in the judgment by the Privy Council as to s. 72 being "exhaustive"[48] is right or wrong; but if it were material, we should think it wrong. In *Fatima Khatoon* v. *Mahomed,*[49] the plaintiffs, who were Mahomedan ladies, were entitled to a charge on certain property in respect of their dower. The defendants, who were holders of a decree against the heirs and representatives of the person to whom the property belonged, obtained leave in execution proceedings to sell the property. In order to prevent that sale, which would have been injurious to them, the plaintiffs paid under protest the amount of the defendants' decree into Court. In a suit to recover back the amount, it was held by the Privy Council that the payment was made "not voluntarily but under a species of compulsion," and that they were, therefore entitled to a decree. It is now well established that if a person pays moneys to save his property which has been wrongly attached in execution, he is entitled to recover the

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42 *Jammu & Kashmir Bank* v. *Attar-ul-Nisa* (1967) A.S.C. 540.
43 *Ibid; Imperial Bank of Canada* v. *Bank of Hamilton* (1903) A.C. 49.
44 Stoljar: The Law of Quasi Contract (1964 Edn.) page 86. Anson: Law of Contract (22nd Edn.) 584.
45 *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 27-29; (1940) 4 All E.R. 20, 35, 37, Lord Atkin criticised the fictional basis of this form of action.
46 *Seth Kanhaya Lal* v. *National Bank of India* (1913) 40 I.A. 56; 40 Cal. 598; 18 I.C. 949; followed in: *Ah Choon* v. *T.S. Firm* (1927) 5 Rang. 653; 106 I.C. 468; 1928 A.R. 55; *Venkatadri* v. *Venkata Kutumbarao,* 1941 A.M. 635; *Onkarmal* v. *Banwarilal* (1962) A.Raj. 127.
47 *Jugdeo Narain Singh* v. *Rajah Singh* (1888) 15 Cal. 656, 664-665 payment made under the force of execution proceedings); *Narayanasami* v. *Osura Reddi* (1901) 25 Mad. 548, 552 (payment made to prevent wrongful sale of plaintiff's holding). See also *Collector of Cawnpore* v. *Kedari* (1881) 4 All. 19, 20.
48 (1913) 40 I.A. 56, 58.
49 (1868) 12 M.I.A. 65; S.C. 10 W.R.P.C. 29.

moneys.[50] Where municipal taxes are illegally levied, it has been held that they are recoverable as money paid under coercion.[51] even though the payment was not made under protest for the threats are covert in the demand. In Madras a contrary view, which is in accord with English law, is taken that in the absence of protest such sums are not recoverable.[52]

Where a plaintiff has a statutory right to recover money under this section, his claim should not be rejected on the ground that, upon a consideration of the whole circumstances, it is not equitable that the money should be repaid.[53]

Duress, compulsion and refund of money—*Duress.*—In Australia, it was held that compulsion in relation to a payment of which refund is sought ... includes every species of duress, a conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee, and applied to the person or the property or any right of the person, who pays or, in some cases, of a person related to or in affinity with him.[54]

Under English law, where there are no threats or duress, and the payment is voluntary,[55] the plaintiff may not be able to recover the money paid even though it could not have been lawfully demanded from the plaintiff[56] But payment made by a Bank under a mistake is recoverable and in equity the property may be followed and recovered. But in India the law being codified the matter will be governed by Status—S. 72.[57]

Coercion.—But a payment made under pressing necessity to avoid seizure of goods or to obtain release of goods unlawfully detained or to prevent some interference with or withholding of a legal right is compelled and not voluntary and is recoverable in an action for money had and received.[58] There need be no actual interference with a legal right. Money paid under the constraint of threats to interfere with a legal right is sufficient and is recoverable.[59]

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50 *Dulichand* v. *Ramkishen Singh* (1881) 7 Cal. 648; S.C.L.R. 8 I.A. 93 (payment by purchaser to prevent sale under decree obtained by mortgagee whose debt has been satisfied) *cf. Pappu Reddiar* v. *Pichu Ayyar,* 1938 A.M. 493; (1938) 1 Mad.L.J. 829; *Forbes* v. *Secretary of State* (1915) 42; Cal. 151, at pp. 154-5; 26 I.C. 893 (money paid as income-tax under threat of attachment); *Muthuveerappa* v. *Ramaswami* (1917) 40 Mad. 285; 34 I.C. 401 (person charged with non-compoundable offence induced to pay money to stifle prosecution); followed in *Trikamdas* v. *Bombay Corporation,* 1954 A.B. 427 (*T* left tram without paying fare. Official demanded Rs. 5 as a penalty to avoid prosecution. *T* can recover the Rs. 5 paid); *Amjadennessa Bibi* v. *Rahim Buksh* (1915) 42 Cal. 286, and *Bindeshari Prasad* v. *Lekhraj Sahu* (1916) 1 Pat.L.J. 48, at pp. 60-1; 33 I.C. 711 (money not recoverable, if no pressure or compulsion exercised upon accused person); *Bansraj Das* v. *Secretary of State,* 1939 A.A. 373; 183 I.C. 134 (money paid by one joint owner to release property attached for purpose of realising fine imposed on another joint owner);*Banjrangal Poddar* v. *Sitaram Kedia,* 1949 A. Cal. 457 (money paid by a person wrongly stating that the goods were his, when they were the judgment-debtor's, not recoverable.

51 *Karanja Municipality* v. *New East India Press Co. Ltd.* 1949 A.N. 215; *State of Vindya Pradesh* v. *Raghunath Mannulal,* 1952 A.V.P. 32 (now that the Privy Council has held in *Sir Shiba Prasad's Case* (*supra*) that s. 72 extends to mistake of law, such payments will probably be held recoverable on the ground of mistake to avoid unnecessary extension of the meaning of coercion). See *Ballabhdass* v. *M.C. Malkapur* (1970) A.SC. 1002.

52 *Municipal Council, Tuticorin* v. *Rally Bros.,* 1934 A.M. 420, 67 Mad. L.J. 566; *Municipal Council, Rajahmundry* v. *Subba Rao,* 1937 A.M. 559, (1937) 1 Mad. L.J. 496; *Rengaswami Pillai* v. *Srirangam Municipal Council,* 1954 A.M. 213; *Slater* v. *Mayor of Burnley* (1882), 59 L.T. 636.

53 *Kanhaya Lal* v. *National Bank of India Ltd.* (1923) 50 I.A. 162; 4 Lah. 284; 75 I.C. 7; 1923 A.P.C. 114; see also *Sinclair* v. *Brougham* (1914) A.C. 398, 456; *Holt* v. *Markham* (1923) 1 K.B. 504 (Scrutton L.J.); *Morgan* v. *Ashcraft* (1938) 1 K.B. 49, 62; (1937) 3 All E.R. 92, 96.

54 *Nixon* v. *Furphy* (1925) 25 S.R. (N.S.W) 151, 160; *T.A. Sundell & Sons Pty. Ltd.* v. *Emm Yannoulatos (Overseas) Ltd.* (1956) S.R. (N.S.W.) 323. See *White Rose Flour Milling Co.* v. *Australian Wheat Board* (1944) 18 A.L.J. 324.

55 See *infra* 'Money paid under mistake.'

56 *Twyford* v. *Manchester Corporation* (1946) Ch. 236; (1946) 1 All E.R. 621; (Money demanded from a monumental mason which was subsequently held not chargeable, is not recoverable); *Moore* v. *Vestry of Fulham* (1895) 1 Q.B. 399 (Money paid as a result of litigation or threat of litigation is not under duress).

57 *Sales Tax Officer* v. *Kanhaiyalal Saraf* (1959) S.C.R. 1350; (1959) A.S.C. 135.

58 *Mason* v. *State of New South Wales* (1959-60) 102 C.L.R. 108, 144; *G.W. Rly.* v. *Sutton* (1869) 4 H.L. 226; *Maskell* v. *Horner* (1915) 3 K.B. 106; *White Rose Flour Milling Co.* v. *Australian Wheat Board* (1944) 18 A.J.L.R. 324; refd. to.

59 *Valpy* v. *Manley* 135 E.R. 673; *Mason* v. *State of N.S. Wales* (1959-60) 102 C.L.R. 108, 145.

Payments made as the result of constraint are none the less involuntary even though the law might have ultimately provided the payer with a remedy if he were prepared to suffer in the meantime.[60] So in a case of recovery of money illegally exacted by duress of property, a payment will be considered as made under compulsion notwithstanding that the plaintiff might have avoided having to make it by resorting to equity for injunction.[61]

Law of Restitution under void taxes and assessment is this: "If the payer reasonably believed that if the payment was not made the means to enforce collection of the tax or assessment would subject him to serious risk of imprisonment or the loss of possession of this things or other substantial loss"

then he can recover.[62] This was considered applicable to *Mason' case* by the Australian High Court.[63]

Plaintiffs contracted to buy iron at £109/15*sh*. per ton and established a Letter of Credit. On defendant's insistence, that unless the letter of credit was increased by £35 a ton the plaintiff would lose the iron, the plaintiffs increased the letter of credit by £35 a ton. Iron was delivered and the defendant collected the full amount under the letter of credit. The plaintiffs sued for return of the price in excess of originally contracted price and succeeded.

The defendants appealed but the appeal was dismissed.[64]

Under s. 72.—Money paid under threat of a proseuction is money paid under coercion within section 72 of Contract Act and is recoverable by the payer.[65]

A person was taken into and kept in wrongful confinement by the police at the instance of a third party. His brother paid money out of joint funds to get him released.

Both of them were held entitled to recover the money from the third party and the maxim *in pari delicto* is inapplicable, nor can it be said that the money was paid voluntarily.[66]

A husband who represented himself a bachelor at the time of his second marriage, which was void under a Madras Act, is not entitled to recovery of jewels given to his bride because the jewels are not given under a mistake of fact even though he may have entered into matrimony under a mistake of law.

Can a husband guilty of polygamy be allowed to take advantage of his own fraud and invoke an equitable principle?[67]

Moneys paid under legal compulsion.—Money paid under compulsion, or even under pressure, of legal process cannot be recovered.[68] Thus, where the Official Assignee in insolvency proceedings pays a creditor under the directions of the Court, he is not entitled to recover it under this section on the ground that the payment was made by mistake.[69]

The cases where money is deposited to have a sale set aside under O. XXI, r. 89, Civil Procedure Code, may be conveniently considered in this place. There has been a conflict of decisions on the question whether money so deposited can be recovered by the person making the deposit from the decree holder. The High Court of Bombay in *Shankerrao* v. *Vadilal*[70] took the view that it was not recoverable, following an earlier Bombay decision, as well as one in Patna and Madras,[71] though one of the judges indicated that, if the matter had been *res in-*

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60 *Astley* v. *Reynolds* (1731) 2 Str. 915; 93 E.R. 939.

61 *Close* v. *Phipps* (1844) 7 M. & G. 586 ; 135 E.R. 236; *Kanhaya Lal* v. *National Bank of India* (1913) 29 T.L.R. 314; *Attorney-General* v. *Wilts United Dairies Ltd.* (1922) 91 L.J. (K.B.) 897. (Illegal impost exacted as price of a license to buy milk). *Brocklebank Ltd.* v. *The King* (1924) 1 K.B. 647. (Payment illegally exacted for a licence to the plaintiff to deal with his own property). *Contra William Whiteley Ltd.* v. *The King* (1909) 101 L.T. 741; *Warrin* v. *Commonwealth* (1938) 59 C.L.R. 158, 159 quoted in *Mason* v. *State of N.S.W.* (1959-60) 102 C.L.R. 108, 144.

62 Restatement of the Law, Chapter Coercion, s.75, p. 318. For Indian Law, see below.

63 *Mason* v. *New South Wales* (1959-60) 102 C.L.R. 108, 145.

64 *T.A. Sundell & Sons Ltd.* v. *Emm Yannoulatos (Overseas) Pty. Ltd.* (1925) S.R. (N.S.W.). 323.

65 *Deputy Commissioner* v. *Har Narain* (1956) A.A. 205.

66 *Onkarmal* v. *Banwari Lal* (1962) A. Raj. 127; *Chitsu* v. *San Gyaw,* 6 Rang, 238 dist.

67 *Gurunadha Rao* v. *Bosaiah* (1959) A.A.P. 277.

68 *Marriot* v. *Hampton* (1797) 2 Smith L.C. 386; 7 T.R. 269; *Secretary of State v. Tatyasaheb* (1932) 56 Bom. 501; 34 Bom.L.R. 791; 140 I.C. 171; 1932 A.B. 386 (payment by Government after adjudication in High Court for land acquired compulsoriy, Government being unaware that the land already belonged to it).

69 *Offtcial Assignee* v. *Dayabhoy,* 1937 A.R. 234; 171 I.C. 401.

70 (1933) 57 Bom. 601; 35 Bom.L.R. 462; 1933 A.B. 239.

71 *Narayan* v. *Amgauda* (1920) 45 Bom. 1094; 62 I.C. 104; 1921 A.B. 169; *Raghu Ram Pandey* v. *Deokali Pande* (1927) 7 Pat. 30; 115 I.C. 193; 1928 A.P. 193, *Kummakutty* v. *Neelakandan Nambudri* (1930) 53 Mad. 943; 128 I.C. 509; 1930 A.M. 921. The last case seems on the facts to have had little bearing on the point under consideration by learned judges in *Shankerrao's case.*

tegra, he might have decided otherwise.[72] Two later decisions in Madras, *Satyam* v. *Perraju*[73] and *Pappu Reddiar* v. *Pichu Ayyar*[74] held that the money was recoverable, though the Bombay cases were not cited in the course of the argument. The various conflicting authorities were however reviewed in *Raman Adiyoty* v. *Kannan Nambiar*[75] in the same Court and the decisions just cited were affirmed on the ground that the money in such circumstances is in fact paid under compulsion and that s. 72 gives a statutory right to recover it, the right not resting merely on consideration of justice and equity. It is submitted that this is the right view.

Money paid under compulsion—'colori officii.—A law requiring permits authorising use of motor transport vehicles was upheld by the Australian High Court but declared unconstitutional by the Privy Council. Before the Privy Council judgment, the plaintiffs had paid permit fees very often under protest. They charged their customers for the fees paid but did not pass them on *nomination*. Plaintiffs sued for the recovery as money had and received by the State unlawfully *colori officii.*

The plaintiffs succeeded as the payment was to prevent criminal action being taken and was a case of compulsion.[76]

Money paid under mistake.—An American Bank, the plaintiff, was instructed to pay to another New York Bank to the account of an English Bank, the defendant. Later in the day the plaintiff through the mistake of an employee made another payment through the Clearing House system, to the New York Bank for the account of the defendant which was later ordered to be compulsorily wound up. The plaintiff brought an action for a declaration that the defendant was a trustee for the money paid by mistake and that it could in equity trace the sum and recover the money paid by mistake. It was held that the plaintiff was entitled in equity to trace the mistaken payment and recover it or in what was equivalent in English money to the amount paid in U.S. dollars because (1) under English Law a person paying under a mistake of fact retains proprietory interest in it in equity and the payee had a fiduciary duty to respect that continuing right and the law of the State of New York was the same. Therefore on whatever law the plaintiff's interest was founded the money in the hands of the defendant represented plaintiff's money at the commencement of the winding up and did not belong to the defendant beneficially and never formed part of the assets of the defendant subject to the statutory trust under the winding up. The declaration was therefore granted.[77]

Where a bank paid a cheque drawn on it by a Customer under a mistake (overlooking the note of countermanding by the customer) it was *prima facie* entitled to recover payment from the payer as it had acted without mandate unless the payee had changed his position in good faith or deemed to have done so in law.[78] The bank in such a case cannot debit its customer without his ratification.

The Bank was entitled to succeed in its claim because (i) it acted without mandate and (ii) the payment was not effective to discharge the drawers obligation on the cheque, and as a result the payee had given no consideration for the payment and there was no evidence of change of position of the payee.[79]

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72 57 Bom 601; at p. 608

73 1931 A.M. 753; 135 I.C. 24.

74 *Supra,* note 93.

75 1940 A.M. 725.

76 *Mason* v. *The State of New South Wales* (1959-60) 102 C.L.R. 108, 146; *McClintock* v. *The Commonwealth* (1947) 75 C.L.R. 1, 39-40. See also *Cam & Sons Pty. Ltd.* v. *Ramsay* (1960) 104 C.L.R. 247. American Restatement of the Law of Restitution, section 75 'coercion'', page 318.

77 *Chese Manhattan Bank* v. *Israel British Bank (London) Ltd.* (1979) 3 All E.R. 1025, 1031-4; *New York* v. *Porter* (1877) N.Y. 133; *Re: Berry* (1906) 147 F. 208; *Dictum of Lord Haldane in Sinclair* v. *Broughton* (1914-15) All E.R. Rep. at p. 632; *Simonds* v. *Simonds* (1978) 408 N.Y.S. (2nd) 359 appld. *Re: Diplocks Estate* (1948) 2 All E.R. 318 explnd; *Cakes* v. *Turquand* (1862-73) All E.R. Rep. 738; *Tennant* v. *City of Glasgow Bank* (1879) 4 App. Cas. 615 disting.

78 *Barclay Bank Ltd.* v. *W.J. Simms Son & Cooke (Southern) Ltd.* (1979) 3 All E.R. 522, 539-40; *Chamber* v. *Miller* (1862) 13 C.B.N.S. 125; *Polland* v. *Bank of England* (1871) L.R. 620, 623 disting.

79 *Barclays Bank Ltd.* v. *W.J. Simms Son & Cooke (Southern) Ltd.* (1979) 3 All E.R. 522, 542.

A New York Bank discounted a forged cheque drawn on a Saudi Bank and paid the money to the credit of a discount Bank in London in the account of the drawee. The fraud being discovered the New York Bank brought an action in London and it was held[80] that a defrauded Bank could get discovery against the defendant, discount bank to trace the money, but the order was limited for the purpose of discovery for tracing the money.

The defendants had an account in Switzerland in which there was a credit ot $ 11,000. He intended to purchase an hotel as an investment. As his instance the bankers in Switzerland sent by telex $ 11,000 to the London bankers. They also sent an advice confirming the telex. By a mistake in the London bank two sums of $ 11,000 were credited to the defendant. When the defendant enquired about his balance it was shown at about $ 32,000. The defendant purchased a hotel and paid out of his balance with the London bankers. But for this balance shown he would not have been able to purchase the hotel. With the error rectified there was a debt balance of about $ 9,000 against the defendant. The plaintiff bank demanded the money of the overdraft. The defendant pleaded Estoppel. It was held that in order to show that it would be inequitable to require the defendant to pay it was not sufficient for him to show that he had spent it, he had also to show that in spending he had altered his mode of living in a way which he would not have done but for the mistake of the bank. Further it was held[81] that the extra money credited to the defendant's account was under a mistake of fact and the bank was entitled to recover it.

Mistake—Adjustment by Government—Government paid a certain amount of cash assistance for exports. It had to pay further amount in respect of further exports but it unilaterally adjusted the same on the ground that the payment was made under a mistake. It was held[82] that the adjustment could not be made when there is a dispute about mutual claims until the dispute is resolved.

Where a bank makes a payment under a mistake of fact, it is *prima facie* entitled to recover it as money paid by mistake. But its claim may fail if (i) the payer had intended the payee to have the money irrespective of the fact being true or false or was deemed in law to have so intended; (ii) if the payment was for consideration in particular to discharge or did discharge a debt to the payee (iii) the payee had changed his position in good faith or was deemed in law to have done so. But its claim would not fail[83] merely because the mistake had not been as between the payer and the payee or because the mistake had not led the payer to believe that he was liable to pay the money.

Nature of mistake.—The sellers deposited certain goods with a bank which agreed to issue a delivery order to the buyers, who deposited certain amount of money with the bank but the bank issued a defective delivery order resulting in the warehouse refusing to make the delivery. The Bank neither corrected the order nor issued a fresh order for delivery. The buyers sued for the return of money deposited but the suit failed on the ground that the amount was not paid under a mistake envisaged by S. 72 which contemplated only those cases where money is paid under a belief that it is legally or in fact due and the belief is mistaken. If the buyers pay as price of goods under an arrangement with the sellers there is no question of mistake under s. 72.[84]

Section 72 not applicable.—Money paid to a dismissed Government servant under orders of the Court pending final decision of the question of dismissal is not money paid under a mistake and section 72 is not applicable.[85] Similarly, cess paid under pressure or compulsion

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80 *Bankers Trust Co.* v. *Shapira* (1980) 3 All E.R. 350, 357, 358. *A.* v. *C.* (1980) 2 All E.R. 347; *Dicta in Initial Services Ltd.* v. *Patterill* (1967) 3 All E.R. at p. 148; *Norwich Pharmaceutical Co.* v. *Custom & Excise Commissioners* (1973) 2 All E.R. at p. 948 appld.

81 *United Overseas Bank* v. *Jiwani* (1977) 1 All E.R. 733, 736-9; *Skyring* v. *Greenwood* (1825) 4 B. & C. 381; *Holt* v. *Markman* (1922) All E.R. Rep. 134 disting.

82 *Keshoram Industries & Cotton Mills Ltd.* v. *Union of India* (1977) A.Cal. 459, 462.

83 *Barclay Bank Ltd.* v. *W.J. Simms Son* (1979) 3 All E.R. 522, 531.

84 *Lohia Trading Co.* v. *Central Bank of India* (1978) A. Cal. 468.

85 *Sham Lal* v. *State of U.P.* (1968) A.A. 139, 146.

of legal process cannot be recovered under section 72 as money had and received.[86] But the Allahabad High Court held that the money is refundable by way of a *quasi* contract as unjust enrichment.[87] It is submitted that money having been paid under compulsion—the order of the court—there is no reason why section 72 should not be applicable.[88]

Wrongful payment.—There is a class of cases which, though not directly bearing on this section, may be conveniently dealt with in this place. They are cases where money is paid in execution of a decree, and it is sought to recover back the amount on the reversal of the decree. In such a case the payment, though in the first instance lawful, becomes wrongful on the reversal of the decree.[89] The rule of law on this subject is that money paid under a decree cannot be recovered back in a fresh suit whilst the decree remains in force. But if the decree is reversed or superseded the amount paid under it is recoverable. And it has been held in effect by the Privy Council that a decree will be deemed to be superseded, though not actually reversed, if it was made pending an appeal to a higher Court from an antecedent decree on the same cause of action, and the latter decree is reversed by the appellate Court, and the order of reversal was intended to deal with all the rights and liabilities of the parties under it,[90] the principle being that where the main decree which is the basis of subsequent decrees is reversed the latter decrees, being subordinate and dependent decrees, are superseded.[91] See Code of Civil Procedure, 1908, s. 144.

Compare s. 86 of the Indian Trusts Act, 1882, which provides that where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

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86 *State of Bihar* v. *Jhawarmal* (1958) A.P. 310.

87 *Sham Lal* v. *State of U.P.* (1968) A.A. 139, 146. Corpus Juris Secundum, Vol. 17 (1939 Ed.). quoted.

88 *Raman Adiyoty* v. *Kannan Nambiar,* 1940 A.M. 725. See also principle of unjust enrichment.

89 Per Cur. *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (1877) 3 Cal. 30, 38.

90 *Shama Purshad Roy* v. *Hurro Purshad Roy* (1865) 10 M.I.A. 203, followed by a majority of the Full Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (1877) 3 Cal. 30. In the former of these cases there were several decrees for interest on a bond, in the latter for enhanced rent. The reversal of one of those decrees by the Privy Council was held to have superseded all other decrees obtained during the pendency of the appeal to the Queen in Council, so as to give a right for the recovery of the amount paid under them.

91 (1877) 3 Cal. 30, 37, 38. See *Kishen Sahai* v. *Bakhtawar Singh* (1898) 20 All. 237. where it was held that there was no such supersession of the decrees as in the Privy Council cases cited above.

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

Compensation for loss or damage caused by breach of contract.

73. When a contract has been broken,[1] the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.[2]

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B* at a certain price, to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A* by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

Scope.—Section 73 is in Chap.VI. Its first paragraph *inter alia* provides that where a party suffers a loss or damage in consequence of breach of contract he is entitled to recover compensation from the party breaking the contract. The principle of award of compensation is that the injured party should as far as possible be placed in the same position in terms of money as if the contract had been performed by the party in default. The paragraph does not apply to cases where the contract is for any reason void.[3]

Paragraph 3 of s. 73 confers a statutory right on a party to get compensation from a party who has incurred a statutory obligation to pay compensation in case of default even though there may be no contract to pay compensation, but the party in default having incurred a statutory liability is enjoined to discharge it as if he has entered into a contract to pay compensation to the injured party and has broken such contract.[4]

Both s. 70 and para 3 of s. 73 are based on the doctrine of Restitution which says that a person cannot unjustly enrich himself by retaining anything delivered to him which does not belong to him. He must return it and if he cannot do so in specie, he must pay its equivalent in

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1 This section is declaratory of the Common Law as to damages: *Jamal* v. *Moolla Dawood Sons & Co.* (1916) 1 A.C. 175; 43 I.A. 6, 11; 43 Cal, 493, 503; 31 I.C. 949. As to the recovery of interest by way of damages, see notes under that heading below.

2 *Anrudh Kumar* v. *Lachhmi Chand* (1928) 50 All 818; 115 I.C. 114; 1928 A.A. 500

3 *Great Eastern Shipping Co.* v. *Union of India* (1973) 2 Cal. 371; (1971) A.Cal. 150, 155. See *Special Officer Amaravathi* v. *Thirumalaswami* (1973) 2 Mad. L.J. 361, 371.

4 *Great Eastern Shipping Co.* v. *Union of India* (1973) 2 Cal. 371; (1971) A. Cal. 150, 155.

money. Similarly if any person does something for another and he accepts it and does not pay just compensation, he will be guilty of unjust enrichment. The principle of restitution[5] is not based on loss suffered by the plaintiff but on the benefit received by the defendant which he is wholly unjustified in retaining.

(Note.—Market rate.—Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price and the market price *at the date of the breach*. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.[6] If the seller in case of a breach of contract, delays the sale of goods (in this case 2½ months) then he must bear the loss due to fall in price or deterioration in quality (delay in this case was 2½ months).[7] If the breach is by the seller, as the seller has the right to deliver at any time on the date of delivery, it is physically impossible for the buyer to purchase elsewhere on the date of the breach. In such a case, therefore, the market price on the day following the breach is the yard stick by which the buyer's claim to damages is evaluated.[8]

Section 73 embodies the same principle as section 50 of the English Sale of Goods Act according to which the measure of damages is to be "estimated"

where there is an available market for the goods "by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or if no time was fixed for acceptance then at the time of the refusal to accept."[9]

Open Market.—Evidence of the price rate of sleepers at the place of delivery F.O.R. prevailing at the relevant time is the rate—open market—with reference to the surrounding circumstances.[10]

Generally it is "quite settled that on a contract to supply goods[11] of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach." The computation of damages by taking the difference between the contract price and the lowest market price on the date of the breach is neither illegal nor unreasonable.[12] Where the seller contracted to sell to another party and without notice cancelled the contract, the buyer was held[13] entitled to damages for breach of contract If the market rate on the due date is not available, the Court may take into consideration the rate prevalent just before and just after that date.[14] But the subject-matter of the contract may not be marketable. In that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute. *Hinde* v. *Liddell* (1875) L.R. 10 Q.B. 265, 269, *Elbinger Actien-Gesellschaft* v.*Armstrong* (1874) L.R. 9 Q.B. 473, 476. Where no such substitute is available, then if there has been a contract to resell them the price at which the

5 *Great Eastern Shipping Co.* v. *Union of India* (1973) 2 Cal. 371; (1971) A. Cal. 150, 155.

6 *Jamal* v. *Moolla Dawood Sons & Co.* (1916) 1 A.C. 175; 43 I.A. 6; 43 Cal. 493; 31 I.C. 949; *The Arpad* (1934) P. 189; *Jivraj* v. *Chainkaran* (1944) Nag. 749, 1944 A.N. 279; *Phalumal Motiram* v. *Valjimal* (1946) Kar. 296, 225 I.C. 145, 1947 A.S. 22; *United Brokers* v. *Alagappa Corporation*, 1948 A.M. 391 appears to be a wrong decision. See('44) A.B. 21. Collateral circumstances will not alter the general rule: *Bolisetti Venkatanarayana* v. *Vekkalagaddalakshmi Punnayya*, 1928 A.M. 1242; 115 I.C. 342; *Union of India* v. *Tribhuwandas Lalji* (1971) A.D. 120, 123; Cp. *Mehr Chand* v. *Jugal Kishore-Gulab Singh* (1923) 85 I.C. 317; 6 Lah. L.J. 415.

7 *Province of West Pakistan* v. *Saaz & Co. P.L.D.* (1964) 1 S.C. 598, 632 Pak.; *Jamal* v. *Moolla Dawood & Sons*, 43, I.A. 6; *Erroll Mackay* v. *Kameshwar Singh* (1932) A.P.C. 196.

8 *Shaw* v. *Holland* (1846) 15 M. & W. 136; *Sohanlal Pachisia* v. *Bilasray*, 1954 A. Cal. 179.

9 *Province of West Pakistan* v. *Messrs. Saaz & Co.* P.L.D. (1964) 1 S.C. 625 (Pak.); *Barrow* v. *Arnaud* (1846) 8 Q.B. 595 refd. to; *Jamal* v. *Moolla Dawood Son & Co.* 43 I.A. 6; *Erroll Mackey* v. *Kameshwar Singh* (1932) A.P.C. 196.

10 *Tata Iron & Steel Co. Ltd.* v. *Ramanlal Kandloi* (1971) 2 Cal. 493; *Inland Revenue Commissioners* (1914) 3 K.B. 466 disting; *Charington & Co.* v. *Wooder* (1914) A.C. 71 refd. to.

11 Including shares in a company, see *Williams* v. *Ed. T. Agius* (1914) A.C. 510 . The rule is not applied so strictly to a sale of land: *Sampatraj* v. *Pokar*, 1955 A.Raj 70; See also *Fateh Chand* v. *Juggilal*, 1955 A. Cal. 465, 469, in reference to an arbitrator's award *M.N. Gangarappa* v. *A.N. Setty & Co.* (1972) A.S.C. 696 (difference between contract rate and lowest market rate).

12 *M.N. Gangarappa* v. *A.N. Shetty* (1972) A.SC. 696, 700.

13 *Jagdish Prashad Keshwani* v. *Fertiliser Corporation of India* (1981) A.P. 58, 60.

14 *Ramdhan Das* v. *Kishori Chand*, 1954 A.Or. 254; *Orissa Textile Mills* v. *Ganeshdas* (1961) A.P. 107; *Ram Prasad* v. *Sasansa Sugar Works Ltd.* (1964) A.P. 250.

contract was made will be evidence of their value,[15] but if there has been no such contract, the market value may be estimated by adding to their price at the place where they purchased the costs and charges of getting them to their place of destination, and the usual importer's profits: *Borries* v. *Hutchinson* (1865) 18 C.B.N.S. 445; 44 R.R. 563; *O'Hanlan* v. *G.W. Ry. Co.* (1865) 6 B. & S. 484; *Cooverjee Bhoja* v. *Rajendra Nath* (1909) 36. Cal. 617; *Hajee Ismail & Sons* v. *Wilson & Co.* (1918) 41 Mad. 709, 715; 45 I.C. 942.[16] On a breach of contract to supply goods by the seller the buyer is entitled to recover all the expenses of procuring same or similar goods.[17]

Forbearance.—Again, if the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually paid: *Ogle* v. *Earl Vane,* Ex. Ch. (1868) L.R. 3 Q.B. 272. "The defendant, in effect, bought forbearance, and must pay for it": Willes, J., at p. 280. Accordingly the decisive date for fixing the damages is the last date to which the contract was extended: *Kidar Nath Behari Lal* v. *Shimbhu Nath-Nandu Mal* (1926) 8 Lah. 198; 99 I.C. 812; 1927 A. Lah. 176. If a party asks to have the performance of the contract postponed, he does so at his own risk; because he will have to suffer if consequent upon the postponement the measure of damages increases: *Levey & Co.* v. *Goldberg* (1922) 1 K.B. 688. If a seller tries to perform the contract at a later date that would not affect the date of the breach or the measure of damages: *Union of India Ltd.* v. *Mouji Lal Shaw* (1960) A.Cal. 729; *Province of West Pakistan* v. *Saaz & Co.,* PLD (1964) 1 S.C. 598 Pak. But where no such request has proceeded from the seller, the buyer is not entitled to anything more than the difference between the contract rate and the market rate at the date of the breach though he may not have pressed for delivery on the due date: *Muthayamanigaran* v. *Lakku Reddian* (1912) 22 Mad. L.J. 413.[18] Nor does time spent in survey of the goods postpone the date of breach.[19]

The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer. The buyer is entitled, as indicated by illustration (a) to the section, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer *might* have obtained goods of like quality at the time when they ought to have been delivered.[20]

"Obviously value created for special purpose is irrelevant and it is for this reason that the prices made by bulls and bears are of no use to us. If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities, and among them to real prices proved about the time of due date. Now market price is to a great extent based on, and made up of the views of, those engaged in a particular business and familiar with its incidents. These views are based not only on transactions in which a man may himself have been actually engaged, but also on the general rumour and reputation in the market. Therefore, a man may be a competent witness for the purpose of testifying to market value, though he may not himself have been engaged in or carried through any dealing in the market at the particular date in question. We cannot then exclude from consideration any evidence on

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15 This evidence was, in the circumstances, rejected by a majority of the Court of Appeal in *The Arpad* (1934) p. 189, on the ground that the sub-contract was far removed in time (in fact five months) from the date of breach, and the selling value of all classes of wheat had greatly diminished since then. In *Heskell* v. *Continental Express* (1950) 1 All E.R. 1033, 1050 Devlin J. rejected the evidence where the plaintiff was a British exporter who had agreed to sell goods to a Persian buyer in Tehran as British exporters were not trying to take any share in the large profits being made on resales in Tehran.

16 As to the case of a buyer failing to accept goods made to his order and of such a kind that they have no market price, *Re Vic Mill* (1913) 1 Ch. 183; in C.A. (1913) 1 Ch. 465, where the question was treated as being wholly on the facts; *Gear & Co.* v. *French Cigarettes Co.* 1931 A.L. 742; 135 I.C. 599.

17 *Tata Iron & Steel Co. Ltd.* v. *Ramanlal Kandoi* (1971) 2 Cal. 493, 528; *Listers Leather & Skin Co. Ltd.* v. *Home & Overseas Brokers Ltd.* (1948) 64 T.L.R. 569; *William Cory & Sons Ltd.* v. *City of London Corp.* (1951) 2 All E.R. 85 disting.; *Eire County Natural Gas & Fuel Co. Ltd.* v. *Samuel S. Carroll* (1911) A.C. 105 reld. on.

18 See also *Anandram Mangturam* v. *Bholaram Tanumal* (1946) Bom. 218, 1946 A.B. 1.

19 *Ramchandra Ramvallabh* v. *Vassanji Sons & Co.* (1921) 45 Bom. 129; 57 I.C. 978.

20 *Hajee Ismail & Sons* v. *Wilson & Co.* (1918) 41 Mad. 709; 45 I.C. 942; *Mackay* v. *Kameshwar Singh* (1932) 59 I.A. 398; 11 Pat. 600; 138 I.C. 658; 1932 A.P.C. 196. Where there was a refusal by the purchasers to take delivery and the goods were sold on the settling day when the defendants failed to take delivery and not on the date of the auction: *Pannaji* v. *Senaji,* 1934 A.B. 361; 152 I.C. 580.

this point, merely because the deponent may not himself have bought or sold on the due date.[21]

Market rate: limits of rule.—The market rate, however, is only a presumptive test: "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed," and the rule as to market price "is intended to secure only an indemnity" to the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser." If he does not get his goods, he "should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have delivered, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market." There is an important exception "if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value." In such a case he must allow for the profit he actually makes and can recover only his actual loss; otherwise he would be placed in a better position that if the contract had been performed. So the law is explained by the Privy Council in *Wertheim* v. *Chicoutimi Pulp Co.* (1911) A.C. 301, 307, 308,[22] *Cp.*, the *British Westinghouse, Etc. Co's* Case, p. 640 below. See *infra* "Principles for Award of Damages" p. 640. Still less is there a fixed rule in the less simple case of wrongful conversion of a principal's goods by his agent.[23]

Export sales and C.I.F. and F.O.R.—Where in a contract for the purchase of cloth made for export to Africa to the knowledge of the seller, there is a breach of the contract by the seller, the measure of damages, in the absence of open market, due to governmental restrictions, is the difference between purchase price and the market rate for export contracts for Africa available at the date of the breach.[24] In a contract for supply of goods which were to be exported to Nigeria the damage for failure to deliver goods contracted for, if there is no market, must be determined by other means, e.g. (i) the price of goods f.o.b. Calcutta where the goods are to be exported from Calcutta; (ii) the price of goods bought and sold in Calcutta for internal consumption; (iii) price of goods exported to Nigeria from Calcutta while they are afloat and are represented by shipping documents.[25] In assessing damages for breach of purchase of Pakistan jute the damages have to be calculated according to Calcutta rates and Dacca prices cannot be taken into consideration.[26] In the case of breach of C.I.F. contract the amount of damages is the difference between contract price and the price on the date of the breach, i.e. the date the shipping documents had to be tendered; but if the seller himself clears the goods then the date of clearance because the documents cannot be tendered. The date of breach is not the date when the seller after clearing the goods dispatches them in pursuance of another contract.[27]

The measure of damages in the case of a breach of contract of sale of goods, where delivery was to be by a Railway receipt for Calcutta f.o.r. Kanpur, is the difference between the purchase price and the price at Kanpur on the date of breach. In this case it could not be

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21 *Shridhan Gopinath* v. *Gordhandas Gokuldas* (1902) 26 Bom. 235, 239. In the first sentence "purpose" appears to be a misprint for "purposes".

22 Note that this "was a case, not of delivery withheld, but of delivery delayed": per Lord Dunedin (1914) A.C. 522; *Union of India* v. *Baijnath* 1951 A.P. 219. As to what are called accidental circumstances as between seller and buyer, see p. 557, below. In a case of non delivery, damages are assessed according to the market rate at the time delivery was due, whether the buyer has made a forward sale at a price below the market rate: *Rodocanachi* v. *Milburn* (1886) 18 Q.B.D. 67, C.A.; *Williams* v. *Agius* (1914) A.C. 510, H.L.: or in excess of it: see illustration (O) to s. 73 (*infra*). See infra "Principles for Award of Damages", p. 640.

23 *Tadi Sarreddi* v. *Chelamcherla Brahmayya*, 115 I.C. 153; 1928 A.M. 1152.

24 *Chalisgaon Sri Laxmi Mills Ltd.* v. *Amritlal Kalidas* (1964) A.B. 76, 81.

25 *Guljari Lal Kanoria* v. *Busi & Stephenson Ltd.* (1960) A. Cal. 590; *Chalisgaon Lakshminarayan Cotton Mills Ltd.* v. *Amritlal Kanji* (1964) A.B. 76, 81. See *Orissa Textile Mills* v. *Ganeshdas* (1961) A.P 107 (where market rate is not available).

26 *Naihati Jute Mills Ltd.* v. *Khyaliram* (1968) A.C.S. 522, 529.

27 *Narayanswami* v. *Sounderajan & Co.* (1958) A.M. 43, 52.

said that the seller knew that goods were meant for sale at Calcutta, because it was open to the buyer to sell the goods wherever he liked.[28] In the case of goods sent by rail the damages for loss of goods in transit is the difference of price at which they were purchased at one market and the price at the place of destination minus the cost of transportation. And these damages are not remote.[29]

Railways—Open delivery.—The Railway Administration is not bound to give open delivery on demand of the consignor. The consignee's right is to take delivery and claim damages for loss, if any.[30] If delivery of a consignment is offered by a Railway to the consignee in whatever condition it is, he is bound to accept it and if damaged he can sue for damages. This as a proposition was received with hesitation.[31] This proposition is not applicable in a case where the goods were offered during the pendency of litigation.[32]

Breach of Contract.—*A* agrees to purchase *B*'s house at Rs. 5,500. *A* afterwards refuses to complete the purchase. The house is then sold by auction in execution of a decree against *B*, and realises Rs. 3,100 net. *B* is entitled to receive from *A* by way of compensation Rs. 2,400: *Mohunlal Tribhowandas* v. *Chunilal Harinarayan* (1902) 4 Bom.L.R. 814; *Nabinchandra* v. *Krishna* (1911) 38 Cal. 458.

The measure of damages in a case of destruction of goods in possession of a Railway by fire is the market price at the time of destruction and not the contract price between the buyer and the seller: *Union of India* v. *West Punjab Factories Ltd.* (1960) 1 S.C.R. 580; (1966) A.S.C. 495.

In case of affreightment and carriage of goods the measure of damages is the market price of goods at the place of destination, where the damage takes place. The plaintiff can produce avoidance of price of similar goods at or near the place in question to prove his damages.[33]

Where the defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of a certain species of coal from February to June, and failed to deliver any of the coal, and no purchase was made by the plaintiff against the defendant's contract, and there was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given, the Court received in evidence a statement produced by the plaintiff showing the rates at which he had during the contract period settled certain contracts for the same coal with other persons, to ascertain the actual value of the coal on the dates of the breach: - *Jugmohandas* v. *Nusserwanji* (1902) 26 Bom. 744.[34]

Where the subject-matter of the contract is not procurable at all in the market or is not available at or about the time of breach the damages are to be taken at the value of the article at the time of the breach, i.e. at the price it was sold by the seller to a third party if it was so sold.[35]

(b)*A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(Note.—Delay in Performance.—*A* contracts with *B* to provide a ship on a certain day to receive a cargo of coal to be carried to Havre. *A* fails to provide the ship in time, and *B* has to

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28 *Murlidhar Chiranji Lal* v. *Harishchandra Dwarkadas* (1962) 1 S.C.R. 653; (1962) A.S.C. 366.
29 *Dominion of India* v. *B.L. Batt* (1957) A.P. 328.
30 *Union of India* v. *Ibrahim Gulaba* (1966) A.M.P. 52; *G.G. in Council* v. *Badridas Gauri Dutt* (1951) A.A. 702; *Dominion of India* v. *Netai Chandra* (1952) A. Cal. 726; and *Jusaf & Ismail Co.* v. *G.G. in Council* (1947) Nag. 335; (1948) A.N. 65 relied on.
31 *Fazalbhai* v. *Dominion of India* (1951) Nag. 545; (1951) A.N. 245; *Jusaf & Ismail* v. *Governor General* (1947) Nag. 335; (1948) A.N. 65; see *Union of India* v. *F. Damodardas* (1958) A.B. 238.
32 *Union of India* v. *F. Damodar Das* (1958) A.B. 238.
33 *Union of India* v. *Venkatiah* (1975) A.M. 119, 123; *Union of India* v. *B. Pralhad* (1976) 1 D. (1976) A.D. 236, 244.
34 Followed in *Ramdhan Das* v. *Kishori Chand,* 1954 A.Or. 254.
35 *Dina Nath Dutta* v. *Mahavir* (1958) A. Punj. 289; *Narayanswami* v. *Soundarajan* (1958) A.M. 43 (Case of breach of C.I.F. contract).

charter vessels at an advanced freight and also buy coal at a higher price. *B* can recover from *A* the increase of price as well as the increase of freight, unless *A* can show that, by reason of a corresponding increase in the market price at the port of delivery or otherwise, the loss is compensated wholly or in part: *Featherston* v. *Wilkinson* (1873) L.R. 8 Ex. 122. *A* contracts with *B* to sell and deliver goods which on the day appointed for delivery are worth Rs. 80 per ton. They are delivered later on a day when they are worth only Rs. 50 per ton, but meanwhile *A* has sold them for Rs. 70 per ton. *A* is entitled to damages only for his actual loss of Rs. 10 per ton: *Wertheim* v. *Chicoutimi Pulp Co.* (1911) A.C. 301 (see p. 617 above).

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

Breach of contract to build—Date of assessment of damages, Inflation, Mitigation.—In the case[36] of the breach of a covenant by the owner of adjacent land to build a boundary wall the failure to do which caused loss of amenity to the adjacent land, the date of assessment of damages is the date of the hearing and not the date of breach and the defendant cannot complain of delay in starting proceedings resulting in increase of damages due to rising inflation nor can he complain that the plaintiff should have mitigated damages as it was not the duty of the plaintiff to build on his own land while there is a reasonable probability that the defendant will carry out the work.

Damages-Consignors claim.—Goods shipped by a vessel were lost on voyage. There was a clause in the contract that the claimant for special damages had to have proprietory right. The consignors brought a suit for special damages. It was held[37] that according to English common law the consignor could sue for the actual loss suffered but could not sue for special damages.

Condition for rejection of goods.—Where in a contract of supply of citrus puffs pellets the condition was "shipment to be made in good condition" and the pellets were damaged due to negligence of the shipping carrier, the buyers, it was held, were not entitled to reject the goods under the condition as it was an "intermediate" term. But the buyers could sue for damages, the measure of which was the difference between the price of sound pellets and the deteriorated ones.[38]

(Note.—Where no time fixed for delivery.—If in the case put above *A* gave notice to *B* that he would not take delivery beyond a certain date, and delivery is not made within that time, the measure of damages would be the difference between the contract price and the market price on that date: *Gauri Datt* v. *Nanik Ram* (1916) 14 All L.J. 597; 35 I.C. 203 or where no time was fixed for acceptance then at the time of the refusal to accept: *Province of West Pakistan* v. *Saaz & Co.* PLD (1964) 1 S.C. 625 (Pak).)

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A* the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.

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36 *Redford* v. *De Forbesville* (1978) 1 All E.R. 33, 56-7.

37 *The Albazero* (1976) 3 All E.R. 129, 137, 138; (1975) 3 All E.R. 21 revd; *Gardano & Giampari* v. *Greek Petroleum George Mamidakis & Co.* (1961) 3 All E.R. 919 overruled; *Dunlop* v. *Lambert* (1839) 6 Cl. & Fin. 600 explained.

38 *Cehawe N.V.* v. *Bremerhandelgessehlschaft* (1975) 3 All E.R. 739; (1975) 3 W.L.R. 447; (1976) 1 Ch. 44.

Unilateral Time fixing.—Where *A* purchaser tendered for the purchase of sugar which was accepted and the purchaser made a deposit but no time was fixed for taking delivery and payment of price. The sellers gave notice to the purchaser for taking delivery by a certain date and pay the balance of the price. On the purchasers default the seller sold the sugar and brought a suit for damages due to sale at a lesser price. The suit was held unmaintainable[39] as the seller could not unilaterally fix the date of delivery and the contract was not a concluded contract.

Under section 73 no compensation is to be given damages are remote or indirect or until they are actually suffered; a contrary view will render s. 73 nugatory and a party will be penalised although the other party suffers no loss.[40]

(**Note.—Late delivery.**—There is not any general rule that damages cannot be recovered for loss of market on a voyage by sea: "wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases": *Dunn* v. *Bucknall Bros.* (1902) 2 K.B. 614, 622, C.A. *per Cur.*,[41] holding that the earlier decision of the C.A. in *The Parana* (1877) 2 P.Div. 118, had not laid down anything to the contrary. It must depend on the circumstances, including the character of the navigation undertaken, what amount of reasonable anticipation can be held practicable. Modern commerce tends to become more certain by sea no less than by land, and perhaps in a more marked degree.) See also Delay in Performance *(supra)*.

Where as a consequence of misconduct, failure or neglect of the Railway in not informing the sender or the consignee that the goods had been seized by the Land Customs Officer, there was unreasonable delay and the goods deteriorated and became unmerchantable, the sender is entitled to the price of the goods as damages.[42] The measure of damages for late delivery of goods consigned by Railway is the difference between the market price on due date of delivery and on the date of actual delivery.[43] The measure of damages to the charterer for late arrival of the chartered ship due to deviation in the route in breach of the Charter-party is the difference of the price of the goods on board on the day when they should have arrived and when they did arrive. The House of Lords laid down the rule that in the case of commodities the price of which was liable to fluctuation, the shipowners should reasonably contemplate that it was not unlikely that if the ship delayed her voyage the value of marketable goods on board would decline.[44]

Where due to delay in delivery there is total loss in perishable goods, the measure of damages is the market value of the goods, the goods at the time and place where goods should have been delivered and not any high value that the consignee may put. The freight if paid will be added to the amount of each of the damages and if not paid will be deducted from the market value.[45]

Non Delivery.—The damages for non-delivery of half the quantity of scrap agreed to be delivered must be fixed on the basis of the price prevailing on the date on which the delivery was to be made.[46]

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39 *National Cooperative Mills Ltd.* v. *Albert & Co.* (1981) A.M. 172.
40 *Union of India* v. *Tribhawandas Lalji* (1971) A.D. 120; *Viswanath* v. *Amarlal* (1957) A.M.B. 190 dissented from *Errol Mackay* v. *Kameshwar Singh* (1932) A.PC. 196 Expld.
41 Followed in *The Ardennes* (1951) 1 K.B. 55.
42 *Lal Chand* v. *Union of India* (1960) A. Cal. 270.
43 *Union of India* v. *Sheobux* (1963) A. Or. 68.
44 See *Koufos* v. *C. Czarnikow Ltd.* (1967) 3 W.L.R. 1491; (1967) 3 All E.R. 686 (H.L.).
45 *Union of India* v. *Prahlad & Co.* (1976) 1 Deh. 436; (1976) A.D. 236, 244.
46 *Union of India* v. *Jolly Steel Industries (Pvt.) Ltd.* (1980) A.SC. 1346.

Currency revalued.—In *Aruna Mills' case*[47] the parties actually contemplated the possibility of revaluation during the period between the date of the contract and the date of payment for the goods as being a sufficiently serious possibility or real danger to justify their making express provision for that eventuality. In the circumstances they must be assumed to have contemplated that late delivery was "liable to result" within the rule stated in *Czarnikow Ltd.* v. *Koufos*[44] in the buyers suffering a loss by the payment of an enhanced price. Relying on *Di Fernando* v. *Simon Smits & Co. Ltd.*[48] and *S.S. Celia* v. *S.S. Volturno*[49] it was argued in *Aruna Mills' case*[47] that losses resulting from revaluation of currencies are always too remote in law to be recoverable but this rule was not accepted by Donaldson J. who said.

"The true rule as to losses resulting from revaluation of currencies is that changes in currencies are irrelevant if they occur after the date at which damages fall to be assessed and are usually to be disregarded if they occur on or before that date, either because the loss flowing from the revaluation has no causal connection with the breach of contracts or because such loss is not within the assured contemplation of parties."[47]

Fall in the value of money.—According to cases decided prior to the decision on cases dealing with "foreign currency" (See under s. 38 and Post) damages could not be increased because of a fall in the value of money between the time the loss was to be assessed and the date of judgment as the English Courts took the value of Sterling as constant.[50] But it is submitted there is no such presumption as to Indian currency even that pound sterling is no longe constant.

(Note.—Delivery by instalments—Anticipatory breach.—If the iron was to be delivered by instalments at certain dates, e.g. at the end of the three months of September, October and November, the measure of damages is the sum of the differences between the contract and the market price of the several instalments on the respective final days for performance: *Brown* v. *Muller* (1872) L.R.7 Ex 319; and the same rule is applied where the seller, before the expiration of the whole time for performance, has refused to complete the contract, and the buyer has treated the refusal as an immediate breach (see notes s. 39, under "Promisee may put an end to the contract," above), unless the seller can show that the buyer could have obtained a new contract on better terms: *Roper* v. *Johnson* (1873) L.R. 8 C.P. 167; *Krishna Jute Mills Co.* v. *Innes* (1911) 21 Mad. L.J. 182)

If a vendor has a specified time allowed to him to deliver goods (the option was to deliver in August or September), and before the expiry of that time he gives notice to the purchaser that he will be unable to perform the contract, and the purchaser does not rescind the contract (as he may do under s. 39), the measure of damages is the difference between the contract price and the market price on the last day of the period limited (i.e. in this case the last day of September): *Mackertich* v. *Nobo Coomar Roy* (1903) 30 Cal. 477, following *Leigh* v. *Paterson* (1818) 8 Taunt. 540; 20 R.R. 552; see *Mackay* v. *Kameshwar Singh* (1932) 59 I.A. 398; 11 Pat. 600; 138 I.C. 658; 1932 A.P.C. 196. If the contract is for delivery in August *and* September, the damages are distributable according to *Brown* v. *Muller: Cooverjee Bhoja* v. *Rajendra Nath* (1909) 36 Cal. 617. If the contract is for sale of a certain quantity of goods, and it is stipulated "shipments to be made by steamers during July to December,.....the agreement to be construed as a separate contract in respect of each shipment," the instalments must be deemed to have been intended to be distributed rateably over the months from July to December, and the damages are distributable according to *Brown* v. *Muller: Bilasiram* v. *Gubbay* (1916) 43 Cal. 305; 33 I.C. 1.

A, a stockbroker, closes the account of a client, *B*, prematurely and without instructions, instead of carrying it over to the next settlement, as on the facts and the true construction of their agreement he ought to have done. *B* informs *A* that he insists on the performance

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47 *Aruna Mills Ltd.* v. *Dhanrajmal Gobindram* (1968) 2 W.L.R. 101, 111.
48 (1920) 3 K.B. 409 (C.A.).
49 (1921) A.C. 544.
50 *Philips* v. *Ward* (1956) 1 W.L.R. 471 (C.A.). See also Paras 1310-11 of Chitty on Contracts (24th Ed.) "Gold Clause".

of the contract. *A* cannot claim to have the damages assessed with reference to the price of stocks at the date of closing the account, but *B* is entitled to claim damages assessed according to the prices at the date fixed for performance: *quaere,* whether according to the highest price reached in the interval: *Mitchael* v. *Hart & Co.* (1902) 1 K.B. 482, C.A.

A client instructs a *pakka adatia* to close outstanding transactions. The *pakka adatia* has already wrongly closed them. The client is entitled to damages on the footing of the prices prevailing on the date on which he gave the instructions: *Ulfatrai* v. *Nagarmal,* A.I.R. 1941 Bom. 211; 43 Bom.L.R. 269.

With regard to several deliveries under one contract, where the defendant agreed with the plaintiff to purchase from him gunny bags, of which delivery was to be given at certain stated times, and the defendant failed to take delivery, it was held that the proper measure of damages was the difference between the contract price and the market price at the dates of failure by the defendant to take delivery: *Cohen* v. *Cassim Nana* (1876) 1 Cal. 264.

In a contract to supply sleepers F.O.R. Tatanagar by instalments according to a time schedule, the sleepers being required for an expansion programme, the seller supplied goods some of which were defective but a portion thereof was accepted as a matter of grace and so was the time extended to help the seller, but the latter failed to deliver the balance of the goods according to the extended time schedule. The buyer thereupon purchased at the sellers' risk and sued for damages. It was held[51] that time was of the essence of the contract and the buyer was not bound to accept defective goods and the buyer was justified in buying goods in the market in view of the clear inability of the seller to deliver goods of the stipulated quality and therefore he was liable for damages.

Repudiation by issue of the writ.—If a party accepts repudiation by the mere issue of a writ that does not alter the date for ascertaining the difference between the market rates for the contract price and the market price. It still remains the date when the buyer would have had the goods—e.g. the date of performance: *Garnac Grain Co. Inc.* v. *Faure & Fair Clough Ltd.* (1967) 3 W.L.R. 143, 151.

(i) *A* delivers to *B*, a common carrier, a machine to be conveyed without delay to *A*'s mill, informing *B* that this mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(Note.—Notice of special circumstances.—The facts in *Hadley* v. *Baxendale,* 9, Ex. 341: 96 R.R. 742, were somewhat like these, except that the defendants did not know that the plaintiffs' mill was stopped for want of part of the machinery which they were to supply. They were held not liable for loss of profit. It may be collected from the judgment that with knowledge they would have been liable. As to the general rule there laid down see the commentary below. The loss of profits on a contract of which the defendant had no notice is clearly too remote. But where the defendant failed to supply an essential part of machine which the plaintiff, to his knowledge, was under contract to supply to a third person, and the plaintiff, by the defendant's default, lost the benefit of the contract, the defendant was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine: *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B.D. 670.

B delivers to *A* several cases of machinery to be carried by sea from Bombay to Karachi for the purpose of building a mill. On arrival at Karachi one of the cases, containing indispensable parts of the machinery, is not to be found. *A* knew that the cases contained machinery, but did not know the specific contents of each case. *A* is liable to pay *B* by way of compensation the value of the lost case, freight and interest, but not the profits lost by the mill not having been set up at the time intended. (See *British Columbia Sawmil Co.* v. *Nettleship* (1868) L.R. 3 C.P. 499.).

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51 *Tata Iron & Steel Co. Ltd.* v. *Ramanlal Kandoi* (1971) 2 Cal. 493; *Badal & Co.* v. *East India Trading Co.* (1964) A.SC. 538; *Thorp* v. *Holdsworth* (1876) 3 Ch.D 637 refd. to: *Nagubai Ammal* v. *Sham Rao* (1956) A.SC. 593 disting.; *Keshavlal Lalubhai Patel* v. *Lalbhai Tricumlal Mills Ltd.* (1958) A.SC. 512 refd.

A sent by railway a set of books to himself as consignee. On arrival it was found that three volumes were missing, making the whole set useless. *A* sued the railway authority for the price of a whole set, but it was held that as the railway had no notice of the fact that loss of three volumes would make the whole set useless, the invoice mentioning only a bundle of books, they were liable only for the price of the lost volumes.[52]

A, who makes a business of collecting and forwarding telegrams, contracts with *B* to forward a ciphered cable message from Calcutta to *X*, who is *B*'s correspondent in London. The message conveys no meaning on the face of it. *A* negligently fails to forward the message in due time, and *B* loses the profits which he would have made if *X* had duly received and acted upon it. *A* is not liable to *B* for these profits, as he had no means of knowing what would be the consequences of a breach of his contract: *Saunders* v. *Stuart* (1876) 1 C.P.D. 326).

D agreed to sell a boiler to *P*, but it was damaged through *D*'s negligence while being loaded on *P*'s lorry. There was a consequent delay of twenty weeks in delivery. *P* was a dyer, and *D* knew that the boiler was required for his business. *P* wanted it for especially lucrative dyeing contracts with the Government, but based his claim for damages merely on the loss of profit on ordinary dyeing contracts. The Court of Appeal held that *P* had been too pressing for it to be arguable that as far as *D* knew the boiler might be required as a museum piece, or as a spare. The Court further rejected *D*'s argument that *P* could not recover some conjectural loss for ordinary dyeing contracts for which he never intended to use the boiler, and held for *P*: *Victoria Laundry* v. *Newman Industries Ltd.*[53]

(j) *A*, having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

If in the circumstances set out in illustration (j) other iron was available, but the market price at the time for delivery had risen to 120 rupees a ton, *A* cannot recover from *C* more than 20,000 rupees as the sub-sale was in contemplation,[54] whereas if the sub-sale was not within *C*'s knowledge *A* could have recovered 40,000 rupees from him.[55]

If the sub-sale was in contemplation, but the market price at the time fixed for delivery was only 90 rupees a ton, it would depend upon the facts whether *A* was entitled to damages at the rate of 20 rupees a ton, for example if he could honour his contract with *B* only by delivering the specific iron to be supplied by *C*, or at the rate of 10 rupees a ton, for example if he could honour his contract with *B* by purchasing similar goods in the market.[56]

(Note.—Notice of contract of resale.—If *C* only knew generally that *A* wanted the iron for resale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach: *Thol* v. *Henderson* (1881) 8 Q.B.D. 457. What is contemplated is that if the goods are not delivered to him, *A* will go out into the market and buy similar goods and honour his contract with *B* in that way. If there is no market price the measure of damages is the difference between the resale price and the contract price: *Patrick* v. *Russo-British Grain Export Co.* (1927) 2 K.B. 535 (*Thol* v. *Henderson* was not cited); *Emil Adolph Zippel* v. *Kapur & Co.*, 1932 A.S. 9; 139 I.C. 114. The Court does not necessarily award the whole of the difference. In *Household Machines* v. *Cosmos*[57] Lewis J. awarded ten per cent, where the resale had been at twelve per cent above the contract price. If there is no available market, the Court will do its best to award such damages as will put the injured party in the same position as if the contract had been performed,[58] but fail-

52 (1952) Nag. 125. (52) A.N. 32.
53 (1949) 2 K.B. 528. Following on the last point: *Cory* v. *Thames Ironworks* (1868) L.R. 3 Q.B. 181 (infra).
54 *Trans Trust* v. *Danubian Trading Co.* (1952) 2 Q.B. 297, 301, per Somervell L.J. *Biggin* v. *Permanite* (1951) 1 K.B. 422, 436, per Devlin J.; *Marles* v. *Philips Trant* (1954) 1 Q.B. 29, 34.
55 *Rodocanachi* v. *Milburn* (1886) 18 Q.B.D. 67, C.A.
56 *Kwei Tek Chao* v. *British Traders* (1954) 2 W.L.R. 365, 384, (1954) 1 All E.R. 779, 797, per Devlin J. See explanation to s. 73.
57 (1947) 1 K.B. 217.
58 *Nanak Bakhsh* v. *Rania*, 1952 A. Punj. 234.

ing such evidence it may be impossible to assess damages.[59]

B, having contracted with a shipowner, *X*, to supply coal to his steamers, enters into a contract with *A*, a colliery owner, for coal. The coal is expressly stated to be for shipment in *X*'s steamers. *A* fails to deliver coal to *B*, in time, and a ship of *X*'s is delayed in consequence. *X* sues *B* and claims large damages; *B* defends the action and reduces the damages to a much smaller amount. *A* is liable to *B* for the costs reasonably incurred by *B* in defending this action, as well as for the damages and taxed costs therein; *Agius* v. *G.W. Colliery Co.* (1899) 1 Q.B. 413, C.A.; *Hammond & Co.* v. *Bussey* (1887) 20 Q.B.D. 79.[60] Similarly if *B* has made a settlement with *X* out of court, this sum may be awarded to *B* as damages against *A* if *B* can establish that the settlement was a reasonable one: *Biggin* v. *Permanite*.[61] See notes on p. 655, below. In cases of this class the seller may be liable not only for damages and costs directly incurred by the original buyer, but for damages and costs for which that buyer has become liable through one or more successive warranties on subsequent sales. (See also under Warranty and measure of damages for breach of Warranty). See the additional illustration following ill. (1).

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher pirce than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(The following additional illustration is taken substantially from the headnote to *Kasler & Cohen* v. *Slavouski* (1928) 1 K.B. 78:

B, a wholesale furrier, bought some dyed rabbit skins from *A* for the purpose, as *A* knew, of making them into fur collars. *B*, having made the fur collars, resold to *C*, *C* resold to *D*, and *D* to *E*, a draper.

E then sold a coat, with one of these fur collars attached, to *F*, a customer, for her own wear. *F* developed "fur dermatitis," owing to antimony in the fur. *F* sued *E* for damages for breach of warranty on the sale of the coat. *E* gave notice of the action to *D*, *D* to *C*, *C* to *B*, and *B* to *A*. *F* recovered judgment for damages and costs. *E* claimed this sum, together with his own costs, from *D*, who paid the amount and recovered it from *C*, together with a further sum of his costs. *C* claimed from *B*, and *B* paid him and sued *A* for £699 damages for breach of the original warranty on sale of the skins.

The Court, having found as a fact that *E* had acted reasonably in defending the original action by *F* held that *B* was entitled to recover from *A* (1) the damages recovered in the original action by *F*; (2) the costs of both sides in that action; and (3) a sum in respect of costs incurred by themselves and *C* and *D* respectively in connection with the claims against them.

It is essential that contracts in the chain should be upon substantially similar terms if a sum recoverable for breach of the last contract is to be the measure of damages for a similar breach higher up in the chain. It is a question what degree of variation in terms suffices to break the chain.[62] The chain may also be broken if the buyer has notice of the defect in quality before he resells to a third party.[63]

Works Contract.—In the case of breach of a contract for specific work, the measure of compensation is the increased cost of the work got done by another contract.[64]

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59 *Maharaj Singh* v. *Narayansingh*, 1951 A.M.B. 103.

60 The judgments in these cases overrule or supersede some earlier decisions.

61 (1951) 2 K.B. 314, C.A.

62 For a valuable discussion, see Devlin J. in *Biggin* v. *Permanite* (1951) 1 K.B. 422, 432, 435, although the Court of Appeal in (1951) 2 All E.R. 191, 197, took a different view of the facts. See also *Trans Trust* v. *Danubian Trading Co.* (1952) 2 Q.B. 297, 303, criticising the declaration made by Lewis J. in *Household Machines* v. *Cosmos* (1947) 1 K.B. 217.

63 *Ibid.*

64 *Namayya* v. *Union of India* (1958) A.A.P. 533; *Wigsell* v. *School of Indigent Blind* (1882) 8 Q.B.D. 357.

In a building contract there was a term that in case of additional or altered work, for which there was no rate fixed in the Schedule of rates of the contract, being order to be carried out and no rates being agreed, the contractor shall inform the Engineer-in-charge of the rates he would charge. If the Engineer does not agree he shall inform the contractor in writing cancelling the carrying out of such work; and if the contractor shall incur any expenditure previous to the determination of the rates aforesaid he shall be paid according to the rates fixed by the Engineer in charge.

It was held that before the rates were settled the contractor was under no obligation to carry out the additional or altered work and from the mere fact that the Engineer did not exercise the right to cancel the order, it could not be said that there was a concluded contract.

It was also held that the giving of written notice was mandatory.[65]

According to the terms of a contract, the contractor required to pay the difference of cost of the work left undone by him and later done by others. The contractor was asked to do *extra* work for which he asked extra payment and asked for the Engineers' confirmation which was sent only two days before the date the work was to be completed. The contractor then expressed his inability to undertake the work which was given to others to finish at a higher cost. The contractor would not be liable in those circumstances for the difference in the cost of extra work done by others.[66]

(Note.—Notice of special circumstances.—In *Jaques* v. *Millar* (1877) 6 Ch.D. 153[67] it was held that where an intending lessor knew that the lessee wanted the premises for a certain trade, and refused to deliver possession for several weeks after the lessee was entitled to it, the lessee could recover for the estimated value to him of the possession during that time. There was another point on the question whether, under the Statute of Frauds, there was any enforceable agreement at all; on that point the case is overruled: *Marshall* v. *Berridge* (1881) 19 Ch.D. 233.)

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B* in reliance upon this warranty, sells it to *C*, with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.[68]

"Essential Condition and Warranty and Effect of breach thereof."—Lord Blackburn in *Heyworth* v. *Hutchinson*[69] explained a condition as a clause "going to the essence of the contract" and a warranty as a clause "only collateral to the contract". The difference between an essential condition and a non-essential promise (a warranty) is this that in the former case the innocent party on becoming aware of the breach can consider himself discharged and sue for damages for loss of the contract or keep the contract on foot and recover damages for the particular breach. In the latter case, only the latter course is available and not damages for loss of the contract.[70] The question whether a term in a contract is essential or not depends upon the intention of the parties. The test of the former is whether the promise is of such importance to the promisee that he could not have entered into the contract without an assurance of a strict or substantial performance of the promise and that ought to have been apparent to the promisor.[71] If the innocent party would not have entered into the contract unless assured of the

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65 *Bombay Housing Board* v. *Karbhase Nath & Co.* (1975) A.SC. 763.

66 *State of Andhra Pradesh* v. *Pioneer Construction Co.* (1978) A.AP. 281, 284.

67 Followed, *Ma Hnin Yi* v. *Chew Whee Shein* (1925) 90 I.C. 635; 1925 A.R. 261.

68 *Askey* v. *Golden Wine Co.* (1948) 2 All E.R. 35; 64 T.L.R. 373; *Leslie* v. *Reliable Advertising Agency* (1915) 1 K.B. 652; *Fitzgerald* v. *Leonard* (1893) 32 L.R. Ir. C.L. 675; *Colburn* v. *Patmore*, 149 E.R. 99; 3 L.J.Ex. 317; *infra* p. 543.

69 (1867) 2 Q.B. 447, 451; repeated in *Bettini* v. *Gye* (1876) 1 Q.B.D. 183; and in *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410; see *Hongkong Fire Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisa* (1962) 2 Q.B. 26, 64, 66; (1962) 1 All E.R. 474, 484, 485; Chitty: Contracts (23rd Ed.), 1360.

70 *A.H. McDonald & Co. (Pty.) Ltd.* v. *Wells*, 45 C.L.R. 506, 513-14; *Heyworth* v *Hutchinson* (1967) 2 Q.B. 447, 451; *Hongkong Fire Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha* (1962) 2 Q.B. 26; (1962) 1 All E.R. 474; *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410 (Contract repudiated by the employer when actress did not appear through illness. This was a case of a "condition"); *Bettini* v. *Gye* (1876) 1 Q.B.D. 183 (Rehearsal clause not a condition).

71 *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1938) S.R. (N.S.W.) 632, 641, revd. on

strict and literal performance he is discharged upon any breach of the promise however slight. If he contracted in reliance upon a substantial performance any substantial breach will ordinarily justify a discharge. In some cases, it is expressly provided that a particular promise is essential, e.g. by stipulation that it is the basis of the contract. In *Bettinis' case*[72] there was a stipulation that an opera singer should be in London at least six days before the commencement of his engagement for rehearsals; this was not a "condition". But in *Poussard* v. *Spiers*[73] a promise by an actress to attend rehearsals and to appear on the first night was held to be a "condition". But in the absence of an express provision the question is one of construction.[74]

Warranty:

To amount to a warranty, an affirmation at the time of the sale, must on the evidence appear to be so intended and there must be evidence that the party had accepted the offer of the warranty and acted on it so as to make the collateral contract of warranty complete.[75] If an essential breach is committed when nothing has yet been done to perform the contract, the innocent party may by giving notice to the defaulting party exercise his right of treating himself discharged from the contract and sue for damages. This notice operates as a final and irrevocable discharge.[76]

A party relying upon an untenable ground can rely upon any valid ground which in fact then existed and has not been waived.[77]

A contract giving a guarantee that the advertisement of the advertiser would be on the track eight hours every day is not performed by a display only for an average period of 8 hours a day and the innocent party can determine the contract by reason of the breach because the condition went to the root of the matter.[78]

Whether a warranty is implied in the absence of express words was a question of fact[79] but where a stockbroker himself made a request for a transfer of shares which the Bank was under the administrative duty to give effect to, if the documents were apparently genuine, the bank would be entitled to imply a warranty in the stockbroker's request that the documents were genuine.

Essential Condition:

An agreement between a newspaper and an artist provided that the latter will furnsih every week to the newspaper a drawing which the newspaper will publish on the front page. Owing to shortage of newsprint this drawing was in three consecutive weekly issues published on the third page. On the ground of breach of the undertaking the artist gave notice of termination of his agreement and the newspaper sued for injunction restraining the threatened breach. It was held that the defendant's conduct was justified as there was a breach of an essential term which was repeated thrice and when the defendant protested he was met with the reply that if anything would be done it would be a matter of grace not of right.[80]

A condition in a policy of motor insurance required the insured to give immediate notice to the insurers of the occurrence of an accident and to forward immediately any letter or notice of intended prosecution...relating thereto. This was a condition precedent to any liability of insurers. An accident having occurred, the police sent a notice of an intended prosecution to the insured and also to the insurers, who ask-

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app. (1938) 61 C.L.R. 286, but the statement of law unaffected; *Flight* v. *Booth*, 1 Bing N.C. 370, 377; *Bettini* v. *Gye* (1876) 1 Q.B.D. 183, 188; *Bentsen* v. *Taylor Sons & Co.* (1893) 2 Q.B. 274, 281; *Fullers Theatres Ltd.* v. *Musgrove*, 31 C.L.R. 524, 537-8; *Bowes* v. *Chaleyer*, 32 C.L.R. 159; *Chiffton* v. *Coffey*, 34 C.L.R. 434, 438; *Associated Newspapers Ltd.* v. *Banks* (1951) 83 C.L.R. 322, 337; Chitty: Contracts (23rd ed.), 1362 (24th ed.) 1502).

72 *Bettini* v. *Gye* (1876) 1 Q.B.D. 183, 187; (1874-80) All E.R. 242, 244; *Huntoon* v. *Kolynos* (1930) 1 Ch. 528; Chitty: Contracts (23rd ed.) 1362 (whole contract, not term test) (24th Ed.) 1502.

73 (1876) 1 Q.B.D. 410.

74 *Bentsen* v. *Taylor Sons & Co.* (1893) 2 Q.B. 274, 280-1; *Clifton* v. *Coffey*, 34 C.L.R. 434, 437-438

75 *Heilbut, Symons & Co.* v. *Buckleton*, 1913 A.C. 30; (1911-13) All E.R. 83; *Coffey* v. *Dickson* (1960) N.Z.L.R. 1135.

76 *Newbon* v. *City Mutual Life Assurance Society Ltd.* 52 C.L.R. 723, 733; *Guy Pell* v. *Foster* (1930) 2 Ch. 169.

77 *British & Benningtons Ltd.* v. *N.W. Cachar Tea Co.* (1923) A.C. 48, 71-72.

78 *Luna Park* v. *Tramways Advertising Pty. Ltd.* (1938) 61 C.L.R. 286; 302 on app. from (1938) S.R. (N.S.W.) 632; see also *Associated Newspapers Ltd.* v. *Bancks* (1951) 83 C.L.R. 322, 336.

79 *Yeung* v. *Hong Kong & Shang Hai Banking Corporation* (1980) 2 All E.R. 599, 604-5, 607 (P.C.).

80 *Associated Newspapers Ltd.* v. *Bancks* (1951) 83 C.L.R. 322, 340; *Mersey Steel & Iron Co. Ltd.* v. *Naylor, Benzor & Co.* (1884) 9 App. Cas. at pp. 838-9, quoted with approval.

ed the insured why he had not informed them and also that they wished to arrange for his defence. The insurers having repudiated responsibility were held liable because their letter to the insured was a waiver of the condition precedent and since they had received all the necessary information it was unnecessary for the insured to give that information and they could not rely on the condition above referred to. And they could not insist on the insured having their solicitor.[81] Moreover the law never compels a person to do that which is useless and unnecessary.[82]

In a contract for sale of manganese ore the quality of the ore was an essential condition of sale. For the purpose of determining the quality of the ore the parties nominated two analysis one by each party. Analysis by both the analysts was held to be an essential condition. Where on the refusal of the buyers analyst to analyse, the sellers intimated their willingness to get the samples analysed by a particular analyst and if the buyers did not agree, the analysis by their analyst would become final and the offer was rejected by the buyers, the rejection by the buyers was held[83] to be justified as it was not in accordance with the terms of the contract to have the analysis done by any other analyst.

Upon a non-guilty party electing to treat the contract as not binding, the contract is not rescinded from the beginning but both parties discharged from further performance and the rights and liabilities already accrued continue unaffected. But where a contract is rescinded which affects its formation as in the case of fraud the parties are restored to position before the contract and they are to be rehabilitated and restored to original position. When the contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one of the parties because the other party has not observed an essential condition or has committted a breach going to its root, the contract is determined as far as it is executory only and the party in default is liable for damages for its breach.[84] But it does not follow that when under an executory contract the price or a part of it is paid in advance the seller may both retain what he has received or recover overdue instalment and also keep the property. The very idea of payment falls to the ground when both have treated the bargain as at an end and from the moment the vendor holds the money paid in advance to the use of the purchaser.[85] But there is a distinction between a contract to sell land and a contract to transfer a business.

Warranty in leases.—There is no contract still less a condition implied by law on the demise of real property only that it is fit for the purpose for which it is let.[86]

Measure of damages where a factory is destroyed by fire as a result of a fundamental breach by defendant in the reinstating of the factory and it may even be a redesigned new factory. *Harbutts Plasticine* v. *Wayne Tank Co. Ltd.* (1970) 1 All E.R. 225 (CA).

Warranty in a sub-lease:

In support of a warranty in a sub-lease that the sub-lessee would be able to use without objection the premises for the purposes of retail business of confectioner and tobacconist three matters were relied upon: (a) the estate agent's oral comment that it could be so used; (b) the failure of the defendant's solicitor to reply to the letter of the plaintiff in relation to permitted user and (c) submission of the draft sub-lease with a clause permissible of user as a tobacco shop. These were held not to be sufficient because (a) the estate agent had no actual authority for giving the warranty and ordinarily they have no such authority; (b) the failure of the solicitor to reply could not constitute a warranty; and (c) the submission of the draft is no more than an offer to negotiate a sub-lease on the terms of the draft. Moreover, all these three matters were superseded by the terms of the sub-lease entered into between the parties and that alone confers rights upon the plaintiff. Russel L.J. also held that it was the duty of the plaintiff's solicitor to call for and inspect the head-lease which would have shown what warranty could be given.[87]

A notice to quit is a landlord's valid exercise of contractual right *vis-a-vis* a tenant and is

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81 *Lickiss* v. *Milestone Motor Policies at Lloyds* (1966) 2 All E.R. 972, 976, referring to; *Plasticmoda Societa per Azioni* v. *Davidsons (Manchester) Ltd.* 1952 1 Lloyds Reports, 527.

82 *Lickiss* v. *Milestone Motor Policies* (1966) 2 All E.R. 972, 975

83 *Madhya Pradesh Industries Ltd.* v. *Rai Bahadur Shriman Durga Prasad Ltd.* (1971) A.S.C. 1983; (1972) 3 SCC 180. *Makkala Narasimlu* v. *Gurnala Raghunandan* (1977) A.P. 374, 376 (Sale of land—earnest money returned—conditions unfulfilled).

84 *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, 476-7; *Boston Deep Sea Fishing* v. *Ansell* (1888) 39 Ch. D. 339, 365; *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1926) A.C. 497, 503, 509; see also *White* v. *Ross* (1960) N.Z.L.R. 247, 249; *McLachlan* v. *Nourse* (1928) S.A.S.R. 230, 233-4. *Madhya Pradesh Industries Ltd.* v. *R.B. Shriram Durga Parshad* (1971) A.S.C. 1983 (are not of proper quality).

85 *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, 477; *Palmer* v. *Temple,* 112 E.R. at page 1309.

86 *Hart* v. *Windsor* (1843) 12 M. & W. 68, 87 (per Parke B.) quoted with approval in *Bottomley* v. *Bannister* (1932) 1 K.B. 458, 468, per Scrutton L.J.; *Endler* v. *Auerback* (1950) 1 K.B. 359, 373 (Devlin J.); (1949) 2 All E.R. 692 approved in *Hill* v. *Harris* (1965) 2 W.L.R. 1331, 1336.

87 *Hill* v. *Harris* (1965) 2 W.L.R. 1331 (C.A.).

effective to terminate a contract of tenancy and his vindicative motive for serving it is irrelevant.[88] Such notice does not give rise to right for damages.

A clause expressly providing right, e.g. defects appearing within 6 months to be made good without expense, does not affect the warranty of a builder above mentioned nor exclude liability for structural defects not discovered within 6 months. Nor would such a clause exclude the liability of a builder in damages.[89]

A person who contracts to do work and supply materials for the work, warrants as part of the obligation to supply the materials that they will be good quality and reasonably fit for the purpose unless the warranty is excluded by the circumstances of the contract.[90]

When the breach is discovered and a defaulting party has wholly performed his contract though defectively and the innocent party has accepted in such a way that he can no longer reject it, he is remitted to his remedy by way of damages or set-off for the breach.[91] If he is in a position to reject performance, he may determine the contract, refuse to perform it further and recover any payments made as on a total failure of consideration and also recover damages.[92] In New Zealand it has been held that where a repairer is called upon to work on the owner's own materials different considerations apply to those where work and materials are supplied by the contractor.[93] *A* sold *B* a box supposed to contain Brandy bottles but on opening the box it was found to contain flasks which were of much lower value. The purchaser's right is for recovery of damages, the measure being the difference in the price. The purhcaser cannot sue for money had and received as it is not a debt.[94]

Actors.—A failure to give an actor an appropriate part is a breach of contract which goes to its root and justifies the actor in treating the contract rescinded.[95]

If a contract gives an opportunity to an author[96] or an actor[97] to enhance his reputation for the loss of that opportunity in breach of contract, damages may be awarded. This is not for an injury to the existing reputation but for the loss of the opportunity to gain an enhanced reputation.[98]

Speculative damages—Beauty Contest.—Damages may be awarded for the loss of a chance of gaining something. Thus a girl recovered damages for losing a chance to appear in the final stages of a beauty contest.[99] Similarly a writer was awarded damages for loss of a chance to earning tips.[1] But where the chance is highly speculative the Court will refuse to award damages.[2]

Breach of warranty[3]—Measure of Damages.—In cases of breach of warranty as to the quality of the goods sold, the measure of damages is the difference between what the goods are

88 *Chapman* v. *Honig* (1963) 3 W.L.R. 19 (C.A.) (Lord Denning M.R. Diss).

89 *Hancock* v. *B.W. Brazier (Anerley) Ltd.* (1966) 2 All E.R. 901, 904.

90 *Prior* v. *McManus Childs Ltd.* (1967) 3 All E.R. 451; see also *Gloucestor County Council* v. *Richardson* (1967) 3 All E.R. 458 (Supply of materials by nominated supplier); *G.H. Myers & Co.* v. *Brent Cross Service Co.* (1933) All E.R. Rep. 9; (1934) 1 K.B. 46.

91 *H. Dakin & Co. Ltd.* v. *Lec.* (1910) 2 K.B. 1003, 1014-5.

92 *Tramways Advertising Pty. Ltd.* v. *Luna Park Ltd.* (1938) S.R. (N.S.W.) 632, 643 revd. on app. (1938) 61 C.L.R. 286 but the statement of law unaffected.

93 *Batchelers Pram House Ltd.* v. *McKenzie Bros. Electrical Ltd.* (1962) N.Z.L.R. 545; *Mayers & Co.* v. *Brent Cross Co.* (1934) 1 K.B. 46; (1933) All E.R. Rep. 9 (a case of warranty where goods were supplied by the repairer); *Stewart* v. *Reavell's Garage* (1952) 1 All E.R. 1191 dis. (Repair to brakes was done with owners approval which he gave when the repairer made representation to him that what he suggested was just as good and would be cheaper).

94 *Simmonds* v. *Kee* (1923) V.L.R. 119.

95 *White* v. *Australia & New Zealand Theatres Ltd.* (1943) 67 C.L.R. 266; see also *Herbert Clayton & Jack Waller Ltd.* v. *Oliver* (1930) A.C. 209, 221 (must be given an opportunity to appear before the public); *Tolnay* v. *Criterion Film Production Ltd.* (1936) 2 All E.R. 1625, 1626-7 (All persons making a living by attracting the public to their works must live by getting known to the public—painters, literary men, pianists, musicians, actors).

96 *Tolnay* v. *Citerion Films Productions Ltd.* (1936) 2 All ER 1625; *Joseph* v. *National Magazine Co. Ltd.* (1959) Ch. 14; (1958) 3 All E.R. 52.

97 *Clayton & Jack Waller Ltd.* v. *Oliver* (1930) A.C. 209; *Marbe* v. *George Edwardes (Daly's Theatre) Ltd.* (1928) 1 K.B. 268 (Statement at P. 281 dissented from in *Withers* v. *General Theatre Corp. Ltd.* (1933) 2 K.B. 536.

98 *Withers* v. *General Theatres Ltd.* (1932) 2 K.B. 536; (1933) All E.R. Rep. 385; See Chitty: On Contracts (24th Ed.). Para 1584.

99 *Chaplin* v. *Hicks* (1910) 2 K.B. 486.

1 *Manubens* v. *Leon* (1919) 1 K.B. 208.

2 *McRae* v. *Commonwealth Disposals Commission* (1950) 84 C.L.R. 337.

3 On damages for breach of condition as to title, see *Butterworth* v. *Kingsway Motors* (1954) 1 W.L.R.

worth and what they would have been worth if there was no breach of warranty.[4] Where there is a market value, the actual contract price.[5] or the price at which the goods have been re-sold[6] is irrelevant in fixing these values. But there is rarely any market price for damaged or defective goods, and thus the price at which the buyer re-sold the goods may be evidence of their value.[7]

Where the seller is guilty of breach of warranty he may recover not only the damages paid to his sub-purchaser including the amount paid by way of reasonable settlement out of Court[8] but also the costs incurred in defending the action[9] for this falls within the second branch of the rule in *Hadley* v. *Baxendale,*[10] the defendant having special knowledge of the probability of the sub-contract.[11]

The seller is liable for loss of profits which the buyer would have made through the use to which he intended to put the goods if the seller knew or is taken to have known about the user.[12] The buyer can also recover damages for any injury caused to the buyer[13]or his property[14] or his wife[15] or to a third person or to his property.[16]

Breach of Warranty—Contract and Tort.—A developing company gave a warranty to a purchaser of a house that it was fit for habitation. It was found that it was liable to collapse at any time due to defective support from adjoining land and the house was unfit for habitation. The purchaser brought an action against the Developing Company, the builder and the Local Authority. Judgment was given against the company and the builder. On appeal it was held that the warranty was broken and had made the house uninhabitable and therefore the compay was liable. The Court also held[17] that the company was liable in tort as a common law duty was owed by the company to examine the site with care and therefore the company was liable in damages in contract and tort.

A vendor sold a fashion company in a traded down state. The vendors gave a warranty that there had been no material change in the net assets of the company since the last balance sheet. Neither party—the vendor and the vendees knew of the continuing loss in the assets.But the vendors had made a general disclosure of the probable future losses. It was held[18] that the vendors were guilty of breach of warranty for non disclosure of the qualified reduction in the net assets or the actual rate of the continuing losses. Therefore the general disclosure did not protect the vendors. The tax benefit received by the vendees was deductable from the total damages awarded by the Court.

1286; on damages for breach of warranty to quiet possession, see *Mason* v. *Burningham* (1949) 2 K.B. 545; (1948) 2 All E.R. 134; on damages for breach of condition where the buyer has lost the right to reject the goods and the market price has fallen, see *Finlay* v. *Kwik Hoo Tong* (1929) 1 K.B. 400; *Kwei Kek Chao* v. *British Traders* (1954) 2 Q.B. 459; (1954) 3 W.L.R. 496.

4 Chitty: On Contracts (24th Ed.) para.; 4644(2) *Ashworth* v. *Wells* (1898) 14 T.L.R. 227. Sales of Goods Act, 1893 (56 & 57 Vict. c. 71) s. 53(3); *Bunting* v. *Tory* (1948) 64 T.L.R. 353; *Brown* v. *Sheen and Richmond Car Sales* (1950) 1 All E.R. 1102 (where higher price had to be paid due to breach).

5 *Loder* v. *Kekule* (1857) 3 C.B. (N.S.) 128.

6 *Clare* v. *Maynard* (1835) 6 Ad. & E. 519; *Slater* v. *Hoyle & Smith Ltd.* (1920) 2 K.B. 11.

7 *Slater* v. *Hoyle & Smith Ltd.*, ibid, at page 17.

8 *Biggin & Co.* v. *Permanite Ltd.* (1951) 2 K.B. 314.

9 *Hammond & Co.* v. *Bussy* (1887) 20 Q.B.D. 79 (case of supply of steamship coal of inferior quality); see *Agius* v. *G.W. Colliery Co.* (1899) 1 Q.B. 413; *Pinnock Bros.* v. *Lewis & Peat Ltd.*, 1923 1 K.B. 690 (cases of failure to deliver goods).

10 (1854) 9 Ex. 34; 2 Sm.L.C. (13th Ed.) 529.

11 *Victoria Laundary (Windsor) Ltd.* v. *Newmen Industries Ltd.* (1949) 2 K.B. 528, 538, ref. to; *British Columbia Saw Mills Co. Ltd.* v. *Nettleship* (1868) 3 C.P. 499, 509; see also *Noine* v. *Midland Railway Co.* (1873) 8 C.P. 131, 141.

12 *Cullanine* v. *British "Rema" Manufacturing Co.* (1954) 1 Q.B. 292; (1953) 2 All E.R. 1257; *T.C. Industrial Plant Pty. Ltd.* v. *Robert Queensland (Pty)* (1964) A.L.R. 1083.

13 *Grant* v. *Australian Knitting Mills Ltd.* (1936) A.C. 85; *Andrews* v. *Hopkinson* (1957) 1 Q.B. 229; (1956) 3 All E.R. 422 (a case of hire-purchase).

14 *Wilson* v. *Rickett Cockerell & Co. Ltd.* (1954) 1 Q.B. 598; (1954) 1 All E.R. 868.

15 *Preist* v. *Last* (1903) 2 K.B. 148; *Jackson* v. *Watson & Sons* (1909) 2 K.B. 193.

16 *Mowbray* v. *Merryweather* (1895) 2 Q.B. 640 (he may recover his own costs if he reasonably defended the third party).

17 *Batty* v. *Metropolitan Property Realisation Ltd.* (1978) 2 All E.R. 445, 451, 453.

18 *Levison* v. *Farin* (1978) 2 All ER 1149, 1156-7.

Inducing Contract by giving negligent forecast.—Where during the pre-contractual negotiation the party, who has special knowledge and expertise concerning the subject matter of the negotiation makes a forecast based on knowledge and expertise with the intention of inducing the other party to enter into a contract and the other party does enter into the contract, it is open to the court to treat the forecast being not merely an expression of opinion but a continuing warranty. Accordingly, since the estimate had been made negligently and was therefore unsound the party making the forecast was liable[19] for the breach of warranty. The measure of damages was the loss the other party has suffered by having been induced to enter into the contract.

Seller's liability for fines paid by the Buyers in cases of vicarious liability.—Where a buyer is prosecuted and fined for goods supplied by a seller and found unfit for human consumption[20] the seller is liable for both the fine and costs of defence if impliedly the purpose of purchase was made known to the seller.[21] and thus it was within the contemplation of parties that the buyer may be prosecuted if the goods supplied by the seller were defective. The damages were held not to be remote but a natural consequence of the seller's breach of contract. In later cases,[22] however, the issue of public policy was raised and in *Askey* v. *Golden Wine Co. Ltd.*, Denning J. held that punishment inflicted by a criminal court is personal to the offender and that the civil courts would not entertain an action by the offender to recover an indemnity against the consequences of that punishment. In his view public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the offender has incurred by reason of being compelled to make reparation for his own crime. In *Leslie's case*[23] it was held that criminal punishments are not by their very nature capable of being the subject of indemnity. But if the buyer is acquitted, he has been held entitled to recover his costs in defending a prosecution resulting from the seller's breach of warranty, since there is no question of public policy in that case.[24] *Aerial Advertising* v. *Batchelor's Peas* [25]

shows that it may be a costly and difficult procedure to establish one's good faith. There £70 was spent with this end in view, and was held to be recoverable from the defendant. It was of course not a case where defendant's breach of contract led to plaintiff's conviction, but the principle might also be applied in that situation.

In *Cointat* v. *Myham*[26] and in *Fitzerald* v. *Leonard*[27] the question of public policy was not considered but in *Burrows* v. *Rhodes*[28] Kennedy J., with this consideration in mind, gave his opinion that if *A* makes a false statement as to the sobriety or soundness of mind of *X*, to induce *B* to serve *X* with liquor, or to receive him into his unlicensed house, and *B* is prosecuted criminally for selling liquor to a drunken person, or for receiving a lunatic in an unlicensed house,[29] *B* can recover the fine and costs from *A*. In the instances given by Kennedy

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19 *Esso Petroleum Limited* v. *Mardon* (1976) 2 All E.R. 5; 14; *Helbut Symonds & Co.* v. *Buckleton* (1913) A.C. 50; *Dick Bentley Productions Limited* v. *Harold Smith (Motors) Ltd.* (1965) 2 All E.R. 67, applied; *Bisset* v. *Wilkinson* (1927) A.C. 177 distinguished.

20 But see s. 113 of the Food & Drugs Act, 1955 (4 & 5 Eliz, 2, c. 16) (Defence that offence was due to the act or default of another person).

21 *Cointat* v. *Myham & Son* (1913) 2 K.B. 220,-(1911-13) All E.R. 724 (reversed on question of warranty, (1914) 30 T.L.R. 282) per Kennedy J. in *Fitzgerald* v. *Leonard* (1893) 32 L.R. Ir. C.L. 675, 682. (Obiter); *Colburn* v. *Patmore,* 149 E.R. 99; 3 L.J. Ex. 317 cf. *Crage* v. *Fry'* (1903) 67 J.P. 240; *Burrows* v. *Rhodes* (1899) 1 Q.B. 816 (plaintiff induced by fraudulent representation of defendant).

22 *Leslie (R) Ltd.* v. *Reliable Advertising and Addressing Agency Ltd.* (1915) 1 K.B. 652; (1914-15) All E.R. 1068; (where plaintiffs were convicted for their agents sending by in-advertence moneyorders advertisement to a minor, a possible breach being within the contemplation of parties) *Proops* v. *Chaplin (W.H.) & Co.* (1920) 37 T.L.R. 112, 114; *Askey* v. *Golden Wine Co. Ltd.* (1948) 2 All E.R. 35, 38.

23 *Leslie (R) Ltd.* v. *Reliable Advertising & Addressing Agency Ltd.* (*supra*); *Burrows* v. *Rhodes* (1899) 1 Q.B. 816 dist.

24 *Proophs* v. *Chaplin (W.H) & Co.* (1920) 37 T.L.R. 112.

25 (1938) 2 All E.R. 788.

26 (1913) 2 K.B. 220; (1911-13) E.R. Rep. 724.

27 (1893) 32 L.R. Ir. C.L. 675, 682.

28 (1899) 1 Q.B. 816, 829.

29 Both these offences are of strict liability in English criminal law. See *Cundy* v. *Le Coeq* (1884) 13 Q.B.D. 207; *R* v. *Bishop* (1880) 5 Q,B.D. 259.

J. the liability of *A* would sound in the tort of deceit and not in contract.[30] It has been suggested that *B* should not be allowed to recover in contract or tort a fine imposed in criminal proceedings, however morally innocent he may be. Dr. Glanville Williams takes the contrary view on the ground that to allow *B* an indemnity will impose a more severe penalty on *A*, who is probably an intentional wrongdoer and thus serve the object of criminal punishment.[31] But English decided cases show that if *B* through his own gross negligence incurs a fine and costs for breaches of Food & Drugs Acts he is debarred from recovering from *A* by way of damages his loss on account of fine, costs and expenses and loss for repayment to others which was reparation for his own crime and for injury to reputation: *Askey's case*,[22] *Leslie's case*,[23] cases:

There seems to be only one Indian authority dealing with the type of case under consideration. In *Ram Kumar* v. *Lakshmi Narayan*,[32] the plaintiff was an agent for the sale of mustard oil manufactured by the defendants. The defendants supplied him with 400 tins of oil for sale to a customer. A sanitary inspector seized the oil, as it was adulterated. The plaintiff was prosecuted, convicted and fined Rs. 100/-. The plaintiff sued the defendants for the fine and costs incurred, for damages for mental suffering, and loss of business and reputation. The Court awarded damages under s. 73, though holding that no compensation could be given under s. 222, as the acts of the plaintiff, albeit innocent, were unlawful. No authorities were cited, and the judgment as reported does not specify which were the claims in fact upheld. It seems that the plaintiff was not negligent, and in England might well have succeeded in recovering the fine and costs, on the basis of the cases already cited, although it has been submitted that in principle the claim should fail. As for loss of business and reputation, the plaintiff could recover in England, only if he could prove pecuniary loss arising naturally from the breach of contract. Damages for mental suffering arising from a breach of contract would not be awarded in an English court. See *Cook* v. *S.* (1967) 1 All E.R. 299, 303; *Groom* v. *Crocker* (1939) 1 K.B. 194.

(Note.—Warranty.—*A*. a stevedore, agrees with *B*, a shipowner, to discharge the cargo of his ship, and *B* agrees to supply all necessary and proper chains (among other gearing) reasonably fit for that purpose. A chain supplied by *B* is defective and breaks in use, and *Z*, a workman of *A*'s, is thereby hurt. *Z* sues *A* under the English Employer's Liability Act, and *A* settles the action by paying *Z* a compensation which is admitted to be reasonable. *B* is liable to make good to *A* the compensation which *A* has paid to *Z* as damages naturally resulting from *B*'s breach of his warranty. *A* was entitled as between himself and *B* to rely on *B*'s warranty, though such reliance was no excuse for *A* as against *Z*: *Mowbray Merryweather* (1895) 1 Q.B. 640, C.A.

A sells a cow to *B*, whom he knows to be a farmer, and likely to put the cow in a herd, with a warranty that she is free from foot and mouth disease. The cow in fact has the disease and communicates it to other cows with which she is placed, and several of them die. *B* can recover from *A* the whole loss, and not only the value of the cow sold, and it is immaterial whether *A* gave the warranty in good faith or not: *Smith* v. *Green* (1875) 1 C.P.D. 92.

The Court of Appeal has emphasised in *Cullinane* v. *British "Rema" Manufacturing Co.*[33] that in a case of breach of warranty the plaintiff cannot combine a claim for capital loss with claim for loss of profit. A hypothetical case put by Evershed M.R.[34] elucidates the position adopted by the Court. If *A* sells *B* a heifer for £100/-and warrants it a four gallon a day cow for the next five lactations, whereas in fact it is a one gallon a day cow worth £10/-; *B* can claim as damages either £90/-, or the loss of three gallons a day, but he cannot combine the two claims.

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30 The dictum of Kennedy J. was approved by the C.A. in *Strongman* v. *Sincock* (1955) 3 All E.R. 90, 93, 95 (Case of liability of architect for breach of warranty to the builder notwithstanding illegality of main contract for not obtaining of license of which builders were unaware; the amount claimed was value of work done and no question of recovery of any penalty imposed arose).

31 8 Camb. L.J. 51, 57.

32 (1947) A. Cal. 157.

33 (1954) 1 Q.B. 292; *T.C. Industrial Plant (Pty) Ltd.* v. *Robert Queensland (Pty) Ltd.* (1964) A.L.R. 1083.

34 At p. 303.

A agrees to recommend a broker to *Z* and recommends *Q*, who is an undischarged bankrupt. *A* does not know this, but could have ascertained it by reasonable inquiry. *Z* on the strength of *A*'s recommendation entrusts money for investment to *Q*, who misappropriate it. If *A*'s agreement amounted to a contract, he has warranted the use of reasonable diligence in recommending a broker, and the measure of damages in an action by *Z* against *A* is the sum entrusted by *Z* to *Q* and misappropriated: *De la Bere* v. *Pearson, Ltd.* (1908) 1 K.B. 280, C.A.[35]

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day: *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

To bring a contract to an end by a breach of warranty, there has to be a failure of consideration. The breach has to be such as to deprive the plaintiff in effect of the benefit of his contract.[36]

(Note.—Delay in payment of money.—Settled law, but treated as anomalous. Illustration (n) to s. 73 "does not confer upon a creditor a right to recover interests upon a debt which is due to him, when he is not entitled to such interest under any provision of the law... As observed in *Jamal* v. *Moolla Dawood, Sons & Co.*[37] s. 73 is merely declaratory of the Common Law so to damages": *Bengal Nagpur Rly. Co.* v. *Ruttanji.*[38] "The law does not regard collateral or consequential damages arising from delay in the receipt of money": *Per Cur. Graham* v. *Campbell* (1878) 7 Ch.D. at p. 494.[39] As to the liability to pay interest see pp. 567 *sqq.*, below. *A* gives an *ijara patta* of certain property to *B*. It is a condition of the *patta* that *B* should pay to the superior landlord the rent which *A* was bound to pay him. *B* fails to pay the rent. The superior landlord thereupon sues *A* for the rent, and, in execution of the decree obtained by him in the suit, the tenure is sold. *B* is not liable to *A* for the loss of the property, for *A* could have paid the rent on default by *B*, and saved the property from sale: *Girish Chandra* v. *Kunja Behari* (1908) 35 Cal. 683.

Contract to pay money[40].— At common law the rule is that for a party's failure to pay money at the appointed time, the other party will only be entitled to nominal damages though a man may be ruined by non-payment or the damage may be enormous.[41] But Romer L.J. & Denning L.J. seem to have doubted this rule.[42] But where the defendant undertook to maintain the plaintiff's financial credit the plaintiff was not entitled to substantial damages for the defendant's default.[43]

Calcutta High Court has held that where money is unlawfully withheld the remedy of the claimant is a decree for the recovery of money and not for damages. Illustration (n) of s. 73 was referred to by the Court.[44]

The circumstances may, however, be such that the loss is within the contemplation of the parties. In *General Securities, Ltd.* v. *Don Ingram, Ltd.*[45] the *S* company had granted to *P* an exclusive franchise to sell *S* cars in Vancouver. *D* agreed to furnish *P* with the necessary credit to finance the purchase of the cars, but later refused to make an advance, and *S* cancelled *P*'s franchise. The Supreme Court of Canada held *D* liable for the loss of franchise and loss of profits, as natural and probable results of the breach within the contemplation of the defendant. In *Trans Trust* v. *Danubian Trading Co.*[46] *D* contracted to buy steel from *P*. *P* was to

35 The doubt of one member of the Court was due to a minor complication in the facts which it is not thought useful to reproduce here.
36 *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 W.L.R. 713, 725.
37 (1915) 43 I.A. 6; 43 Cal. 493; 31 I.C. 949; 1915 A.P.C. 48.
38 (1937) 65 I.A. 66; at pp. 72-3; 173 I.C. 15; 1938 A.P.C. 67; *Nawabshaw, District Local Board* v. *Bulchand* 1942 A.S. 165.
39 *Bhabani Prosanna* v. *Sarojini Debya* (1943) 1 Cal. 578, 212 I.C. 483, (1944) A.Cal. 196.
40 Chitty: On Contracts (24th Ed.) Para 1589.
41 *Wallis* v. *Smith* (1882) 21 Ch. D. 243, 257 (per Jessel M.R.)
42 *Trans Trust S.P. R.L.* v. *Dunubian Trading Co. Ltd.* (1952) 2 Q.B. 297, 306, 307.
43 *Rolin* v. *Steward* (1854) 14 C.B. 595; Wilson v. *United Countries Bank* (1920) A.C. 102; cf. *Larinos* v. *Bonary Y Gurety* (1873) L.R. 5 P.C. 346; *Prehn* v. *Royal Bank of Liverpool* (1870) 5 Ex. 92.
44 *Talchar Coalfields* v. *Central Coal Fields Ltd.* (1978) A. Cal. 449, 454.
45 (1940) S.C.R. 670 (Can.).
46 (1952) 2 Q.B. 297; (1952) 1 All E.R. 970.

buy steel from *A* company to whom the manufacturers had given an option to purchase. Neither *P*, *D*, nor *A* had the necessary cash. It was a term in the contract between *D* and *P*, that payment by *D* should be by cash against the shipping documents, from a confirmed credit to be opened at a bank in favour of *A* by an American corporation to whom *D* had contracted to resell. *D* failed to procure the opening of the credit, and eventually repudiated. *P* claimed damages for his loss of profit. The Court of Appeal held for *P* on the ground that the loss arising from *D*'s failure to open a Credit was not too remote, and was within the contemplation of the parties. In *Muhammad Issa El Sheikh Ahmad* v. *Ali,*[47] the Privy Council, in an appeal from the Supreme Court of Palestine, held that loss, which was due to the impecuniosity of the plaintiff, was recoverable as being within the contemplation of the parties. *P* had agreed to sell land to *H*, and to pay him a fixed sum as liquidated damages if he defaulted. *P* later agreed to sell the same land to *D*, *D* agreeing to indemnify *P* against any claim by *H*. *P* agreed to notify *D* of any such claim by *H*, and it was agreed that *D* was to appoint and pay the lawyers. *H* did sue *P* who notified *D*, and the latter appointed lawyers. *H* recovered judgment by instalments against *P*, and *D* paid the first instalment. The remaining instalments being unpaid, *H* sold other land belonging to *P* in execution at £2,883/- below its true value. *D* was held liable to *P* for the loss.).

Failure to lend money.—Rule that a defendant who fails to pay or lend money is not liable to damages was severely criticised by the Court of Appeal in *Wallis* v. *Smith*[48] as "not quite consistent with reason" was not followed in some later cases e.g. where a person promising to subscribe to the purchase of debentures of a Company failed to do so.[49]

In cases of default to lend money contracted to be lent the normal rule is that the damages are the difference between the cost of the loan contracted and the cost of a substitute loan in the market—hence nominal damages[50] except where the loan is procurable at more onerous terms as to the rate of interest or the period of the loan or otherwise[51] Or where the plaintiff fails to raise money elsewhere and fails in his project and the lender knew the object of the loan required.[52]

Breach of contract to advance money after mortgage deed executed:

A contract between the State and a company provided that
(1) The State would advance Rs. 2,50,000 against mortgage of property by the company:
(2) The company would supply to the State within 5 months 3,000 tons of groundnut cake 600 per tons p.m. which would be credited against the mortgage amount at the price fixed by Government and the balance would be paid by the company;

the mortgage deed was executed but the State did not advance any money. The Company offered to supply the groundnut cake but received no reply from the State. The Company then sued for damages for failure to advance the money and for breach of contract to purchase the goods.

The Supreme Court held that the mortgage was not invalid even though the money was not advanced. It had passed from the realm of contract into one of conveyance.[53] Nor was the liability to purchase groundnut cake dependent upon the advancing of money and even though the transactions were integrated the contract could not be terminated by the default of the State. Breach of contract, (by one party does not automatically terminate the obligations under the contract) the injured party having the option to keep the contract alive and insist on performance.[54]

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47 (1947) A.C. 414.
48 (1882) 21 Ch.D. 243.
49 *Wallls Chlorine Syndicate* v. *American Alkali Ltd.* (1901) 17 T.L.R. 565.
50 *South African Territories* v. *Wallington* (1898) A.C. 309; *Astor Properties Ltd.* v. *Tunbridge Wells Equitable Friendly Society Ltd.* (1936) 1 All E.R. 531.
51 *South African Territories* v. *Wallington* (1897) 1 Q.B. 692. 696-7. appd. (1898) A.C. 309.
52 *Manchester & Oldham Bank* v. *Cook* (1884) 49 L.T. 674. See also *Astor Properties Ltd.* v. *Tunbridge Wells Equitable Friendly Society Ltd.* (1936) 1 All E.R. 531.
53 *State of Kerala* v. *Cochin Chemical Refineries Ltd.* (1968) 3 S.C.R. 556; (1968) A.SC. 1361; *Tatia* v. *Babaji,* 22 Bom. 176; and *Dip Narain Singh* v. *Nageshwar Prasad,* 52 All. 338; and *Rasik Lal* v. *Ram Narain,* 34 All 273, 276, appd.
54 *State of Kerala* v. *Cochin Chemical Refineries Ltd. Ibid.; White & Carter (Councils) Ltd.* v. *McGregor* (1962) AC. 413; (1961) 3 All E.R. 1178 (Law of Scotland & England the same on this point) relied on.

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B* the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be take into account.

(**Note.**—But a contract to resell at an advanced price is evidence, if not contradicted[55] of advance of market value: *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659. The sale was of real estate, and the vendors had failed, not to show title, but to obtain possession, which they might have done.)

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks the promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

(q) *A* contracts to sell and deliver to *B*, on the first of January certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after appointed time, and too late to be used that year in making the caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(**Note.—Loss of profits on breach of contract.**—*Wilson* v. *Lanc. & Yorks R.C.*, 9 C.B.N.S. 632; 127 R.R. 814, followed by the Court of Appeal, *Schulze* v. *G.E.R. Co.* (1887) 19 Q.B.D. 30, and approved by the Privy Council, *Wertheim* v. *Chicoutimi Pulp Co.* (1911) A.C. 301, 308. The market price means here the price as diminished by the want of demand consequent on the season being past.[56]

Loss of Profit.—In *Victoria Laundry Case*[57] the plaintiff agreed to buy a large boiler from the defendant by a fixed date but the seller delayed delivery. The plaintiff sued for damages and for loss of profits on the ground (1) the large number of customers they could have taken had the boiler been installed and (2) the amount they could have earned under a special dying contract. The defendant knew that the plaintiffs were launderers who wanted the boiler for immediate use. The Court of Appeal held that under the circumstances the defendant as a reasonable man could have foreseen some loss of profit though not the loss under special contract of dying of which they had no knowledge. The plaintiffs were therefore entitled to damages for normal loss under the contracts but not actual loss suffered. Failure to deliver or late delivery by a carrier would make him liable for normal measure of damages i.e. difference between the market rates on the due date and the actual date of delivery even though loss of profits may have resulted because a carrier knows less of the object of the buyer or the consignee for which the goods are needed or of other special loss for the carriers' default.

But a carrier may be liable for exceptional loss due to delay if it could be shown that he knew the facts which would cause special loss if he failed to deliver or delayed delivery.[58]

A tailor, expecting to make large profits on the occasion of a festival that is to be held at a certain place, delivers a sewing machine and a cloth bundle to a railway company to be conveyed to that place, and through the fault of the company's servants they are not delivered until after the conclusion of the festival. The company had no notice of the special purpose for which the goods were required. The tailor is not entitled to damages for the loss of profits nor for his expenses incidental to the journey to that place and back, as such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach: *Madras Railway*

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55 The circumstances may contradict the evidence: *The Arpad* (1934) P. 189; *Heskell* v. *Continental Express* (1950) 1 All E.R. 1033.

56 See also *The Ardennes* (1951) 1 K.B. 55—shipowner, who delayed delivery and who had knowledge of importance of prompt delivery, held liable to cargo owner for loss due to seasonal increase in import duty and seasonal fall in price.

57 *Victoria Laundry (Windsor Ltd.)* v. *Newman Industries Ltd.* (1949) 2 K.B. 528, 537; (1949) 1 All E.R. 997. See also *Heskell* v.*Continental Express Ltd.* (1950) 1 All E.R. 1033, 1049 where Devlin J. said that the knowledge of a sub-contract is more easily imputed to a vendor than a carrier); *Andre et cie* v. *J.H.V. Ventol* (1952) 2 Lloyd. Rep. 282.

58 *SS Ardennes (Cargo Owners)* v. *S.S. Ardennes Owners* (1951) 1 K.B. 55 (1950) 2 All E.R. 517. (loss of market). *Simpson* v. *L.N.W.Ry.* (1876) 1 Q.B.D. 274; *Jameson* v. *Midland Ry.* (1884) 50 L.T. 426; *Monte Video & Gas Dry Dock Co. Ltd.* v. *Clan Line Steamers Ltd.* (1921) 37 TLR 866; see also *Schuize & Co.* v. *G.E. Ry.* (1887) 19 Q.B.D. 30, cf. *Stroms Bruks Aktie* v. *John & Peter Hutchinson* (1905) A.C. 515.See Chitty: On Contracts (24th Ed.) Paras 1579, 1580.

Co. v. *Govinda Rau* (1898) 21 Mad. 172[59] If the company had known that the tailor wanted to use his goods for profit at the festival, it would be liable to him for the estimated loss of profit, and it would not be necessary for him to prove in detail what profit he expected to make: *Simpson* v. *L & N.W.R. Co.* (1876) 1 Q.B.D. 274.

Where goods are lost in transit on a Railway, the Railway is not responsible for loss of profits as part of the damages in the absence of a special contract: *Union of India* v. *Satyabhushan* (1966) A. Cal. 540. Damages cannot be awarded for loss of profit on the ground of equity in the absence of proof of any damage having been sustained: *Union of India* v. *United Timber Works* (1960) A.Punj. 478.

(r) *A*, a shipowner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon the first, but not the sum of money which *B* lost by arriving in Sydney too late.[60]

Sale of Goods—Loss of profit.—Where a defendant refuses to accept goods sold to or manufactured for him, and the plaintiff sells it to a third party on the same terms as were agreed to by the defendant and makes a similar profit, the plaintiff is entitled to nominal damages if the demand exceeds the supply of similar goods; but if supply exceeds the demand, the plaintiff will be entitled to recover his loss of profit on the defendant's contract.[61]

Loss of profit: Sale of land.—In a contract for sale of land special circumstances are necessary to impute to the vendor the knowledge that the purchaser wants to use it in a particular manner so as to justify the recovery of profits lost as a result of the default of the defendant.[62]

(Note.—No notice of special circumstances.—Here, and in several of the foregoing illustrations, it is assumed that *A* has no defence to *B*'s action on the contract; and in this illustration it seems to be assumed that *A* does not know *B*'s particular reason for wanting to be at Sydney by a certain date. *A* contracts to sell by description to *B* sulphuric acid commercially free from arsenic. *A* does not know what *B* wants the acid for. *B* receives sulphuric acid from *A* under the contract, and uses it in producing a kind of sugar used by brewers. The acid is, in fact, not free from arsenic, the sugar manufactured with it is spoilt and useless, and *B* incurs liability to his customers, and the goodwill of his business is diminished in value and other goods of *B*'s are spoilt by being mixed with this acid. *B* is entitled to recover from *A* only the price of the acid and the value of the goods spoilt: *Bostock & Co.* v. *Nicholson & Sons* (1904) 1 K.B. 725. In a claim against the Railway for price of goods lost in transit, the plaintiff cannot also claim loss of profit unless the parties knew that loss of profit would arise to the plaintiff due to non-delivery, nor can interest be claimed: *Union of India* v. *Natabar Lal* (1963) A.Or. 66.)

Where the loss due to breach of contract is more than or different from what it would have been in normal circumstances, the actual knowledge of the defendant, if relied upon, must exist before or at the time of making the contract.[63] But it is unnecessary for the parties

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59 See also *Fazal Ilahi* v. *East Indian Rly. Co.* (1921) 43 All. 623; 64 I.C. 868; *G.A. Jolli* v. *Dominion of India,* 1949 A. Cal. 380.

60 This illustration does not affect the rule as to measure the damages where the contract is for the sale of goods; *Kandappa Mudaliar* v. *Muthuswami Ayyar* (1926) 50 Mad. 94; 99 I.C. 609; 1927 A.M. 99; *Mohendrolal Sen* v. *Union of India* (1960) A.P. 411.

61 *Charter* v. *Sullivan* (1957) 2 Q.B. 117; (1957) 1 All E.R. 809 (1957) 2 WLR 528; *Thompson (W.L.)* Ltd. v. *Robinson (Gum Makers) Ltd.* (1955) Ch. 177. (1955) 2 WLR 185; (1955) 1 All E.R. 154. Chitty: On Contract (24th Edn.) para 1578.

62 *Diamond* v. *Campbell Jones* (1961) Ch. 22; (1960) 1 All E.R. 583; *Cotrill* v. *Steyning & Littlehempton Building Society* (1966) 1 W.L.R. 753; (1966) 2 All ER 295.

63 *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (1949) 2 K.B. 528, 539; (1949) 1 All E.R. 997. cf. *Kollman* v. *Watts* (1963) V.L.R. 396 (knowledge acquired after the contract).

to have contemplated[64] the quantum of damages provided it is within the type of loss contemplated.

But Willies J.[65] held in 1868 that mere knowledge is not enough; it should be brought to the knowledge of the defendant that he accepts the contract with that knowledge. Thus knowledge on the part of a carrier must form part of the contract. It may be that the defendant gets the knowledge casually from a stranger, the owner not caring whether defendant had that knowledge or not.

If it is clear from all the circumstances that the defendant, to the knowledge of the plaintiff, did not wish to accept the risk of the unusual loss, the mere knowledge of the special circumstance is not enough. Secondly, if it is clear from the circumstances that the defendant as a reasonable man would not, despite his knowledge of the special circumstances, have accepted the risk of the unusual loss, mere knowledge is insufficient.[66]

The rule has been simplified thus:-

Notice of the special circumstances will make the defendant liable for the unusual loss if in all those circumstances a reasonable man would consider himself to have taken the risk, when he made the contract. Was it as reasonable man within the contemplation of parties that the defendant was accepting the risk?[67]

In *Hadley* v. *Baxendale*[68] itself, communication was considered to be a vital factor but a casual communication from a stranger is insufficient. It is essential that there should be communication of the special circumstances by or on behalf of the plaintiff to or to the agent of the defendant to show that the plaintiff thought it important that the defendant should know whether matters depended on the fulfilment of the contract. These facts may lead to the inference that the defendant as a reasonable man was accepting the risk of special loss to the plaintiff[69]

General Damages.—General damages are damages which the jury may give when the judge cannot point out any measure of damages by which they are to be assessed except the opinion and judgment of a reasonable man.[70] In the case of wrongful termination of contract for supply of bins, the measure of damages in regard to finished bins is the difference between contract price and the market price when the contract is broken.[71] And in case of unfinished bins, it is the difference between the contract price and the cost of labour and material required for the manufacture of the component parts.[71]

Where the market price at the date of breach is ascertainable, the resale price of the buyer whether higher or lower is generally irrelevant to the assessment of damages for the sellers default.[72] The seller cannot plead that the buyer by using other goods had fulfilled his contract and made greater profit.[73]

Remedy provided by this section not the only remedy for breach of contract.—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer

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64 *Wroth* v. *Tyler* (1974) Ch. 30, 60-62; (1973) 2 WLR 405; (1973) 1 All E.R. 891. See also Chitty on Contracts (24th Ed.) para 1575.

65 *British Columbia Saw Mills Co. Ltd.* v. *Nettleship* (1868) 3 C.P. 499, 504. See also *Robophones Facilities* v. *Blank* (1966) 1 W.L.R. 1428, 1448; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (1949) 2 K.B. 528, 538.

66 Chitty: On Contracts (24th Ed.) Para 1576. cf. *Robopone Facilities Ltd.* v. *Blank* (1966) 1 WLR 1428, 1437, 1448; *Roufos* v. *C. Czarnikow* (1969) 1 A.C. 350, 421, 422.

67 *Mohammad Isa-el-Sheikh Ahmed* v. *Ali* (1947) A.C. 414, 427. *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* (1952) 2 Q.B. 297; *Aruna Mills Ltd.* v. *Dhamrajmal Gobindram* (1968) 1 Q.B. 655 contemplated risk of devaluation.

68 (1854) 9 Ex. 341, 354; (1843-60) All E.R. Rep. 461.

69 Chitty: On Contracts (24th Ed.) Para 1576.

70 *Prehn* v. *Royal Bank of Liverpool* (1870) 5 Ex. 92.

71 *Bungo Steel Furniture* v. *Union of India* (1967) A.S.C. 378; (1967) 1 S.C.R. 633.

72 *William Bros Ltd.* v. *Ed. T. Agius Ltd.* (1914) A.C. 510; *James Finlay & Co.* v. *Kwik Hoo Tong* (1929) 1 K.B. 400, 411.

73 *Sheikh Mohammad Habibullah* v. *Bird & Co.* (1921) 37 T.L.R. 405 (P.C.). Chitty: On Contracts (24th Ed.) para 38 Vol II.

wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may, at his option, either sue for the price of the goods for damages for non-acceptance. The present section prescribes the method of assessing the damages, and it does not take away the right of a seller to maintain an action for the price where the property in the goods has passed to the buyer.[74] See Sale of Goods Act, 1893, ss. 49 and 50.

Rule in Hadley v. Baxendale.—The illustrations to this section were obviously considered of special importance. We have thought that several of the English and recent Indian decisions would be most usefully dealt with by stating them in the form of additional illustrations and inserting them, distinguished by inclusion within square brackets and by the reference to the report of each case, in the places which seemed most appropriate.

The law is concerned with the legal obligations only and the law of contract only with legal obligations created by mutual agreements between contracts—not with expectations however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.[75]

The text of the section is in substance identical with the draft of the Law Commissioners, and so are the illustrations as far as they go, though the number originally proposed was greater. The intention was plainly to affirm the rule of the Common Law as laid down by the Court of Exchequer in the leading case of *Hadley* v. *Baxendale,* now more than hundred and twenty-six years ago. That rule, expressly and carefully framed,[76] to be a guide to judges in directing juries, was as follows:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communciated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be amount of injury which would ordinarily follow from a breach of contract, under these special circumstances so known and communicated. But, on the other hand, if these special cricumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; thus it would be very unjust to deprive them.[77]

The Court which gave judgment in *Hadley* v. *Baxendale* was a strong Court; and the rule laid down by it is in harmony with many other rules in our law which fixed the measure of liability by the standard of what was known to the defendant, or ought to have been then and there known to a reasonable man in his circumstances. As formulated the rule has two branches. First, the party breaking a contract is liable for damages arising "according to the usual course of things": secondly, he is liable, or also liable, for "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it".[78] But, as Lord Birkenhead, when a junior at the Bar, correctly pointed out, the first branch is in truth only a specification of the simpler cases under the second; for the natural and ordinary consequences of an event—namely, such as can be foreseen without any special information—are always assumed to be in the contemplation of reasonable men, and it is no excuse for a man to say that he failed to think reasonably or did not think at all.[79] This view seems to be borne out by a remark of Lord Bowen when a member

74 *P.R. & Co.* v. *Bhagwandas* (1909) 34 Bom. 192; *Finlay, Muir and Co.* v. *Radhakissen* (1909) 36 Cal. 736.

75 *Lavarak* v. *Woods of Colchester Ltd.* (1966) 3 All E.R. 683, 690 per Diplock L.J.

76 See 4 H. & C. 247; 143 R.R. 600.

77 *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 354; 96 R.R. 742, 753 (where one passage is amended in accordance with the report in 23 L.J.); (1843—1860) All E.R. Rep. 461, 465.

78 The distinction is usually described as that between general and special damages: per Lord Wright in *Monarch Steamship Co.* v. *A/B Karlshamns* (1949) A.C. 196, 221. Also per Kania C.J. in *Panna Lal Jankidas* v. *Mohan Lal,* 1951 A.S.C. 144, 156.

79 (1900) L.Q.R. xvi, 275, 399; *Cory* v. *Thames Ironworks* (1868) L.R. 3 Q.B. 181, well illustrates the principle. *P* claimed damages from D for non-delivery of a floating boom derrick, which he intended

of the Court of Appeal: "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley* v. *Baxendale*."[80]

Another eminent Judge proposed a still further simplification. Why need we bring in the consideration of what the parties contemplate? "In my opinion" he said, "the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract".[81] But, with great respect, this would not really simplify the matter. For there is no universal definition of what is meant by "natural and probable", and when we ask what is to be deemed natural and probable in a given case there seems to be no better way of fixing it than by reference to the judgment of a reasonable man having the means of information then and there available. In other words, those consequences are natural and probable in a legal sense which the parties in fact contemplate, or would as reasonable men contemplate.

Modern rule.—The principles laid down in *Hadley* v. *Baxendale*[82] were restated in *Victoria Laundry case*[83] by the Court of Appeal and in *Kourfos* v. *C. Czarnikow Ltd.*[84] by the House of Lords. In the former case they were:

"(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at time of the contract reasonably foreseeable as liable to result from the breach....."

"(3) What was at that time reasonably so forseeable depends on the knowledge then possessed by the parties or at all events, by the party who later commits the breach....."

"(4) For this purpose, knowledge 'possessed' is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things and consequently what loss is liable to result from a breach of contract in that ordinary course.' But to this knowledge which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case—knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstance would be liable to cause more loss."

The innocent party does not have to show that the contract breaker ought to have contemplated as not being unlikely to have the exact details of the damage or the manner of its happening. It is enough if he should have contemplated that damage of that kind is not unlikely.[85] (like the test of remoteness of damages in tort). The test is that the damage is of such a kind that a reasonable man should have foreseen.[86] If the parties should have con-

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to use to work machinery in the discharge of coal, a novel and highly profitable use. *D* believed the hull was wanted to store coal, the obvious use. *P* claimed damages merely on the basis of the obvious use, as *D* had no notice of the espically profitable use. *D* contended no damages were payable at the parties were not *ad idem* regarding the use, but the Court held that in such a case the measure of damages is the profit resulting from the ordinary use. Followed by the C.A. in *Victoria Laundry* v. *Newman Industries* (1949) 2 K.B. 528 (*supra*). See also *Mason* v. *Burningham* (1949) 2 K.B. 545, C.A. (*P* buys from *D* a used typewriter which unknown to either party is *X*'s property, *P* at once has it overhauled. *P* later has to return it to *X*. *P* can recover from *D* not merely the price paid, but also the cost of overhaul, since the overhauling of the machine was reasonably foreseeable by *D* at the time of the contract).

80 *Grebert-Borgnis* v. *Nugent* (1885) 15 Q.B.D. 85, at p. 92. See also per Devlin J. in *Biggin* v. *Permanite* (1951) 1 K.B. 422, 436.

81 Cotton L.J. in *McMahon* v. *Field* (1881) 7 Q.B.D. 591, at p. 597.

82 (1854) 9 Ex. 541; (1843-60) All E.R. Rep.

83 *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries* (1949) 2 K.B. 528; (1949) 1 All E.R. 997. See also *East Ham Corporation* v. *Bernard Sunley* v. *Sons Ltd.* (1966) A.C. 406, 440, 445, 450-451.

84 (1969) 1 A.C. 350, (also known as Heron II): (1967) 3 All E.R. 686; (1967) 3 W.L.R. 1491.

85 *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.* (1969) 3 All E.R. 1496, 1542.

86 *Overseas Tankship (U.K.) Ltd.* v. *Mover Dock & Engineering Co. Ltd. (The Wagon Mound)* (1961) A.C. 388, 426; (1961) 1 All ER 402; (1961) 2 WLR 126.

templated in particular the kind of loss they need not have contemplated the extent of that loss.[87]

As to what was within the contemplation of reasonable men depends on the relevant degree of likelihood that particular kind of loss may occur. This was discussed in *Koufos* v. *C. Czarnikow Ltd.*[84] (The Heron II). For actual and imputed knowledge see below:[88]

Hadley v. *Baxendale* has been followed by the Courts in Canada in the cases given below.*

These cases show that damages are to be awarded for those losses which were within the contemplation of the parties when the contract was made limited to those items which are natural and direct consequence of the breach.[89] The more recent Canadian cases suggest that losses for which damages are awarded must be reasonably likely losses and reasonably contemplated and probable losses of the breach of the particular kind. The policy[90] is to limit the liability of defendants against amounts of damages unforseeable to an unlimited number of plaintiffs over an indefinite period of time.

In Parta case[91] a carrier undertook to carry goods from Montreal to Grand Forks. En route the goods were damaged and substitute goods had to be ordered from Europe causing delay of three months in the production scheme of the plaintiff. Damages were awarded for the delay which could have reasonably been foreseen which the Court assessed at 45 days.

In *Freedhoff case*[92] the defendant failed to deliver a functioning ski-lift to the Ski operator which would have provided revenue to the latter (the plaintiff). The defendant's plea was that a third party, a Bank exercised its power of sale over the property. But the trial Court awarded damages for loss resulting from this default. On appeal however the Court held that unlike in a sale of goods meant for resale, the loss to the plaintiff in this case was not reasonably foreseeable and moreover the plaintiff could have made a reasonable alternative arrangement. In the instant case the Court also held that because of the exercise of the Bank's power of resale, the plaintiff was not entitled to damages for loss.

Remoteness of Damages:—Said Donaldson J. in *Aruna Mills' case:*[93]

"With regard to remoteness of loss, until recently it could fairly be said that, subject to the decision in *The Parana,*[94] the law on remoteness of damage in contract had been codified by the decision in *Hadley* v. *Baxendale*[95] as explained in the classic judgment delivered by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[96] Now the House of Lords in *C. Czarnikow Ltd.* v. *Koufos*[97] has held that *The Parana*[94] is not to be considered as an exception. In the course of the speeches in the *Czarnikow case*[97] their Lordships expressed varying degrees of enthusiasm for the *Victoria Laundry case*[96] but, subject to two possible qualifications, it seems to me to remain unimpaired as the classic authority on the topic. These two qualifications are as follows. First, reference in the judgment in the *Victoria Laundry* case to a loss being "reasonably foreseeable" should perhaps be taken as referring to the loss having been within "actual or assumed contemplation" (see the speech of Lord Reid).[98] Second, the

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87 *Cf. Wroth* v. *Tyler* (1974) Ch. 30, 60-62.
88 (1969) 1 A.C. 350, 383, 388, 397, 410-11, 415,425. Chitty: On Contracts (24th Ed.) Para 1573-1574.
* *Leitch Goldmines Ltd.* v. *Texas Gulf Sulphur Co.* (1969) 3 D.L.R. (3rd) 161 (Ont. H.C.); *Cull* v. *Heritage Mills Ltd.* (1974) 49 D.L.R. (3rd) 521 (Ont. H.C.); *Parta Industries Ltd.* v. *Canadian Pacific Ltd.* (1974) 48 D.L.R. (3rd) 463 (B.C.)
89 *Parta Industries Ltd.* v. *Canadian Pacific Ltd.* (1974) 48 D.L.R. (3rd) 463, 469 (B.C.)
90 Boyle & Percy(ed) Contracts: cases and materials: Carswell Co. Toronto, 1978: p 686.
91 *Parta Industries Ltd.* v. *Canadian Pacific Ltd.* (1974) 48 D.L.R. (3rd) 463, 469.
92 *Freedhoff* v. *Pomalift Industries Ltd.* (1970) 13 D.L.R. (3rd) 523; on appeal revd. (1971) 19 D.L.R. 3rd, 153,158.
93 *Aruna Mills Ltd.* v. *Dhanrajmal Gobindram* (1968) 2 W.L.R. 101, 111.
94 (1877) 2 P.D. 118, C.A.
95 (1854) 9 Exch. 341.
96 (1949) 2 K.B. 528, 539; 65 T.L.R. 274; (1949) 1 All E.R. 997, C.A.
97 (1967) 3 W.L.R. 1491; (1967) 3 All E.R. 686, H.L. (E).
98 (1967) 3 W.L.R. 1491, 1498.

phrase "liable to result" is not correctly paraphrased by the use of the expression "on the cards", but conveys the relevant shade of likelihood by its own wording (Lord Hodson)[99] or when defined (as it was in proposition (6) in the *Victoria Laundry case*[96]) as indicating that a loss is a "serious possibility" or "real danger" (see Lord Pearce[1] and Lord Upjohn[2], words which amongst others had the approval of Lord Morris of Borth-y-Gest."[3]

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

Principles for award of damages: Mitigation of damages:—The principles for award of damages laid down by Lord Haldane in *British Westinghouse Electric Co. Ltd.* v. *Underground Electric Railways Co.*[4]are:

The first is that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach,[5] or as stated by Lord Wright in *Monarch Steamship case,*[6] broad principle of the law of damages is that the party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position he would have been but for the breach.

This is qualified by a second principle which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part which is due to his neglect to take such precautions.[7] Or as was said by James L.J. in *Dunkirk Colliery Co.* v. *Lever*[8] the person who has broken the contract is not to be exposed to the additional burden by reason of the plaintiffs' not having done what they ought to have done as reasonable men, and the plaintiffs' not being under any obligation to do anything otherwise than in the ordinary course of business, or as observed by Scrutton L.J. in *Payzu* v.

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99 *Ibid.*, 1524.
1 *Ibid,* 1528.
2 *Ibid,* 1536.
3 *Ibid,* 1515.
4 (1912) A.C. 673, 689; (1911-13) All E.R. 63,69.
5 *Trojan & Co.* v. *Nagappa Chettiar* (1953) S.C.R. 789,799; (1953) A.S.C. 235,238; *Mohamad Khan* v. *Ram Narayan* (1956) A.Or. 156; *Murlidhar Charanjilal* v. *Harish Chandra Dwarkadas* (1962) 1 S.C.R. 653; (1962) A.S.C. 366,369; *Board of Trustees, Calcutta Port* v. *Dhanrajmal Gobindram* (1978) A. Cal. 369, 371 (absence of special circumstances). See also p. 531 (n.15).
6 *Monarch Steamship Co. Ltd.* v. *Karlshamns* (1949) A.C. 196,220 (per Lord Wright); (1949) 1 All E.R. 1,12; *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 354, (1843-60) All E.R. Rep. 461, 465 refd. to; *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1932) A.C. 452, 474-5; (1932) All E.R. Rep. 181, 190; *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39, refd. to; *Lalchand* v. *Union of India* (1960) A. Cal. 270; *G.A. Jolli* v. *Dominion of India* (1949) A. Cal. 380 refd. to.
7 (1912) A.C. 673, 689.
8 (1878) 9 Ch.D. 20, 25, quoted in *Westinghouse case* (1912) A.C. 673, 689; (1911-13) All E.R. Rep. 63, 69; *Staniforth* v. *Lyall,* 131 E.R. 65; (1830) 7 Bing. 169.

Saunders,[9] a plaintiff can recover no more than he would have suffered if he had acted reasonably.

Mitigation of damages: English rule.—The doctrine as stated by an English Text book writer[10] is governed by three rules:

1. The plaintiff cannot recover the loss consequent upon the default of the defendant if the plaintiff could have avoided the loss by taking reasonable steps.
2. If the plaintiff avoids or mitigates the loss he cannot recover for such avoided loss even if he takes steps which are more than what was reasonably required of him.
3. Where the plaintiff suffers loss or incurs expense by taking reasonable steps to avoid or mitigate the loss resulting from the defendant's default, he may recover the further loss or expense from the defendant.

Duty.—A duty is imposed upon the plaintiff to take reasonable steps to mitigate the loss or damages. His position is similar to that of a plaintiff guilty of contributory negligence.[11]

American view—In America the law has been stated to be this. The measure of damages to the non-defaulting party will be measured as if that party has made reasonable efforts to avoid the losses resulting from the default. Some Courts have stated this doctrine as a duty owing by the innocent party i.e. a duty to minimise damages. "However on analysis it is clear that in contract-cases as well as generally, there is no duty to minimise damages because no one has a right of action against the non-defaulting party if he does not make the non-defaulting party liable to suit. Such a failure the party only shows that the damages actually suffered are greater than law will compensate. Therefore, in contract action, the doctrine of avoidable consequences is only a statement how the damages will be measured.[12]

The statement of the law enunciated in *James Finlay & Cos.*[13] case was approved by the House of Lords. It was stated: "In England... the law is that a person is not obliged to minimise damages.... if by doing so he would have injured commercial reputation by getting a bad name in the trade".

(1) The plaintiff is not required to do anything more than in ordinary course of business,[14] the standard not being high. The plaintiff if placed in difficulty, is required to take remedial measures acting reasonably. He will be entitled to the cost of such measure and the defendant cannot plead that less burdensome measures could have been taken.[15] The plaintiff is not required nor is he under any duty to take risks with his money[16] attempting to mitigate nor to take steps which might endanger his commercial reputation; e.g. by enforcing sub-contracts.[17] The plaintiff is under no duty even under an indemnity to embark on a com-

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9 (1941) Ch. 360; (1941) 2 All E.R. 18.
10 Chitty: On Contract (24th Ed.) Paras 1592, 1597, 1599.
11 Chitty: On Contract (24th Ed.) Paras 1593 & 1598. *British Westing House Electric Co.* v. *Underground Electric Ry.* (1912) A.C. 673, 689 quoted by Supreme Court in *Murlidhar Charanjilal* v. *Harishchandra* (1962) 1 S.C.R. 653 See also *Tucker* v. *Singer* (1882) 21 Ch.D. 18; *McRae* v. *H.G. Swindells* (1954) 1 W.L.R. 597; (1954) 2 All E.R. 260; cf. *Darbishire* v. *Warran* (1963) 1 W.L.R. 1067, 1075. (1963) 3 All E.R. 310. See also *M. Lachia Setty* v. *Coffee Board Bangalore* (1981) A.S.C. 562.
12 American Jurisprudence, 2nd Vol. 22 para 33 at pp. 55-56 quoted with approval in *Lachia & Co. Ltd.* v. *Coffee Board* (1981) A.SC. 162, 168.
13 *James Finlay & Co.* v. *Kwick Hoo Tong* (1929) 1 K.B. 400 appld, approved in *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1932) A.C. 452, (quoted with approval in *Lachia & Co. Ltd.* v. *Coffee Board* (1981) A.SC. 162, 168).
14 *Dunkirk Colliery Co.* v. *Lever* (1878) 9 Ch.D. 20,25 approved in *British Westing House Electric Co.* v. *Underground Electric Ry* (1912) A.C. 673, 689.
15 *Banco de Portugal* v. *Waterlow* (1932) A.C. 452; 506. See also *Moore* v. *DER Ltd.* (1971) 1 WLR 1476; (1971) 3 All E.R. 517.
16 *Jewelowski* v. *Propp* (1944) K.B. 510; (1944) 1 All E.R. 403. *Lesters Leather & Skins Co.* v. *Hume Overseas Brokers* (1948) 64 TLR 569.
17 *Finlay & Co.* v. *Kwick Hoo Tong* (1929) 1 K.B. 400; *Banco de Portugal* v. *Waterlow* (1932) A.C. 452

plicated litigation with a third party.[18] Nor is the plaintiff required to sacrifice any of his property or rights to mitigate loss.[19]

(2) Loss which is avoided cannot be recovered. Similarly, advantage arising from wholly independent transaction cannot be relied upon in mitigation of damages,[20] as for instance a sum due on an insurance policy. If by another transaction with a third person entered into before the contract with defendants is breached which prevents loss to the plaintiff from the defendant's default the defendant cannot thus reduce his damages.[21]

Where on a breach of contract by the purchaser the vendor made a gain he is not entitled to any damages nor was he entitled to retain the advance payment made by the purchaser.[22]

Mitigation.—The Privy Council in *Jamal* v. *Moola Dawood Sons & Co.*[23] held that "it is undoubted law that a plaintiff who sues for damages owes the duty of taking reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect". This law was accepted in India as indeed it had to be and later the Supreme Court held in 1962 in *Murlidhar Chiranjilal* v. *Harish Chandra Dwarkadas* (1962) 1 SCR 653[24] that there are two principles on which damages are calculated in the case of breach of contract of sale of goods. In his judgment Wanchoo J. said:

> "The first is that he who has proved a breach of a bargain to supply what he has contracted to get, is to be placed so far as money can do it in as good a situation as if the contract had been performed; but the principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps *(British Westing House Electric & Manufacturing Company Ltd.* v. *Underground Electric Ry. Co.*[25]
>
> These two principles also follow from the law as laid down in S.73 read with the Explanation thereof."

According to the latest pronouncement of the Supreme Court[26] the principle of mitigation does not give any right to a party in breach of contract but it is a circumstance to be borne in mind in assessing damages. The correct position may be stated as follows:

1. The plaintiff must take all reasonable steps to mitigate the loss and if he fails to do so he cannot claim such loss which could have been avoided. But the rule is modified.
2. But the plaintiff is only required to act reasonably and whether he has done so or not is not a question of law but a question of fact in each case. He must act reasonably not only in his own interest but also in the interest of the defendant and keep down the damages by acting reasonably and properly.

(not to act as to injure innocent persons); *Anglo African Shipping Co.* v. *Mortimer Ltd.* (1962) 1 Ll. Rep. 81, 94; on appeal *ibid* 610.

18 *Pilkington* v. *Wood* (1953) Ch. 770; (1953) 3 WLR 522; (1953) 2 All E.R. 810.

19 *Elliot Steam Tug Co.* v. *Shipping Controller* (1922) 1 K.B. 127, 140-41; cf. *Weir (Andrew) & Co.* v. *Dobell & Co.* (1916) 1 K.B. 722.

20 *Bradburn* v. *G.W. Ry.* (1874) 10 Ex. 1; *Lavarack* v. *Woods of Colchester* (1967) 1 Q.B. 278 (1966) 3 WLR 706; (1966) 3 All E.R. 683.

21 *Haviland* v. *Long* (1952) 2 Q.B. 82, 84; (1952) 1 All E.R. 463.

22 *Mohanlal* v. *Dayaldas* (1976) A. Raj. 68.

23 43 I.A. 1, 10.

24 (1962) A.SC. 366. 369; (1962) 1 SCR 653.

25 (1912) A.C. 673, 689; (1911-13) All E.R. Rep. 63.

26 *M. Lachia Setty & Sons Ltd.* v. *Coffee Board Bangalore* (1981) A.SC. 162, 168; Halsbury's Laws of England (4th Ed.) Vol. XII, Paras 1193 & 1194 quoted with approval.

3. The plaintiff is required to do no more than act in the ordinary course of business and where he is placed in embarrassment, the measures he takes to extricate himself, ought not to be weighed in nice scales at the instance of the party in breach.
4. The plaintiff is under no obligation to destroy his property or to injure himself or his commercial reputation to reduce the damages payable by the defendant.
5. The plaintiff need not take steps which will injure innocent persons.

It is submitted that in *Lachia case* the learned Judges of the Supreme Court have not considered the previous judgment of the Privy Council nor of the Supreme Court itself nor has its attention been drawn to the Explanation to Section 73. It is also submitted that the word "duty" used in those cases may not give the party in default the right to sue, but it is submitted that it does lay an obligation on the non-defaulting party of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. The duty may not be such which gives the defaulting party a right to sue, but it is a positive defence in the matter of quantum of damages.

A wronged plaintiff is entitled to compensation for his losses subject to the rule that the extent of the damages depends on whether he has taken reasonable steps to avoid their avoidable accumulation.[27]

So also where the plaintiff by another contract with a third party entered into before the defendant's default should and in fact does prevent loss to the plaintiff from the defendant's fault, the defendant cannot rely on it to reduce his damages, it is *res inter altos acta* or an extraneous circumstance.[28]

The opportunity to mitigate the loss may arise if the defaulter makes an offer. The plaintiff, if he unreasonably refuses is in breach of duty to mitigate his loss.[29] Where the seller in breach of his contract offered to supply goods at other than the contract rates, the refusal of the buyer being in the circumstances unreasonable, the Court took that circumstances into account in reducing damages.[30] But the plaintiff is not bound to accept defective quality goods.[31]

The buyer is not obliged by the doctrine of mitigation of damage to accept goods from the seller which are not of the contractual standard[32] but he may be obliged to accept goods of the contractual standard, but which are to be supplied on different terms as to the timings and terms of payment.[33]

A seller of a house with vacant possession which was in possession of a protected tenant offered to repurchase the house, it was held[34] the buyer was not bound to accept the offer and that his choice of retaining the house and sue for damages was not to be subject to the test of reasonableness.

Costs incurred by plaintiff.—Costs reasonably incurred by a plaintiff as a result of defendants breach of contract may be recovered as damages in indemnification of these costs.[35]

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27 *Payzu Ltd.* v. *Saunders* (1919) 2 K.B. 581, 589; *Red Dear College* v. *Michaels* (1976) 57 DLR (3rd) 386, 390-2 (Onus on plaintiff and avoidable losses).
28 *Haviland* v. *Long* (1952) 2 K.B. 80, 84. Chitty: On Contracts (24th Ed.) Para 1598.
29 *Payzu* v. *Saunders* (1919) 2 K.B. 981; *Houndsditch Warehouse Co.* v. *Waltex* (1944) K.B. 579; (1944) 2 All E.R. 518; *Brace* v. *Calder* (1895) 2 Q.B. 253 (Contract of Service) cf. *Edwards* v. *Society of Graphic & Allied Trades* (1971) Ch. 154; (1970) 3 WLR 713; (1970) 3 All E.R. 689; *A.B.D. (Metals & Waste) Ltd.* v. *Anglo Chemical & Ore Co.* (1955) 2 Lloyds Rep. 456.
30 *Payzu* v. *Saunders* (1919) 2 K.B. 981.
31 *Heaven & Kesterton Ltd.* v. *Establishments Francois Albiac* (1956) 2 Lloyds Rep. 316.
32 *Heaven & Kesterton* v. *Establishments Francois Albiac & Co.* (1956) 2 L 1. Rep. 316, 321; cf. *Pragnan (R) Fratelli* v. *Corbisa Industrial Agrop.* (1970) 1 W.L.R. 1306.
33 *Payzu* v. *Saunders* (1919) 2 K.B. 581. See Chitty: On Contracts (24th Ed.) Vol. II, Pr. 4637.
34 *Strutt* v. *Whitnell* (1975) 1 WLR 870; (1975) 2 All E.R. 510. *Payzu Ltd.* v. *Saunders* (1918-19) All E.R. Rep. 219; (1919) 215 B. 581 disting.
35 *Hales* v. *N.W. Ry. (1867) 4 B and S. 66; Berries* v. *Hutchinson* (1865) 18 C.B. N.S. 445; *Hoodger* v.

Similarly the plaintiff may also recover legal expenses paid in legal proceedings against third parties if the defendants breach of contract led the plaintiff to be involved in them[36] e.g., where the plaintiff enters into a sub sale and due to defendant's breach is sued by the sub buyer and reasonably acted in defending the action.[37]

Expenses incurred prior to the contract and in contemplation thereof may be recovered in an action for the breach of contract if they were within the reasonable contemplation of the parties at the time of making the contract.[38] Thus where the vendor of land failed to sell the land, the buyer's damages could include legal expenses for the contract and an act required to be done by the contract notwithstanding its being in anticipation of the contract.[39]

The onus of proof is on the defendant to show that the plaintiff as a reasonable man should have taken steps to mitigate damages. Anyhow loss which is caused by the plaintiff's failure to fulfil this duty is not recoverable from the defendant.[40] Anyhow consequent upon the failure to fulfil the duty is not recoverable.

Mitigation of damages Impecuniosity—Tort.—A taxi driver whose taxi met with an accident found himself unable to pay for the repairs and so had to wait till the repairs were carried out at the expense of the insurers. We brought an action for the hire he paid for a car hired by him to be used as a taxi.

It was held that impecuniosity[41] is no defence against non mitigation of damages, but he succeeded since he was seeking in the first instance damages from the defendants insurers rather than from his own and until the repairs were authorised by the defendants insurers and until the repairs were okayed he could not stand in a good position vis-a-vis insurers.

Perishable goods.—In the case of damages to perishable goods due to delay if the damaged goods are saleable the plaintiff must sell them at a reasonable price and recover the balance of the loss due to the damage to the goods.[42]

Damages for mental distress.—Except in cases of breach of promise of marriage damages are not awarded in contract for injury to plaintiff's feeling or for mental distress, loss of reputation or social discredit[43] as where a servant is dismissed in an humiliating manner.[44] But see the

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G.W. Ry. (1867) 2 C.P. 318, 319; *Grant* v. *Australian Knitting Mills Ltd*, (1936) A.C. 85; *Heskel* v. *Continental Express Co.* (1950) 1 All E.R. 1033, 1046. *S.S. Ardennes (Cargo Owners) Ltd.* v. *S.S. Ardennes Owners* (1951) 1 K.B. 560 (Increase in import duties) (1950) 2 All E.R. 517; *Wilson* v. *Richett Cotterell & Co. Ltd.* (1954) 1 Q.B. 598. *East Ham Corpn.* v. *Bernard Sunley & Sons* (1966) A.C. 406; reinstatement of defective building. See also *Bain* v. *Fothergill* (1874) 7 H.L. 158.

36 *Mowbrey* v. *Merryweather* (1895) 2 Q.B. 640; cf. *Cointat* v. *Myham* (1913) 2 K.B. 220 (fine in prosecution) *Hammand* v. *Bursem* (1888) 20 Q.B.D. 79 (legal costs) *Yeoman Credits Ltd.* v. *Odgers* (1962) 1 W.L.R. 215 (Legal costs). *Bowmaker (Commercial) Ltd.* v. *Day* (1965) 1 W.L.R. 1596.

37 *Biggins* v. *Permanito* (1951) 2 K.B. 314. See also Chitty: On Contracts (24th Ed.) Vol. II, 4640 & 4656.

38 *Anglia Television Ltd.* v. *Read* (1972) 1 Q.B. 60 criticised in (1972) 32 M.L.R. 423. Chitty: On Contracts (24th Ed.) Para 1580.

39 *Lloyd* v. *Stanbury* (1971) 1 W.L.R. 535, 546. See: *Molling* v. *Dean* (1901) 18 TLR 217 *Cullinante* v. *British Rema Mfg. Co. Ltd.* (1954) 1 Q.B. 292, 308. Chitty: On Contracts (24th Ed.) para 1980.

40 *Roper* v. *Johnson* (1873) 9 C.P.D. 167; *Pilkington* v. *Wood* (1953) Ch. 770; (1953) 3 WLR 522; (1953) 2 All E.R. 810; *Edwards* v. *Society of Graphical & Allied Trades* (1971) Ch. 354; (1970) 3 WLR 713; (1970) 3 All E.R. 689; *Struct* v. *Witnell* (1975) 1 W.L.R. 870; (1975) 2 All E.R. 510. Chitty: On Contracts (24th Ed.) Para 1593.

41 *Mattindale* v. *Duncan* (1973) 2 All ER 355, 358; *Dredger Liesbosch* v. *Steamship Edison* (1933) All E.R. Rep. 144 disting.

42 *Union of India* v. *B. Prehlad & Co.* (1976) 1 Del. 436; (1976) A.D. 236, 245 (245).

43 *Hamlin* v. *G.N. Ry.* (1856) 1 H. & N. 408; *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488; (1908-9) All E.R. Rep. 1 (no exemplary damages for harshness and oppression in dismissal); *Groom* v. *Crocker* (1939) 1 K.B. 194; *Foaminol Laboratories Ltd.* v. *British Artid Plastics Ltd.* (1941) 2 All E.R. 393 (loss of co-operation of advertisers); *Bailey* v. *Bullock* (1950) 2 All E.R. 1167 (no damages for annoyance or mental distress but can recover for inconvenience and discomfort); *Last-Harris* v. *Thomson Bros.* (1956) N.Z.L.R. 995, nor are damages recoverable for loss of society of one's spouse or child, cf. *Jackson* v. *Watson* (1909) 2 K.B. 191. See *post*. See also *Solicitor & Client, infra* Chitty on Contracts (24th ed.), para 158.

44 *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488; (1908-10) All E.R. Rep. 1; *Thomakutty* v. *Thomas*

undermentioned cases for inconvenience and discomfort.[45]

Dismissal from Service.—In *Addis's case*[46] it was held that the jury is debarred from awarding exemplary damages because of harshness and oppression accompanying the dismissal and injuring the feeling of the servant and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain employment. Nor can general damages be claimed for "humiliation, embarrassment and loss of reputation."[47] But an action will lie for loss of publicity or loss of opportunity to enhance reputation in certain cases of a breach of contract of service for theatrical engagements and substantial damages may be awarded.[48] The law is the same in the case of authors. It has been suggested by some learned writers and it is submitted with some justification that where mental suffering was in the contemplation of parties as the result of the breach of contract English Courts should follow American Courts and award damages for such injury, e.g., failure to give message of ill health or death of a near relative.[49] But damages have been awarded to an employee for the employer's failure to carry out his undertaking to promote an employee to a post of responsibility.[50]

(1954) A.T.C. 104, 113-4. See also continuing breach dismissal of servant infra.

45 Damages for inconvenience and discomfort are sometimes awarded; *Hobbs* v. *L.S.W. Ry.* (1875) 10 Q.B. 111; 44 L.J.Q.B. 49; *(D's* train does not stop at Station *X* as advertised. *P* and family have to alight at dead of night and walk miles to *P*'s home, as there is no available conveyance *D* is liable in damages); *Bailey* v. *Bullock* (1950) 2 All E.R. 1167 *(D, P's* solicitor, negligently fails to take proceedings to obtain possession of *P's* house from *X*. *P* and family have to prolong their stay with *P's* mother-in-law. *D* is liable in damages for the inconvenience and discomfort); *Stedman* v. *Swan's Tours* (1951) 95 S.J. 727; (*P* books from *D*, a travel agent, a superior room at a sea-side hotel with a sea-view. The room is neither superior nor has it sea-view. The C.A. approving *Bailey* v. *Bullock (supra)* awarded *P* £50 as damages for inconvenience and discomfort.).

The basis of these cases is that the defendant would have been liable to pay the cost in *Hobb's case* of a carriage to convey *P* home, and in *Bailey's case* of alternative accommodation, and although *P* cannot obtain a carriage in the former case, and does not hire a house in the latter case, *D* is at any rate liable for the inconvenience caused to *P*.

In *Union of India* v. *Shri Nivas Mal,* 1955 A.P. 282, a claim for damages for inconvenience in travelling in the defendant's overcrowded train was rejected *inter alia* on the ground that no damage was suffered.

46 *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488; (1908-10) All E.R. Rep. 1; (1909) A.C. 488, 78 L.-J.K.B. 1122; 101 L.T. 466; approved *obiter* in *Thomakutty* v. *Thomas,* 1954 A.T.C. 104, 113-114; in *Withers* v. *General Theatres* (1933) 2 K.B. 536, the C.A. applied the same rule to actors, but exceptionally the latter can recover damages for loss of the opportunity of enhancing their reputation, though not for injury to their existing reputation. In *Groom* v. *Crocker* (1939) 1 K.B. 194, 206, Green M.R. in the C.A., while dutifully following the *Addis Case (supra),* expressed the wish that the law were otherwise at any rate in the case of professional men, who may suffer grave social discredit, without any real pecuniary damage; *Aerial Advertising* v. *Batchelor's Peas* (1938) 2 All E.R. 788 is an interesting case, where injury to reputation did lead to loss of trade. *P* agreed to provide aerial displays advertising *D's* canned peas for a period of 9 months. The first display was given, by the pilot's mistake, during the two minutes' silence, observed throughout Britain on the 11th November, in memory of those who fell in the Great War. *D* produced letters to show that some members of the horrified public were determined to boycott his product, and called as witnesses greengrocers, who testified that sales of *D's* peas had slumped. *D* was allowed to rescind the contract, and was awarded £300 damages to cover loss of trade, and to reimburse him for £70 spent in advertising his regret, and his innocence.

47 *British Guiana Credit Corporation* v. *Clement Da Silva* (1965) 1 W.L.R. 248, 249 (P.C.).

48 Halsbury's Laws of England (3rd ed.) Vol. 25, p. 522 n(b); *Clayton & Jack Waller Ltd.* v. *Oliver* (1930) A.C. 209; *Marbe* v. *George Edwards (Daly's Theatre) Ltd.* (1928) 1 K.B. 269; see *Withers* v. *General Theatre Corporation Ltd.* (1933) 2 K.B. 538; *Tolnay* v. *Criterian Film Productions Ltd.* (1936) 2 All E.R. 1625; *Joseph* v. *National Magazine Co. Ltd.* (1959) Ch. 14; (1958) 3 All E.R. 52; (1958) 3 W.L.R. 366; see also *supra.*

49 Chitty: On Contracts, paragraph 1358 (22nd Edn.) para 1583 (24th Ed.). But see *Cox* v. *Philips Industries Ltd.* (1976) 1 W.L.R. 638. Damages for distress to employee for demotion. Maine and McGregor on Damages (1961), paragraph 52.

50 *Cox* v. *Philips Industries Ltd.* (1976) 3 All E.R. 161, 166; *Garvix* v. *Swan Tours Ltd.* (1973) 1 All E.R. 71 appld.

Non-pecuniary loss.—Where the breach of contract involves the plaintiff in substantial physical discomfort or inconvenience, the defendant will be liable in damages,[51] so also for physical injury causing pain and suffering,[52] and for loss of expectation of life.[53] In such a case defendant may be liable without negligence.[54]

In spite of the rule in *Baker* v. *Bolton*[55] damages for breach of contract may be claimable in cases of death e.g. for loss of services of wife where the cause of action is independent of death and death is merely an item of damages.[56]

Damages may also be awarded for nervous shock or actual breakdown in health suffered by the plaintiff if that was within the contemplation of parties as not an unlikely consequence of the breach of contract.[57]

The Court of Appeal has awarded damages[58] in a case of failure in breach of contract to provide holiday or other kind of entertainment or enjoyment; thus causing disappointment and mental distress caused by the breach of contract.

The defendants issued a brochure[59] promising various attractions of their tours. One of them was a House Party in Morlialp. The plaintiff accepted the offer of the tour for 15 days; but he found no houseparty, a deserted bar, no night life. He successfully sued for damages for mental anguish for loss of entertainment and enjoyment and was awarded £125.

Damages for injured feelings.—In some of the recent cases damages have been awarded for injured feelings. Damages have been awarded against a package tour operator for failure to provide a holiday accommodation of the standard contracted for the contractee and his family,[60] against a photographer failing to take photographs of a wedding, against an Airline[62] for failure to get guests to a wedding celebrations. But no extra damages awarded for distress and mortification to bride for delay in delivery of wedding dress.[63]

An employee was awarded damages against an employer for failure to promote him to a position of responsibility.[64] Damages for causing anxiety cannot be awarded in a contractual action.[65] Injured feelings must be distinguished from anxiety. No extra damages allowed for this breach.

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51 *Burton* v. *Parkerton* (1887) 2 Ex. 340; *Hobbs* v. *L.S.W. Ry.* (1875) 10 Q.B. 111; *McMohan* v. *Field* (1881) 7 Q.B.D. 591, 596-7; *Bailey* v. *Bullock* (1950) 2 All E.R. 1167.

52 *Grant* v. *Australian Knitting Mills* (1936) A.C. 85.

53 *Summers* v. *Salford Corporation* (1943) A.C. 283. See also *Griffin* v. *Pillett* (1926) 1 K.B. 17; *Porter* v. *Jones* (1943) 112 L.J.K.B. 173; *Kimber* v. *Willitt* (1947) K.B. 570; *Godley* v. *Perry* (1960) 1 W.L.R. 9.

54 Chitty: On Contracts para 1582 (24th Ed.).

55 (1808) 1 Camp. 493.

56 *Jackson* v. *Watson* (1909) 2 K.B. 193.

57 *Cook* v. *Swinfen* (1967) 1 WLR 45; (1967) 1 All E.R. 299.

58 *Jarvis* v. *Swan Tourist Ltd.* (1973) 1 Q.B. 233; (1973) 1 All E.R. 71; (1973) 3 WLR 954; See also (1973) 36 MLR 535; *Jackson* v. *Horizon Holiday Ltd.* (1975) 1 WLR 1468; (1973) 3 All E.R. 92; *Heywood* v. *Wellers* (1976) Q.B. 446; (1976) 2 WLR 101; (1976) 1 All E.R. 300. See observations of H.L. in *Photo Production Ltd.* v. *Securicor Transport Ltd.* (1980) 1 All E.R. 556. See also discussion in (1978) 52 ALJ 626.

59 *Jarvis* v. *Swan Tours Ltd.* (1973) 1 Q.B. 233 (C.A.); (1973) 1 All E.R. 71 folld: in *Cos* v. *Philips Industries Ltd.* (1976) 1 WLR 638; *Jackson* v. *Horizon Holidays Ltd.* (Holiday in Sri Lanka) (1975) 1 W.L.R. 1468; (1973) 3 All E.R. 92.

60 *Jarvis* v. *Swan Tours Ltd.* (1973) Q.B. 233.

61 *Dieson* v. *Sampson* (1971) S.L.T. 49 (Sh. Ct.).

62 *Claude* v. *East African Airline* (1964) E.A. 78.

63 *Serdenbach Inc.* v. *Williams* 361 p. (2nd) 185 (1961).

64 *Cox* v. *Phillips Industries Ltd.* (1976) 3 All E.R. 161.

65 *Cook* v. *Swinfen* (1967) 1 WLR 457; (1967) 1 All E.R. 299. See *Heymond* v. *Wellers* (1976) Q.B. 446 (Solicitors failure to pursue non-molestation action).

Mental Anguish.—The opinion of Lord Denning in cases of mental anguish has been adopted in Canada.[66] But the principle of remoteness continues to have a restraining influence and the doctrine of foreseeability in contractual standards has generally limited recovery of damages for mental anguish to the cases of enjoyment or where mental distress was a likely consequence of the defendant's breach.

The parties to a Contract can create for themselves special rights and obligations such as providing for themselves the measure of damages for breach.[67] S. 62 of the Indian Sales of Goods Act is a statutory recognition of this right.

It is open to parties to a sale of goods to provide their own measure of damages in case of breach of contract.[68] The damages for a breach of contract cannot be fixed merely on the basis of what in other cases was accepted as an equitable basis.[69]

Surreptitious market.—Surreptitious market is a market which is fed by persons who in breach of their covenants under a licensing system sell goods, purchased at controlled prices, at higher prices.[70]

The appellant, on buying a new American motor-car from the respondent dealers, entered into a special covenant with them as required by the Board of Trade under penalty, as a condition of issuing an import licence agreed not to resell the car within two years unless he first offered it back to the dealers at the original price less allowance for depreciation. In breach of covenant the appellant sold the car for a sum higher than the price paid by him. The dealers claimed the difference between the two figures as damages. The appellant contended that the covenant was illegal and unenforceable as it offended against the Control of Prices Act.

The special covenant was held not to be illegal because it was given for the privilege of being allowed to buy a new car, its purpose being to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public. It also held that the importers of the car were entitled to assume that the Price Controller knew of the special covenant and fixed the maximum price on that basis. The dealers were entitled in law to be put in as good a position as if the appellant had fulfilled his covenant and were entitled to buy a similar car at the market price. The rule applied even though the only available market was a "surreptitious market" which was fed by persons breaking their covenants. The dealers were therefore entitled to the sum claimed, i.e. the difference between the price in the surreptitious market and the control price minus the depreciation.[71]

Foreseeable and Remoteness of Damages.[72]—Remoteness of damage is a question of fact, and the only guidance the law can give is to lay down general principles.[73]

Damages may still be awarded even though precision cannot be arrived at in the calculation of the figure. In *Chaplin* v. *Hicks*[74] the plaintiff was on the short list in a beauty competition organised by the defendant, but was given no reasonable opportunity to appear at the final selection through the defendant's negligence. The Court of Appeal upheld the award to

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66 *Keko* v. *Esquire Pleasure Tours Ltd.* (1974) 3 WLR 406 (Man Co. Ct.); *Elder* v. *Koppe* (1974) 53 DLR (3rd) 705; (N.S.); *Lippett* v. *I.T.U. Loc.* 266 (1977) 71 DLR (3rd) 146 (B.C.S.C.); cf. *McNeill* v. *Forest Lawn Memorial Services Ltd.* (1977) 72 DLR. (3rd) 556 (B.C.S.C.) Contract: Cases & Commentaries by Christine Boyle & David Percy (1978) P. 688.

67 *Union of India* v. *Tribhuwandas Lalji* (1971) A.D. 120, 122.

68 *Firm S. Brindaban* v. *Brijlal* (1958) A.B. 291; *Lancaster* v. *J.F. Turner & Co.* (1924) 2 K.B. 222.

69 *Rajagopal Oil Mills* v. *Louis Drayfus & Co.* (1960) A.M. 388.

70 *Mouat* v. *Betts Motors Ltd.* (1959) A.C. 71, 82.

71 *Mouat* v. *Betts Motors Ltd.* (1959) A.C. 71 (P.C.)—a case from New Zealand.

72 See also under *Hadley* v. *Baxendale, supra.*

73 Per Lord Wright in *Monarch Steamship Co.* v. *A/B Karlshamns* (1949) A.C. 196, 223. For the respective functions of judge and jury in an English case, see *Mehmet Dogan Bey* v. *G.G. Abdeni* (1951) 2 K.B. 405, 411.

74 (1911) 2 K.B. 786, C.A.: (1911-12) All E.R. Rep. 224.

the plaintiff of £100 damages. This case was followed by the High Court of Madras in *Mariappa* v. *Anthonisami,*[75] where a deed of dissolution of partnership between *A* and *B* imposed an obligation upon *A* to assist *B* to obtain a one quarter share of the quota allotted under Government licence to the partnership. *A* in fact opposed the granting of a licence to *B,* and was held liable to *B* in damages, although the issue of the licence being within the Controller's discretion was only a possibility.[76]

A horse trainer induced the defendant who knew nothing about racehorses to buy a horse for him. The horse was leased to him for 3 years for training as a racehorse with the object of making profit, by winning prize money betting and giving information as to prospect of success to others. The defendant took away the horse from the plaintiff and the plaintiff brought an action for damages for breach.

The jury awarded £250 as damages. The plaintiff was held entitled to damages as he was deprived of something which had a monetary value[77] which was capable of being calculated in money. Damages for breach of agreement to enter into a contract can be awarded if there is a real loss or actual damage and not merely a probable or a possible one.[78]

An important question that arises is whether there is liability for the direct consequences of a breach of contract, even though the extent of the damage was not foreseeable. In a famous Court of Appeal case,[79] *D* hired *P*'s ship under a charterparty and loaded some petrol in tins. During the voyage the tins leaked and there was inflammable vapour in the hold. At a port of call, a stevedore, a servant of *D,* carelessly allowed a plank to drop into the hold. There was an explosion and the ship became a total loss. *D* was held liable to *P,* although it was found as a fact that an explosion could not reasonably have been anticipated to follow from the fall of the plank. This case is generally regarded as an authority in the law of tort, although even in this sphere it has been criticised, and has not yet been approved by the House of Lords. In England opinion is divided whether it applies to contract. In *Hambrook* v. *Stokes,*[80] Sargant L.J. expressed the view that it applied only where there was a contract, pointing to the existence of the charterparty. The view that it applies to contract as well as tort has been championed in learned articles by Lord Porter and Lord Wright.[81] The solution of the problem both in India and in England depends upon the construction to be placed upon the words "naturally in the usual course of things". The matter came before the Supreme Court of India in *Pannalal Jankidas* v. *Mohanlal.*[82] There a majority of the Court held an agent liable to his principal for "the direct consequences of his neglect" relying on s. 212, and referring with approval to the distinction between direct and remote damage drawn in *Re Polemis,* but not expressly mentioning s. 73. Patanjali Sastri J. (dissenting) considered that the rules laid down by s. 73 and s. 212 as to the measure of damages were the same, but that in the circumstances the damage arose neither "directly" nor "naturally in the usual course of things"

Foreseeable and remote damages.—In deciding whether damages claimed are too remote the test is whether the damage is such as must have been in the contemplation of parties as being a "possible" result of the breach. If it is, then it cannot be regarded as too remote.[83] The

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75 (1950) Mad. 697, 1950 A.M. 289.

76 See also *Otter* v. *Church* (1953) 1 W.L.R. 156.

77 *Howe* v. *Teefy* (1927) 27 S.R. (N.S.W.) 301, 307; *Chaplin* v. *Hicks* (1911) 2 K.B. 786 refd. to.

78 *Pravu Dayal* v. *Ram Kumar* (1956) A.Cal. 41; *Johnston* v. *Braham & Campbell* (1917) 1 K.B. 586; *Salvesen & Co.* v. *Rederi Akti Nordstjeram* (1905) A.C. 302.

79 *Re Polemis* (1921) 3 K.B. 560.

80 (1925) 1 K.B. 141, 164.

81 5 Camb. L.J. 176; 14 Mod. L.R. 393. They were the counsel for the unsuccessful defendants in *Re Polemis* itself, but extra judicially, and so far as Lord Wright is concerned from the bench itself (see *Bourhill* v. *Young* (1943) A.C. 92), they have upheld the decision of the Court. See also Professor Winfield in Pollock on Contracts, 13th edn. 542, and in Salmond and Winfield on Contract (1927), 506; Dr. Stallybrass in Salmond on Torts, 10th edn., 155. *Contra* Lord McNair in 4 Camb. L.J. 125; Professor Brierly in Anson on Contract, 20th edn., 366a; Wilson and Slade in 15 Mod. L.R. 458.

82 (1950) S.C.R. 979, 1951 A.S.C. 144, 1951 S.C.J. 149.

83 *Chaplin* v. *Hicks* (1911) 2 K.B. 786; (1911-13) All E.R. Rep. 224, 226; *Pravu Dayal* v. *Ram Kumar* (1956) A. Cal. 41 (possible result of the breach); *Hadley* v. *Baxendale* (1854) 9 Ex. 341; (1843-60) All E.R. Rep. 461 (Reasonablly supposed to have been within the contemplation of the parties when contract made).

damages are to be assessed on the basis of natural and probable consequences of the breach.[84] Actual knowledge of unseaworthiness must be shown, mere imprudence and carelessness is not knowledge.[85] In the case of breach of contract the aggrieved party is entitled to damages which naturally arise in the usual course of business. He is not entitled to compensation for remote or indirect loss sustained by him for not being able to carry out a contract of export, a fact of which the seller never was nor could have been made aware that contract being subsequent to the original contract with the seller.[86] If a passenger misses his engagement due to defective management in the reservation of seats, he is not entitled to damages at the punctuality of trains is not guaranteed and there is no contract to carry a passenger for a particular object. In this case the passenger missed his connection at a changing of trains station due to his seats not being booked.[87] Similarly where the train does not stop at a Railway Station as advertised and the plaintiff had to alight at the dead of night and walk a long distance with his family, no conveyance being available, the damages for inconvenience were not too remote.[88] If there is late delivery of goods due to misconduct of the Railway administration, the consignee is not entitled to compensation on account of fall in prices consequent upon the imposition of a Control Order, as it does not fall within section 73.[89] A breach of covenant of lease may give rise to a claim of damages fairly attributable to the breach and as a natural consequence of the same.[90] These damages would be the amount of mesne profits in cases where possession is not given.[91]

In a forest contract, the right of a contractor to remove the timber cut before the illegal termination is *de hors* the cancellation and is an independent right and cannot be claimed as damages.[92] Profit actually made on a sub-sale which is outside the contemplation of parties cannot be used to reduce the damages by a national loss in market rate but it is otherwise if it is within the contemplation of parties.[93] Where a contractor refuses to carry out the contract unless a new condition is acceded to, the other party is entitled to treat the contract terminated and claim damages which arise or parties know would naturally arise from the breach. But the principle of mitigation of damages applied.[94]

In assessing compensation payable under s. 70 and para 3 of s. 73 the Court will take into account[95] the compensation which the parties considered to be reasonable at the time the goods were delivered or at the time works were done. In the former case the rates to be considered are the market rates on the date of delivery. In the latter case the Court will consider the remuneration what other persons doing those work would have charged on the date the plaintiff rendered the service.

Remoteness of damages—Tort and Contract.—Reasonable foreseeability is a test of remoteness in the law of Torts; in cases of contract the House of Lords[96] had laid down a much higher degree of foreseeability i.e., a "serious possibility" or a "real damages" that the loss will occur. The result is to limit damages more in contract than in tort.

This point was further considered in *H. Pearson (Livestock) Ltd.* v. *Utley Ingham Co. Ltd.*[97] in which the defendant failed to see that the livestock feed supplied to the plaintiff was properly ventilated as a result of which several pigs of the plaintiffs died. It was held that the test laid down in the *Heron II case*[98] was satisfied as the defendant could have contemplated a serious possibility of the pigs getting ill.

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84 *Pravu Dayal* v. *Ram Kumar* (1956) A. Cal. 41; *Hadley* v. *Baxendale* (1854) 9 Ex. 341.
85 *Monarch S.S. Co.* v. *A/B Karlshamns* (1949) A.C. 196; (1949) 1 All E.R. 1, 4.
86 *Karsandas Thacker* v. *Saran Engineering Co. Ltd.* (1965) A.S.C. 1981.
87 *Monhindro Lal Sen* v. *Union of India* (1960) A.P. 411.
88 *Hobbs* v. *L.S.W. Ry.* (1875) 10 Q.B. 49.
89 *Kishan Lal* v. *Union of India* (1961) A. Raj. 289.
90 *Brahmdeo Narain Singh* v. *Notified Area Committee* (1965) A.P. 179.
91 *Purnanand* v. *Kamla Sinha* (1965) A.P. 39.
92 *Rattayya* v. *Venkataramayya* (1959) A.A.P. 551, 556; *Venkata Sastrulu* v. *Home Venkanna* (1920) A.M. 867.
93 *Biggin & Co. Ltd.* v. *Permanite Ltd.* (1951) 1 K.B. 422, 435; (1949) 2 All E.R. 859, 869.
94 *Namayya* v. *Union of India* (1958) A.A.P. 533.
95 *Great Eastern Shipping Co.* v. *Union of India* (1973) 2 Cal. 371; (1971) A. Cal. 150, 155.
96 *The Heron II* (1969) 1 A.C. 350, 414-415; also 382.
97 (1978) 1 All E.R. 525, 541.
98 *The Heron II* (1969) 1 A.C. 350, 414-415; also 382.

Novus actus: Third party intervention.—Another difficult question is the effect of a *novus actus interveniens* on the liability of the original contract breaker. In *Weld-Blundell* v. *Stephens*[99] Lord Sumner held that "even though *A* is in fault, he is not responsible for injury to *C*, which *B*, a stranger to him, deliberately chooses to do." *A* was an accountant, employed by *P* to investigate the affairs of a company. *P* wrote to *A* a letter containing defamatory statements concerning *C*. *A* carelessly left the letter lying about, and his manager *B* showed it to *C*. *C* recovered damages against *P*, and *P* failed to recover the damages from *A* in an action for breach of contract. Lord Sumner held that although the consequences were foreseeable by *A* nevertheless they were not direct. In two cases of tort, this view has been rejected by the Court of Appeal,[1] which held that despite the intervening deliberate act of a third party the original tortfeasor was still liable provided the intervention was foreseeable. It is submitted that the foreseeability test should also be the criterion in cases of pure contract. At least it is clear that if there are two co-operating causes of equal efficacy, one attributable to the contract-breaker, there is liability for breach of contract. In *Burrows* v. *March Gas Co.*[2] the defendant *D* carelessly supplied *P*, with a gaspipe containing a hole. *S*, the servant of a gasfitter employed by *P* on other work in his shop, approached the leak with a lighted candle, and *P*'s shop was damaged by the explosion. *D* was held liable to *P* in damages for breach of contract, as there was joint negligence by *D* and *S*, and both would be liable to *P*. in *Heskell* v. *Continental Express*[3] *H* agreed to sell goods, then in *C.E.*'s warehouse at Manchester, to *M* in Persia. He arranged shipping space and instructed *C.E.* to send the goods to the ship in the port of Manchester. *C.E.* carelessly failed to send them or to inform *H* of their failure. *S*, the shipowners' loading brokers, negligently issued a bill of lading, although the goods had never been received. *H* claimed from *C.E.* the fall in the market value of the goods between December 1946 when they should have been sent to the ship and March 1948 when *C.E.* returned them to *H*, and also for £10 he had expended in the meantime in endeavours to trace the goods. *C.E.* argued that the loss was due to a *novus actus interveniens*, the false bill of lading issued by *S*, which stifled inquiry. Delvin J. held that both causes were co-operating and of equal efficacy, and that *C.E.* were liable.[4] In *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co.*[5] under a contract between *A*, a steamship company, and *R*, elevator owners, *A* was to deliver by water a cargo of corn to *R*'s elevator at Port Colborne, and the ship was to proceed to the elevator immediately to lighter. The ship arrived on Friday, but was still not unloaded, as *R*'s elevator was full, late on Monday night, when the water in the berth was lowered by the wind and the ship settled on the bottom. This lowering of the water was known to the parties to occur from time to time, and *R* had stilled *A*'s fears on the subject by asserting that even if the water lowered, the ship was as safe in the berth as it would be in *R*'s office. Unknown to either party, there lay on the bottom of the berth a large anchor that must have been dropped by some other vessel. When *A*'s ship settled, it was holed on the anchor, and the damage was very extensive. The Privy Council, in an appeal from Ontario, held that *R* was liable for breach of contract for the whole damage, in that grounding was the very thing that it was anticipated might occur, and the precise nature of the damage thereby resulting was immaterial. The case differs from *Re Polemis* in that the damage was of the same kind as was foreseen viz. damage by grounding, whereas in *Re Polemis* damage by fire could not be anticipated from the dropping of the plank, but only damage say to the ship's paintwork. There is, however, the element of *novus actus* not present in *Re Polemis*. It appears to be another instance of two co-operating causes of equal efficacy.

The plaintiff was an independent contractor working for the defendant, who were to supply the necessary equipment, but failed to supply a step ladder, in the absence of which the plaintiff used a folded trestle. The plaintiff suffered injury as a result of the trestle slipping.

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99 (1920) A.C. 956, 986.
1 *Stansbie* v. *Troman* (1948) 2 K.B. 48; *Davies* v. *Liverpool Corporation* (1949) 2 All E.R. 175.
2 (1872) L.R. 7 Ex. 96.
3 (1950) 1 All E.R. 1033.
4 He had held that *S* was not liable, as he owed no duty to *H*.
5 (1924) 41 T.L.R. 21.

The defendant was held not liable for damages as the negligence of the plaintiff had broken the chain of causation in the links leading to the damage.[6] The phrase "negligent breach of contract", though described as unfortunate, was used by Greer L.J. to mean a breach of the term not to be negligent.[7]

A boiler was sold to the plaintiff company by the defendants who knew the boiler was required for the plaintiffs for laundry business and for immediate use. In dismantling by a contractor, a third party, the boiler was damaged and there was delay in repairing it.

The plaintiffs were held entitled to loss of profits as defendants as reasonable persons had means of knowledge of the purpose of the boiler and the loss that the delay would cause and the fact that the boiler constituted a part of a profit-making machine was significant in so far as it bore on the capacity of the defendants to foresee the consequences of non-delivery.[8]

A lessee in breach of the contract of lease sublet the premises to a person for turpentine distillery and the premises were burnt down;

the lessor was held entitled to damages for loss due to fire.[9] Goods to be shipped from England were delayed and when they reached Australia a federal tariff came into operation. A claim for damages on account of the increase arising out of this tariff was held not to have been within the contemplation of parties. The test laid down was: "Was the damages a consequence of what might fairly have been contemplated."[10]

The plaintiff *A* purchased steel in Belgium from *B* in Belgium at 7555 Fr./ton and sold it to *C*, the defendant, in London at 8025 Fr./ton. An American firm at the instance of the buyers was to supply the finance for purchasing from *B*. The credit was never opened and *C* repudiated the contract. In an action by *A* against *C* for breach of contract and loss of profit.

the Court of Appeal held that the damages were foreseeable. The buyers being aware that the sellers could not obtain the goods unless the letter of credit was provided, the sellers were entitled to loss of profit which they would have made on the sale to the buyers, that being a loss which at the time of the contract was foreseeable, reasonable and therefore could be recovered.[11] But any damages paid by *A* to *B* was a special loss not within the contemplation of parties, as the buyers had no reason to suppose that on a rising market the seller *B* would have any claim against *A*.[11] Damages, even if they are the result of impecuniosity of the sellers, are not, as a matter of law too remote. They depend on whether they were foreseeable or not.[12]

The plaintiff and defendant dissolved their partnership and the defendant agreed to pay £1000/- to the plaintiff on a particular date in lieu of plaintiff's share. The plaintiff on the basis of this agreement entered into a contract of purchase of a farm. The defendant failed to pay by the due date and paid £7200/- a few months later. The plaintiff had to raise the balance money by mortgage for which he had to pay interest and cost of mortgage. In an action against the defendant the plaintiff was held entitled to recover the balance and interest paid by him, also cost of the mortgage; as not being too remote or enforceable and that it was a money claim.[13]

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6 *Quinn* v. *Burch Bros. (Builders) Ltd.* (1966) 2 W.L.R. 430, 438.
7 *Grein* v. *Imperial Airways Ltd.* (1937) 1 K.B. 50; (1936) 2 All E.R. 1258 (C.A.).
8 *Victoria Laundry Ltd.* v. *Newman Industries Ltd.* (1949) 2 K.B. 528; (1949) 1 All E.R. 997.
9 *Lepla* v. *Rogers* (1893) 1 Q.B. 36.
10 *Emu Gravel & Road Metal Co.* v. *Gibson* (1903) S.R. (N.S.W.) 204, 215.
11 *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* (1952) 2 Q.B. 297, 307; (1952) 1 All E.R. 970.
12 *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* (1952) 2 Q.B. 297, 306; (1952) 1 All E.R. 970, 975; *Monarch S.S. Co. Ltd.* v. *Karlshamns A/B* (1949) A.C. 196; (1949) 1 All E.R. 19 refd. to.
13 *Wadsworth* v. *Lydall* (1981) 2 All E.R. 401, 405; *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1893) A.C. 429, disting; *Lamb* v. *London Borough Camden* (1981) 2 All E.R. 408 (Case in Tort).

Notice to the defendant that an extraordinary loss will occur if he is in breach of contract does not *per se* involve the defendant in liability for such loss.[14] But this rule was not accepted in *Frank Hauser* v. *Dykes Pty. Ltd.*[15] by Sholl J.

The defendants printed and supplied notes for the plaintiff bank. They in breach of contract, printed from the same plates or plates made from the same dies other notes which they supplied to fraudulent persons who put them in circulation. They were all V. de G. notes. The bank withdrew the circulation of those notes and exchanged new notes for authorised and unauthorised notes and sued the printers for damages for breach of contract.

The bank was held entitled to the sterling equivalent of the unauthorised notes and the charges for printing the V. de G. notes rendered useless. Despite the fact that the notes were not convertible into gold they represented so much purchasing power and the bank could accept them for repayment of debts.[16] A person is not obliged to minimise his damages for a breach of contract if by so doing he would injure his commercial reputation and therefore the bank was justified in exchanging new notes for authorised and unauthorised V. de G. notes.[16]

A supplied goods to Dutch Government and the Government supplied it to third parties. The goods were found to be unsatisfactory and Government refused to pay. In arbitration proceedings between *A* and the Government, a compromise was arrived at and *A* accepted liability for £43,000. *A* then claimed damages from his sellers, the defendants.

The compromise was held not to be a foreseeable consequence of the breach by the defendants or a consequence thereof in a legal sense and therefore irrelevant to the issue of damages and the amount £43,000 cannot be the measure of damages.[17]

Where a defendant could not complete his contract of giving vacant possession of his house to the plaintiff on the date specified because a third party could not complete his contract of giving vacant possession to the defendant and the plaintiff had to incur expenses for the period the plaintiff was not given possession. The House of Lords held that even though time was not of the essence of contract, the contract must be construed in accordance with the clear terms thereof and the plaintiff was entitled to damages for expenses incurred.[18]

Defends Carelessness.—If the defendant owes a contractual duty to take care so as not to permit the intervention of a third party[19] he will be liable if he fails to do so. Thus a customer owes a duty to the bank to draw his cheque carefully so as not to facilitate fraud. Where the customer drew a cheque carelessly so as to make it possible to alter the amount and a third party forged an increase in the amount, the customer was held liable to the Bank for this increased amount despite the fact that this was caused through a crime.[20]

Solicitors negligence.—The voluntary act of a third party will break the chain of causation between the breach and the loss suffered by the non-defaulting party, but this will depend on the appraisal of the circumstances, by the Court.[21] Thus the negligence of a Solicitor creates a risk for the client but a subsequent error of judgment by counsel advising the client may not break chain of causation resulting from the solicitors' negligence.

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14 *Horne* v. *Midland Ry.* (1873) 8 C.P. 131; *British Columbia Saw Mill Co.* v. *Nettleship* (1868) 3 C.P. 49.

15 (1960) V.R. 376, 380; see also *Keshavlal Brothers* v. *Diwanchand,* 50 I.A. 142; *Horne* v. *Midland Ry.* (1874) 8 C.P. 131 dist.

16 *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1932) A.C. 452; (1932) All E.R. Rep. 181.

17 *Biggin & Co. Ltd.* v. *Permanite Ltd.* (1951) 1 K.B. 422; (1950) 2 All E.R. 859, 864, 865; *Fisher* v. *Val de Travers Asphalte Co.* (1876) 1 C.P.D. 511 dist.

18 *Rajneri* v. *Miles* (1980) 2 All E.R. 145. 153-155.

19 *London Joint Stock Bank Ltd.* v. *Macmillan* (1918) A.C. 777; (1918-19) All E.R. Rep. 30. See also *de la Bere* v. *Pearson* (1908) 1 K.B. 280. cf. *Cobb* v. *G.W. Ry.* (1894) A.C. 419.

20 *London Joint Stock Co.* v. *Macmillan* (1918) AC 777. (1918-19) All E.R. Rep. 30.

21 *Cook* v. *S.* (1966) 1 All E.R. 248. (1966) 1 WLR 635, 642 Court of Appeal in (1967) 1 WLR 547 (did not discuss this aspect cf. *East Ham Corp.* v. *Bernard Sunley & Sons* (1966) A.C. 406 (negligence of an architect): (1966) 3 All E.R. 619; (1965) 3 WLR 1096.

Third party action feared.—In a case where the defendant refused to deliver goods which were lying in the defendant's godown to the plaintiff fearing that the delivery of goods will lead to industrial action against the defendant the Court held[22] that that amounted to conversion and the plaintiff was entitled to damages for non-delivery thereof an indefinite period—long or short—and the defendant's fear of industrial action was no ground for their refusal to release the goods to the plaintiff.

Foreseeable damages: Special circumstances.—There was at one time considerable authority for saying that, as to damages which could not be foreseen without information of special circumstances, notice of any such circumstances at the time of entering into the contract would not suffice to make the defendant liable, but there must be in effect, if not in terms, an undertaking to answer for resulting special damages.[23] But this view was afterwards distinctly rejected by the Court of Appeal in England. "It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid".[24] Even without this authority the opinion in question could not be entertained in India, being inconsistent with the plain terms of the section. Further discussion of it would, therefore, be useless here.[25] See notes to illustrations (h) to (j) above.

So far as practicable, "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly." It is even his duty to take all reasonable steps to mitigate the loss consequent on the breach; and then the effect in actual diminution of the loss he has suffered may be taken into account, and this apart from the question whether it was his duty to act.[26] "The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances," and one test is "what a prudent person uninsured," i.e. not having a claim for compensation or indemnity on any one, "would do under the same circumstances".[27] It is not a reasonable thing, for example, to hire a special train to save an hour or so of time when there is no particular reason for being at one's destination at a certain hour; and expense so incurred cannot be recovered as damages.[27] If a buyer disappointed to his goods can buy in the market at a sum equal to or less than the contract price, he has suffered no loss and can recover nothing (under English law merely nominal damages).[28]

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22 *Howard E. Perry & Co. Ltd.* v. *British Railways Board* (1980) 2 All E.R. 579 at page 583, 584. (Ch. D.) (1874) 9 Ex. 86 explnd.

23 *Horne* v. *Midland R. Co.* (1873) L.R. 8 C.P. 131, Ex. Ch.; see especially the judgment of Blackburn J. Willes J. had more than once intimated a like opinion. The learned editors of Benjamin on Sale still adhere to the view that a special contract is necessary: 8th edn. (1950) 975.

24 *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B.D. 670, at p. 677, per Cotton L.J. The party "does not enter into a kind of second contract to pay damages": Bramwell L.J. at p. 674, "an agreement to pay damages does not form part of the contract": Brett L.J. at p. 676. This is confirmed by *Hammond & Co.* v. *Bussey* (1887) 20 Q.B.D. 79; see especially per Bowen L.J. at p. 97; and the later case of *Agius* v. *Great Western Colliery Co.* (1899) 1 Q.B. 413, assumes the opposite opinion to be untenable. The learned editors of Mayne on Damages, in which book the theory of an auxiliary contract to pay special damages appears to have been first propounded, do not seem to us to have succeeded in explaining away these decided and unanimous utterances; neither do the learned editors of Smith's Leading Cases (notes to *Vicars* v. *Wilcocks* in vol. ii).

25 In *Keshavlal Brothers & Co.* v. *Diwanchand & Co.* (1923) 50 I.A. 142, 152; 47 Bom. 563; 74 I.C. 396; 1923 A.P.C. 105, the dicta now cited seem not to have been before Lord Atkinson when, delivering the judgment of the Privy Council, he said: "The authorities in England seem to go to the length of holding that notice to *C* of the special purpose for which *A* requires the goods is not enough; that to make *C* liable for the additional damage the must have, expressly or impliedly contracted to run the additional risk" citing *(Horne* v. *Midland Ry. Co.* (1874) L.R. 8 C.P. 131) *supra,* noté 78.

26 *British Westinghouse, &c. Co.* v. *Underground Electric, &c. Co.* (1912) A.C. 673, see per Lord Haldane at p. 689.

27 *Le Blanche* v. *L. & N.W.R. Co.* (1876) 1 C.P.D. 286, per James L.J. at p. 309, and Mellish L.J. at p. 313; approved by the Privy Council in *Erie County Natural Gas, &c. Co.* v. *Carroll* (1911) A.C. 105.

28 *Erie County &c. Co's Case* (1911) A.C. 105.

Seller's Refusal to deliver goods to the buyer.—In England the Sale of Goods Act, 1983,[29] provides as follows:—

"(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of goods at the time or times when they ought to have been delivered.[30] or, if no time was fixed, then at the time of the refusal to deliver."

S. 57 of the Indian Sale of Goods Act follows sub-s. (1) of the section now quoted, but does not add to or amend s. 73 of the Contract Act. The other sub-sections, though not of positive authority in India, may be useful as a compendious and well-considered statement of the existing rule.

As to the difference between contract and market price, it may be regarded as an application of the principle last stated as to the disappointed party's right to fulfil the contract himself at the defaulting party's cost, so far as it can reasonably be done; and on this very principle the rule is not literally applied in the case of an anticipatory breach by repudiation of the contract.[31]

In the absence of any more specific rule applicable to the case, damages for the breach of a contract to perform any specified work are to be "assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed," not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same.[32]

Matters of external and collateral compensation, as by insurance,[33] or by an access of profit to some only of plaintiffs suing jointly in another transaction which but for the breach of contract would not have taken place,[34] or through a new contract with a third person[35] are not taken into account for the purpose of reducing damages. The explanation to the present section does not appear to contradict this rule. The article on Damages by the late Blake Odgers, K.C., in the Encyclopaedia of the Laws of England, may be referred to as giving a learned and careful summary of the whole subject down to its date, 1939, 3rd ed., vol. 4. We may add that the English rules appear to have been adopted not merely in jurisdictions under the British flag but also under systems of law differing generally from the Common Law and from one another.

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29 S. 51.

30 In India also the date of breach is the material date; a seller who holds on after the buyer's default can recover no further loss, nor is he liable to allow for improvement due to later change in the market price: *Jamal* v. *Moolla Dawood Sons & Co.* (1916) 1 A.C. 175; 43 I.A. 6; 31 I.C. 949; *Bachkraj Amolakchand* v. *Khupchand Narsingdas* (1948) Nag. 867, 1949 A.N. 199; when goods are to be delivered on arrival in Madras, the date of delivery is when they arrive in Madras: *B. Muniswamy Chetty & Co.* v. *D. Muniswamy Chetty & Co.* 1944 A.M. 418.

31 *Millet* v. *Van Heek & Co.* (1921) 2 K.B. 369, C.A., see heading "measure of damages" under s. 39.

32 *Wigsell* v. *School for Indigent Blind* (1882) 8 Q.B.D. 357, at p. 364, following *Robinson* v. *Harman* (1848) 1 Ex. 855, Finch, Sel. Ca. 753, and *Lock* v. *Furze* (1866) L.R. 1 C.P. 441. But there is a special rule as to covenants to repair.

33 *Bradburn* v. *G.W.R. Co.* (1874) L.R. 10 Ex. 1.

34 *Jebsen* v. *E. & W. India Dock Co.* (1875) L.R. 10 C.P. 300.

35 *Joyner* v. *Weeks* (1891) 2 Q.B. 31, C.A.: *Williams Bros.* v. *Ed. T. Agius* (1914) A.C. 510, where the House of Lords conclusively settled the rule. "It is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price".

No Breach.—The defendant sold two trucks to the plaintiff on priority basis but failed to deliver them due to the manufacturer not delivering any truck to the defendant during the relevant period because of the prohibitory orders of the Government. It was held[36] that in the circumstances there was no breach of contract by the defendant.

Total failure of consideration in sale of motor-cars.—The following cases illustrate the application of the principle of total failure of consideration to cases of sale of motor-cars.

A motor-car sold to the plaintiff was found to be stolen property and taken possession of by the police. The defendant was held liable for the price received from the plaintiff as there was total failure of consideration. The fact that the plaintiff used the car before it was found to be stolen is irrelevant.[37]

In *Yeoman Credit Ltd.* v. *Apps,*[38]

a car taken on hire-purchase was found to be unsafe and unroadworthy. On the hirer refusing to pay the instalments after user for some time, it was repossessed by and sold for £210 by the owner who then sued for arrears of instalments and for damages.

The owner was held guilty of breach of a fundamental obligation. Therefore, the claim was dismissed except for the instalment due before the hirer rejected the car. And the hirer was held

"entitled to £100 damages to make good the car, for the use of which he was paying and which he had ultimate right to buy—a right which he had now lost".

Similarly in *Charterhouse Credit Co. Ltd.* v. *Tolly,*[39] a secondhand car taken by the hirer was completely unroadworthy and unfit for use and the hirer did not pay the balance of instalments though he had earlier reaffirmed the contract by asking for time; thereupon for non-payment of instalments by the hirer, the owners repossessed the car, sold it and sued for the balance of hiring charges minus the price of the car recovered on sale and the hirer claimed damages.

The Court of Appeal held that the owner was in breach of the fundamental obligation and that since the owner had terminated the agreement and there was no repudiation by the hirer, only the unpaid hiring charges upto the date of termination were recoverable from the hirer. In this case the clause authorising repossession was held not to be available in view of fundamental breach. The hirer was held entitled to damages.[39] The appropriate measure of damages of the hirer in such a case is not the cost of repairs in conformity with the general principle of *restitutio in integrum,* but the reimbursement to the hirer of all moneys paid in respect of the car less deduction for the use of it, i.e. the initial deposit, the instalments paid.[40]

Explanation to s. 73: "means which existed," etc.—This explanation has caused considerable difficulty in practice, the words "means which existed of remedying the inconvenience" have seemed obscure. No similar words are known to occur in English authorities, but the framers of the Act appear to have had in view the class of cases where, as we have just seen,[41] the damages recoverable for consequential expenses are limited by the test of what a prudent man might have reasonably done if the whole expense was to fall on himself. The words are also sufficient to cover the case of a party who omits to take natural and obvious means of diminishing the loss incurred by the other party's failure to perform his contract. It

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36 *Utkal Automobiles (Pvt.) Ltd.* v. *Braja Prasad Roy* (1975) Cutt. 440; (1976) A.Or. 15, 18.

37 *Rowland* v. *Divall* (1923) 2 K.B. 500; 1923 All E.R. Rep. 270 refd. to in *The Julia* (1949) A.C. 293, 323.

38 (1962) 2 Q.B. 508; (1961) 2 All E.R. 281.

39 (1963) 2 W.L.R. 1168, 1174 (C.A.): (1963) 2 All E.R. 432; *Financings Ltd.* v. *Baldock* (1963) 1 All E.R. 443; (1963) 2 W.L.R. 359 (C.A.) applied; where the facts were similar. See *Supra* under fundamental breach.

40 *Charterhouse Credit Co. Ltd.* v. *Tolly* (1963) 2 W.L.R. 1168, 1177, 1178; *Yeoman Credit Ltd.* v. *Apps* (1962) 2 Q.B. 508; (1961) 3 W.L.R. 94 dist.

41 Pp. 548 *sqq.*

seems on principle that in such a case consequential damage which might have been avoided by the exercise of common intelligence and prudence is not recoverable; thus, if one has to replace goods that have not been delivered in time, and has recklessly or stupidly bought them at an excessive price, the seller in default remains chargeable only with the difference between the contract and the normal market price; and default in building a wall does not entitle the promisee to stand by doing nothing and then recover for loss which he might have prevented by reasonable diligence.[42] Where a tenant who has promised to pay Government revenue and cess has failed to pay it, the landlord on notice of intended sale of property by Government should pay the arrears and save the property from sale. He is not entitled to stand by and allow the property to bé sold and then after purchasing it to file a suit to recover the purchase price as damages from the tenant.[43]

The rule must, of course, be applied with discretion; a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence; much less can he be expected to warrant success where the result of diligent endeavour is in its nature doubtful. It has been held that the injured party is not obliged, even under an indemnity, to embark upon a complicated and difficult piece of litigation against a third party.[44]

If goods are purchased for delivery in England, and on delivery prove to be unmerchantable, the buyer is not bound to go hunting the globe to find similar goods and have them shipped to arrive some months after the contract date; it might be different if such goods were available as near as France.[45] An unusual situation arose in *Macrae* v. *Swindells*.[46]

There *D* negligently damaged *P*'s Standard car, and lent him a Morris car while the Standard was being repaired. The Morris was wrecked through the negligence of *P*'s servant, and ultimately *D* obtained judgment against *P* for its value. Repairs on the Standard were not completed until months after the Morris was damaged. For this period *P* hired another car from *X* and claimed this amount from *D*.

Barry J. held that the fact that the Morris ceased to be available because of the negligence of *P*'s agent was irrelevant, and that *P* was entitled to recover from *D* the hire charges he had to pay to *X*. Although *P* was under a duty to mitigate damages by using the Morris, this duty came to an end when the car was destroyed, and the reason for the destruction was immaterial. This decision seems to be correct. It has to be determined why *P* had no motor car for the two months between the destruction of the Morris and the return of the Standard. It seems that the original negligence of *D* in damaging the Standard and the intervening negligence of *P*'s servant *Y* were co-operating cause of equal efficacy, and, therefore, *prima facie P* should be entitled to recover against *D* or *Y*.[47] Does it make any difference to *D*'s liability that *Y* was *P*'s servant acting in the course of his employment? It seems from *Burrows* v. *March Gas Co.*[48] that this makes no difference[49] on the ground that in an action in contract it is only the negligence of the plaintiff himself that is material.[50]

The principle is that if the buyer had a reasonable opportunity of mitigation of damages by buying the goods at a lower price after the repudiation but before the date of performance a reduction of damages may be appropriate.[51] But a person is not expected to minimise the loss

42 *Ramkumar* v. *Shankar Dutt* (1928) 108 I.C. 433 (the case belongs here, not to the head of remoteness of damage as supposed); *Karim Bux* v. *Devi,* 1933 A.A. 511; (1933) All L.J. 670.
43 *Dhanu Lal* v. *Kuldip Narayan,* 1940 A.P. 88; 186 I.C. 852.
44 *Pilkington* v. *Wood* (1953) Ch. 770, 777; (1953) 2 All E.R. 810; *Beard* v. *Porter* (1948) 1 K.B. 321, 324.
45 *Lesters Leather and Skin Co. Ltd.* v. *Home & Overseas Brokers Ltd.* (1948) 64 T.L.R. 569.
46 (1954) 1 W.L.R. 597.
47 See *Heskell* v. *Continental Express* (1950) 1 All E.R. 1033 (facts *supra*).
48 (1872) 7 Ex. 96 (facts *supra*).
49 Per Cockburn C.J. delivering the judgment of the Exchequer Chamber. In *Burrows* the negligent person was not even the servant of the plaintiff, so that the learned judge did not deal expressly with the situation.
50 In the lower court, Martin B. expressly held that the negligence of the plaintiff's servant is immaterial in contract: L.R. 5 Ex. 67, 72. See generally Glanville Williams on Joint Torts, 214-222.
51 *Garnac Grain Co. Ltd.* v. *Faure & Fairclough* (1967) 3 W.L.R. 143, 152; *Hochester* v. *De La Tour*

at the expense of his commercial reputation.[52]

In this connection may be noted the observations of the Privy Council in *Jamal* v. *Moola Dawood Sons & Co.*[53] "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect.[54] But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth* v. *Lyall*[55] is an illustration of this. But the fact that by reason of the loss of the contract which this defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the later contract." In *Jamal's Case*[53]

the plaintiff sold certain shares of the defendant to be delivered on or before 30th December, 1911. The shares were tendered on 30th December, but the defendant declined to take delivery or pay for them. The difference between the contract price and the market price on 30th December, that is, the date of the breach, amounted to Rs. 1,09,218. Between 28th February, 1912, and August, 1912, the plaintiff sold the shares in a rising market, thus realising more than if he had sold on 30th December, 1911, namely, a sum only of Rs. 79,862 less than the contract price. In March, 1912, the plaintiff sued the defendant on the contract, claiming Rs. 1,09,218. The defendant contended that he was entitled to the benefit of the prices actually obtained in mitigation of damages, and the plaintiff was only entitled to recover Rs. 79,862;

this contention was successful in the then Chief Court of Lower Burma. But on appeal the Privy Council held that the measure of damages was the difference between the contract price and the market price *at the date of the breach*.

"If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises".[56]

The English Court of Appeal followed this case in *Campbell Mostyn Ltd.* v. *Barnett*.[57]

There *D* agreed to buy 500 tons of ham from *P* in January 1951, delivery to be made from March to June. Delivery of 350 tons was not made until August, and *D* refused to accept delivery as it was out of time. A trade arbitration followed, and an award was made against *D*. *P* later sold the ham at a price above the contract price, although at the time of *D*'s refusal to accept, the market price was below the contract price.

D was nevertheless held liable for the difference between the market price and the contract price at the time of *D*'s refusal.

The duty to minimise damages may be removed by an express clause in the contract. In *Ralli Brothers* v. *Bhagwan Das*[58] *P* ought to have resold goods refused by *D* in May soon afterwards as the market was falling, but unreasonably waited until November. *P* was held to be protected by a clause in the contract authorising him in the event of breach of contract to resell at such time as in his uncontrolled discretion seemed desirable, and precluding an objection on behalf of the buyer that such resale was carried out after an unreasonable lapse of time. The

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(1853) 2 E. & B. 691, 692; *Frost* v. *Knight* (1872) 11 Exch. 111, 113, *Roper* v. *Johnson* (1873) 8 C.P. 167; *Melachrins* v. *Nikall & Knight* (1920) 1 K.B. 693; *Province of West Pakistan* v. *Saaz & Co.*, P.L.D. (1964) 1 S.C. 598, 632 (Pak) (A case where seller delayed the sale 2 ½ months he had to bear loss due to deterioration in quality and fall in prices).

52 *Banco de Portugal* v. *Waterlow* (1932) All E.R. Rep. 181; (1932) A.C. 452 *James Finlay & Co.* v. *Kwich Hoo Tong* (1929) K.B. 400 appd. both quoted with approval in *Lachia Setty & Co. Ltd.* v. *Coffee Board* (1981) A.SC. 162, 168.

53 (1916) 43 I.A. 6 at p. 10; 43 Cal. 493, at p. 502; 31 I.C. 949.

54 Later example, *Arjundas Hariram* v. *Secry. of State* (1924) 85 I.C. 786; 1925 A.Cal. 737.

55 (1830) 7 Bing. 169.

56 43 I.A. 6, at p. 10; 43 Cal. 493, at p. 502; *Bachhraj Amolakchand* v. *Khupchand Narsingdas* (1948) Nag. 867, 1949 A.N. 199.

57 See Times Newspaper, 10th February 1954; (1954) 1 Lloyds Rep. 65.

58 (1944) Lah. 578.

duty may also be removed by the conduct of the defendant subsequent to the breach in insisting that he will shortly perform his contract.[59]

A agrees to let his house to *B* at a certain rent. *B* refuses to take the house, and *A* sues *B* for damages. It is reported to have been held in the Punjab that the measure of damages is the loss of rent suffered by *A* after deducting such sum as *A* could recover from another person by way of rent by making reasonable efforts to secure another tenant.[60] We do not think the Court can have intended to lay down this or any like general proposition; reasonable efforts to secure a tenant do not produce any rent until an actual tenant is found, and the interval may be considerable. The probability of such effort succeeding within a reasonable time must obviously depend on local and often on temporary circumstances.

At the beginning of the cotton season *A*, a cotton merchant, and *Z*, a millowner, agree that during six months *Z* shall put his mill at *A*'s disposal at a fixed rate in order to gin cotton, which *A* contemplates buying, and on his part agrees to procure and supply to the mill. Before *A* has supplied any cotton, and without any unreasonable delay on his part, *Z* repudiates the contract.

A is entitled to recover damages from *Z* for his estimated loss of profit; he is not bound to buy and tender to *Z*'s mill cotton which he knows would be refused.[61]

In re Vic Mill, Limited[62] is an important decision of the Court of Appeal.

P claimed damages from *D* for loss of profit on *D*'s order of spinning machines to be manufactured by *P*. *D* repudiated the order at a time when four machines had been made, and the rest were not begun. Somewhat different considerations apply to the made and the unmade machines, and they merit separate treatment. As to the made machines, there was no available market as they had been made to a particular specification. *P* retained these machines for some time, made some alterations costing £5/-,and sold them to *X*, a new customer, for £23/- below the price *D* had agreed to pay. *D* argued that *P*'s damages were limited to £28/-,

but the Court held that *P* was entitled to the profit he would have made on *D*'s order for the four machines, as *X* was not a substitute for *P*, for had *D* not repudiated *P* would have had both orders and both profits. This decision was followed in *Thompson* v. *Robinson*.[63]

There *R* agreed to buy a new Standard car from *T*, who was a retail motor dealer. Then *R* changed his mind, and *T* returned to his supplier *S* the car he had obtained for *R*. There was no available market for such a car, as the supply was greater than the demand. *T* claimed £60/- damages for his loss of profit, but *R* pleaded that as *S* had accepted the car back without any claim *T* had suffered no damage.

Upjohn J. held for *T*, as he had lost one sale. He had acted reasonably in returning the car to *S*. He could not sell it in the market for what it would fetch, because the manufacturers did not permit the sale of new cars below the list price. If *T* had kept the car until another customer appeared, *R* would still have been liable to him as the new customer would be an additional not a substituted one, though it was of course conceded that had *T* had a waiting list for such cars *R* would be liable only for nominal damages.

As to the unmade machines in the case of *In re Vic Mill*,[62] it was argued for *D* that allowance should be given for profits made on other contracts on which *P* had been engaged. The Court rejected this plea, holding that there was no evidence that *P*'s factory was working to capacity, or that if he had executed *D*'s order he could not have performed the other contracts. The Court awarded *P* damages for the loss of profit he would have made on the manufacture of the machines.[64] A similar question came before the House of Lords in *Hill* v.

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59 *Smeed* v. *Foord* (1859) 28 L.J.Q.B. 178—where *D* who had agreed to sell *P* a threshing-machine to get *P*'s harvest, but was late in delivery, kept assuring *P* that it would shortly be delivered, thus rendering it unnecessary for *P* to take steps to hire or buy a substitute.

60 *Lachmi Narain* v. *Vernon* (1906) Punj. Rec. No. 137.

61 *Ramgopal* v. *Dhanji Jadhavji Bhatia* (1928) 55 I.A. 299; 55 Cal. 1048; 111 I.C. 480; 1928 A.P.C. 20.

62 (1913) 1 Ch. 465.

63 (1955) 1 All E.R. 154.

64 Followed in *Samuel Fitz & Co.* v. *Standard Cotton Co.* (1946) Mad. 192, 1945 A.M. 291, but no question of the duty to mitigate damages was raised.

Showell.[65] Their Lordships ordered a new trial so that evidence might be admitted to prove that the plaintiff's factory was fully employed on other work as profitable. Lord Dunedin dissented on the ground that the defendant would fail, even if he established his two pleas, first the plaintiff's factory was fully occupied, and second that the defendant's order could not be executed elsewhere. His Lordship observed that the plaintiff might be able to extend his factory, or work extra shifts, or farm out of the *new* work on advantageous terms. His Lordship's judgment lucidly illustrates the difficulties facing a defendant, who seeks to show that a manufacturer has minimised the damage arising from the repudiation of an order. It is submitted that his Lordship's reasoning is a timely warning that Courts, in applying the explanation to s. 73, should take care to see that they have put the plaintiff in the same position as if the contract had been performed, and have not been over generous to the contract-breaker by too severe an application of the rule that the plaintiff must take reasonable steps to mitigate damages.

Tax deduction—several of ways of performing contracts—wrongful dismissal—Bonus.—In ascertaining the plaintiff's loss, his tax liability including surtax in acquiring the lost earnings must be deducted from his loss.[66] The principle of damages is that a party suffering loss is entitled to be compensated for his net loss i.e. after taking into account the income tax and surtax. Generally speaking where there are several ways in which a contract may be performed. that mode is adopted which is the least profitable to the plaintiff and the least burdensome to the defendant.[67]

Principle for assessing damages for wrongful dismissal.—In assessing damages for wrongful dismissal the court has to make two calculations: (1) what the position would have been if the old employment had run its full course; and (2) what the plaintiff has done since his dismissal. It is his duty to act reasonably in mitigation of damages. If he has acted reasonably and obtained new appointment the court must calculate the sums received for his work during the run-off period. If he has not acted reasonably the court must calculate the sums which he might reasonably have been expected to receive if he had acted reasonably. The damages then are assessed by giving him the sum which he would have received in his old employment less the sum deducted in mitigation of expenses.[68] In regard to mitigation of damages, a servant would not be acting unreasonably by seeking employment at a level comparable to that of his previous salary nor in not accepting a post of lower rank in the service of his master.[69] But the court did assume for the purpose of assessing damages a sum of money at which the servant would be able to find employment at the end of the litigation for the remaining period of employment. And that sum was deducted from the assessed amount of damages.[69] He must mitigate.[70] An employee employed for a period of time cannot be dismissed during that period except for a valid cause. He is entitled to his salary for the full period by way of damages unless it can be shown that he could take another equivalent employment which he refused to take.[71]

A secretary of a Building Society employed for an indefinite period subject to reasonable notice for termination was held entitled to 9 months' notice and compensation on that basis

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65 (1918) 87 L.J.K.B. 1106.

66 *Parsons* v. *B.N.M. Laboratories Ltd.* (1964) 1. Q.B. 95, 124; (1963) 2 All E.R. 658; (1963) 2 W.L.R. 1273; *British Transport Commission* v. *Gourley* (1956) A.C. 185; (1955) 3 All 796 (a case of tort). As the function of damages is similarly compensatory and not retributive the principle is applicable to contracts. *Beach* v. *Reed Corrugated Cases Ltd.* (1956) 1 W.L.R. 897; (1956) 2 All E.R. 652; (a case of wrongful dismissal); *In re Houghton Main Colliery Co.* (1956) 3 All E.R. 300; (1956) 1 W.L.R. 1219.

67 *Cockburn* v. *Alexander* (1848) 6 C.B. 791, 814 (Per Maule J.). For fuller discussion of the subject see Kanga & Palkivala's Law of Income Tax (7th Ed) pp. 139-140.

68 *Lavarack* v. *Woods of Colchester Ltd.* (1966) 3 All E.R. 683, 686 (C.A.); *F. Bhagwandas* v. *State of M.P.* (1966) A.M.P. 95 (Must mitigate).

69 *Yetton* v. *Eastwoods Froy Ltd.* (1966) 3 All E.R. 353, 365, 366; *Prafulla Ranjan Sarkar* v. *Hindustan Building Society Ltd.* (1960) A.Cal. 214; *Clayton Greene* v. *De Courville,* 36 T.L.R. 790.

70 *F. Bhagwandas* v. *State of M.P.* (1966) A.M.P. 95.

71 *Trimbak Panchabhai* v. *Akola Education Society* (1957) A.M.P. 144 (a case of a teacher); *Turner* v. *Goldsmith* (1891) 1 Q.B. 544; *Sundaram Chettiar* v. *Chockalingam* (1938) A.M. 672.

was allowed for wrongful dismissal. He could not be expected to minimise damages by accepting employment of a lower status.[72] Similarly, where a Managing Director is deemed to be dismissed, because of the winding up of a company, his claim will be evaluated at the date of the winding up and deduction made for what he would be able to earn he being free to do any business he likes. In *Jwala Bank case*[73] it was assessed at half the evaluated amount.

Bonus.—Whether in a suit for damages for wrongful dismissal, a servant is entitled to compensation for loss arising from a substitution of salary in lieu of bonus was decided in *Lavarack* v. *Woods of Colchester Ltd.*[74] Lord Denning M.R. said he would be entitled but the majority held he would not be because he is entitled to loss of benefit under the contract, which might be affected by events extraneous to the contract; e.g. abolition of the bonus scheme itself. Diplock L.J. was of the view that he might be entitled to future bonuses on the construction of the contract. But the employers were under no obligation to continue the scheme which in *Lavarack's case* in fact was discontinued and replaced by an increase in salary of £1,000 a year.[75]

Continuing breach—Dismissal of a servant.—The distinction between a covenant to do a definite act capable only of a breach once for all and a continuing covenant has consequences not only in relation to a waiver but also in the measure of damages, in the effect of lapse of time under statutes of limitation and where the covenant runs with the land in the liability of an assignee to sue or be sued for further breaches.[76] There is nothing in general law preventing the wrongful dismissal of a servant operating to discharge him from service notwithstanding that he declines to accept the dismissal as absolving him from further performance. But the employee will be entitled to damages for wrongful dismissal and upon *quantum meruit*.[77]

If under a Government Regulation an employer carrying on a protected undertaking cannot terminate the employment of any person in the undertaking without the permission of an authority designated therein then the regulation is legally infrangible and the employee if dismissed without permission will be entitled to salary until the Regulation goes out of operation or the dismissal is legal under the Regulation and in accordance with it.[78] Damages for breach of contract of service are not wages within the Payment of Wages Act.[79]

A continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision is implied by custom in the ordinary contract of domestic service, which can be terminated either by a month's notice or the payment of a month's wages.[80] Similar terms may be incorporated in other contracts between employer and employed, either expressly or by the usage of a trade,[81] and even where the duration of a written contract is on the face of the instrument indefinite and unlimited such a provision may sometimes be implied from the nature of the contract.[82] Thus a partnership for no fixed time is determinable by notice.[83]

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72 *Prafulla Ranjan Sarkar* v. *Hindustan Building Society Ltd.* (1960) A.Cal. 214; *Clayton Greene* v. *De Courville* , 36 T.L.R. 790.
73 *Jwala Prasad* v. *Jwala Bank Ltd.* (1957) A.A. 143.
74 *Lavarack* v. *Woods of Colchester Ltd.* (1966) 3 All E.R. 683, 687, 690, 691, 693 (C.A.); *Abraham* v. *Herbert Reiach Ltd.* (1922) 1 K.B. 477; *Cockburn* v. *Alexander* (1848) 6 C.B. 791, 814, appd.
75 *Lavarack* v. *Woods of Colchester Ltd.* (1966) 3 All E.R. 683, 690.
76 *Larking* v. *Great Western (Nepeare) Gravels Ltd.* (1940) 64 C.L.R. 221, 253.
77 *Automatic Fire Sprinklers Ltd.* v. *Watson* (1946) 72 C.L.R. 435.
78 *Automatic Fire Sprinklers Pty. Ltd.* v. *Watson* (1946) 72 C.L.R. 435; *George* v. *Mitchell & King Ltd.* (1943) 59 T.L.R. 153; *Woolley* v. *Allen Fairhead & Sons* (1946) 62 T.L.R. 294.
79 *New Prajapat Tiles Co.* v. *Labhshankar* (1964) A. Guj. 22.
80 *Nowlan* v. *Ablett* (1835) 2 C.M. & R. 54; *Moult.*v. *Halliday* (1898) 1 Q.B. 125, at page 130.
81 *Parker* v. *Ibbetson* (1858) 4 C.B. N.S. 346.
82 *Crediton Gas Co.* v. *Crediton U.D.C.* (1928) 1 Ch. 447; *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* (1948) A.C. 173; *Martin-Baker Aircraft Co. Ltd.* v. *Canada Flight Equipment Ltd.* (1955) 2 Q.B. 556.
83 Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 26, s. 43 of (Indian) Partnership Act (IX of 1932).

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances, e.g. a contract may be made by the parties subject to a condition subsequent.[84] They may agree that, in the event of the fulfilment or non-fulfilment of a certain condition or upon the occurrence of a certain event, they are to be mutually discharged from their obligations. Sometimes this discharge is automatic, as in the case of "excepted risks" clauses of a charterparty; sometimes it is only to take place at the option of one of the parties as in *Head* v. *Tattersall*[85] where the buyer was given the option of returning the horse bought if it did not come up to the required standard. But in both cases the provision for discharge is contained in the contract itself.

In the case of breach of contract of service by the employer, general damages for "humiliation, embarrassment and loss of reputation" cannot be claimed and the person aggrieved is entitled only to such damages as will compensate him for the loss suffered to the extent that such loss was reasonably foreseeable as liable to result.[86]

Unfair dismissal—whether employee can change terms.—An employee who had his contract changed to self employed agent for tax purposes and his duties remained the same as before, cannot claim to be an employee for purposes of dismissals and for claiming compensation.[87]

Loss to an Employer.—A loss caused by an employee to his employer, a bank, by his gross negligence and by acting contrary to specific instruction entitles the bank to recover the whole of the loss from the employee and the liability is not restricted to the amount of the surety bond in the absence of a specific term to the contrary.[88] A custodian followed the practice of his predecessor of keeping cash in a box in a locked drawer and this practice had the approval of the Managing Committee in that they never objected nor did they provide any safer measures for the cash. The cash was found missing. The Custodian was held liable for the loss for it was the custodian's legal duty to keep the cash in safe custody and this in spite of the previous practice or the acquiescence of the Managing Committee of the Society.[89]

Bank dishonouring Cheques.—A bank which dishonours its customer's cheque while it still has funds to meet it, is only liable for nominal damages unless the customer is a trader or proves special damage.[90]

Banker & Customer—damages.—A banker is bound to act according to the instructions of the customer in the absence of which according to the usage prevalent at the place, where the banker is, applicable to the matter in hand.[91]

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84 Anson on Contract (22nd Edn.), page 122.

85 (1871) L.R. 7 Ex. 7.

86 *British Guiana Credit Corporation* v. *Clement Hugh Da Silva* (1965) 1 W.L.R. 248, 249 (P.C.). For facts, see section 65 "contracts under Seal". *Supra. Dunk* v. *George Walter & Sons,* (1970) 2 All E.R. 630 (Wrongful dismissal of apprentice and damages for future prospects); Chitty: On Contracts (24th) Ed. para 1560 (under heading "exemplary damages"), *Edwards* v. *Society of Graphical Allied Trades* (1971) Ch. 354 (damages for wrong expulsion from Trade Union leading to dismissal may include damages for difficulty of getting employment). See also under "Damages for mental distress"—*Supra.*

87 *Massey* v. *Crown Life Insurance Co* (1978) 2 All ER 576, 580-582; See Halsbury Laws of England (4th ed.) para 615 Vol. 16; For Contract of Service & Contract for Service see *Ibid* para 501.

88 *Bishal Chand Jain* v. *Chattur Sen* (1957) A.A. 506.

89 *Gaur Chandra Mukherjee* v. *Adrew Yules Cooperative Society Ltd.* (1977) A.Cal. 336.

90 *Gibbons* v. *Westminster Bank* (1939) 2 K.B. 882; (1939) 3 All E.R. 577; *Cf. Wilson* v. *United Counties Bank Ltd.* (1920) A.C. 102; (1918-19) All E.R. Rep. 1035; *Marzetti* v. *Williams* (1830) 1 B. & Ad 415; (1824-34) All E.R. Rep. 150; *Rolin* v. *Steward* (1854) 14 C.B. 595; *Bank of New South Wales* v. *Milvain* (1884) 10 V.L.B. 3; *Kinlain* v. *Ulster Bank Ltd.* (1928) I.R. 171; *Mohammal Hussain* v. *Chartered Bank* (1965) A.M. 266; *Wilson* v. *United Counties Bank Ltd.* (1920) A.C. 102; (1918-19) All E.R. Rep. 1035.

91 *Mohamad Jacub* v. *Indian Bank* (1975) A.M. 220, 221; *Banco de Portugal* v. *Waterlow* (1932) A.C. 452. quoted *Keshrichand* v. *Shillong Bank Corpn.* (1965) 3 SCR 110; (1965) ASC 1711—followed.

A claimant (in this case a bank) is required to act reasonably in adopting remedial measures. The standard of reasonableness is not high when the other party is the wrong doer and he cannot be deprived of recovering costs merely because the wrong doer can suggest other less burdensome measures.

A customer transacted the business in dispute with Indian bank which in turn transacted through State Bank by negotiating documents. The former did not deliver the customer a particular form as a result of which the customer suffered damages but as there was no privity between the dealer and the State Bank the latter was not liable only Indian Bank could be held liable.

Contracts relating to immovable property.—It is commonly said that where a person sustains loss by reason of a breach of contract he is *prima facie* entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed,[92] though, as we have seen, this form of statement is open to some misunderstanding.[93] Now this rule does not apply in English law to contracts for the purchase of immovable property. It was finally settled by the decision of the House of Lords in *Bain* v. *Fothergill*[94] that a purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses; and that even if the vendor knew that he had no title nor any means of acquiring it, the purchaser may have a further remedy by an action for deceit, but not on the contract. The reason for this exceptional rule is that the purchaser of real estate in England must expect some degree of uncertainty as to whether a good title can be effectively made by the vendor, whereas the vendor of a chattel must know, or at all events is taken to know, what his right to the chattel is.[95] Decree for damages should not be given in a suit for specific performance where neither party is blameless.[96] The rule applies in absence of fraud or misrepresentation.[97]

But it does not apply where there is bad faith even if there is no fraud. Unwillingness to use his best endeavours to make out a good title constitutes bad faith. In such cases the vendor is liable for substantial damages.[98]

It also does not apply where the vendor could make his title good e.g. by paying off a previous charge and he refuses to do so.[99] Moreover if at the time of making the contract, the vendor knew of the defect of title and he falsely represents a good title he will be liable indeed.[1]

The special rule does not, however, apply to the case of wilful default in giving possession[2] nor to an express covenant for quiet enjoyment in an executed conveyance,[3] nor to an executory agreement to make a title by a party who appears on the face of the agreement not to have any title at its date,[4] nor, it seems, to unreasonable omission to complete the title by tak-

92 *Robinson* v. *Harman* (1848) 1 Ex. 855.
93 See pp. 548-552, above.
94 (1874) L.R. 7 H.L. 158.
95 In the United States, where registry of title or of assurances, in some form, is universal, the reason is generally held not to exist, and the rule therefore not accepted: Sedgwick, Elements of Damages, *ad fin*. See (Indian) Registration Act, s. 17.
96 *Umar Noor Mohammad* v. *Dayal Saran Darbari* (1967) A.A. 253.
97 *Watts* v. *Spence* (1975) 2 All E.R. 528: (1976) Ch. 165. But see on Appeal (1979) 1 All E.R. 186.
98 *Malhotra* v. *Chaudhury* (1979) 1 All. E.R. 186, 199; *Braybrooks* v. *Whaley* (1919) 1 K.B. at pp.441-2; *Ken* v. *Mear* (1920) All E.R. Rep. 147 appld.
99 *Day* v. *Singleton* (1899) 2 Ch. 320; *Re Daniel* (1917) 2 Ch. 405; *Malhotra* v. *Chaudhary* (1978) 3 WLR 825; (1979) 1 All E.R. 186.
1 *Watts* v. *Spence* (1976) Ch. 165, (1975) 2 W.L.R. 1039; (1975) 2 All E.R. 528.
2 *Engell* v. *Fitch*, Ex. Ch. (1869) L.R. 4 Q.B. 659 (as to the authority of this case see per Byrne J. (1902) 1 Ch. 191, at p. 195); *Jaques* v. *Millar* (1877) 6 Ch.D. 153; *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch.D. 390. Similarly, where the vendor was tempted by a higher offer to sell the property to a third person in breach of his contract, the measure of damages was the difference between the price the plaintiff agreed to pay and the price the defendant received: *Radha Kishan Kaul* v. *Shankar Das*, 1927 A.L. 252; 100 I.C. 422.
3 *Lock* v. *Furze*, Ex.Ch. (1866) L.R. 1 C.P. 441; *Kanchanlal* v. *Hariprasad* (1951) Nag. 516; 1951 A.N. 379.
4 *Wall* v. *City of London R.P.Co.* (1874) L.R. 9 Q.B. 249. The court thought the case so clear that they did not delay judgment to see the result of *Bain* v. *Fothergill, supra* then pending in the House of Lords; see L.R. 9 Q.B. 249, at p. 352.

ing some definite step in the vendor's power, such as applying for the lessor's consent to an assignment,[5] nor to damages caused not by defect of title or any real difficulty of conveyancing, but by the vendor's want of reasonable diligence in completing.[6]

The rule in *Bain* v. *Fothergill*[94] was at one time assumed in the High Court of Bombay to be the law of India. A purchaser claimed to recover damages for the loss of his bargain, and the Court disallowed his claim on the ground that the vendor had offered to do all that lay in her power to carry out her contract.[7] No reference was made to the Contract Act, but the argument turned on the question whether the case came under the rule in *Bain* v. *Fothergill*[94] or the exception in *Engell* v. *Fitch*.[8] The assumption so made by counsel and the Court was, it is submitted, erroneous. S. 73 is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property,[9] and in fact the rule was not settled beyond question in England when the Act was passed. "The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities".[10] Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him "naturally arose in the usual course of things from such breach"; and in an ordinary case it would be difficult to hold otherwise.

Even apart from the Act, the English rule is treated in its own jurisdiction as anomalous, and justified only by the peculiar conditions of English titles and conveyancing. It would therefore seem very doubtful whether, on the general principle of "justice, equity, and good conscience," it was ever applicable in India. The view propounded above was approved by the High Court of Bombay in *Ranchhod* v. *Manmohandas*.[11] The case was, however, one of wilful default on the part of the vendor in completing the title, and it was held, following *Day* v. *Singleton*,[12] that the purchaser was entitled to recover not only the deposit with interest and expenses, but the loss of his bargain.[13] At the same time the Court expressed the opinion that the rule in *Bain* v. *Fothergill*[14] was not law in this country. "As section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of an immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.[15] A similar view has been expressed by the High Courts of Calcutta,[16] Lahore,[17] Nagpur,[18] and Rangoon.[19] Likewise in Full Bench of the Madras High

5 *Day* v. *Singleton* (1899) 2 Ch. 320, C.A., where, however, on the view taken by the Court of the facts, the default was wilful: see *Chandanee* v. *C.L. Katial* (1964) A.S.C. 978.

6 *Jones* v. *Gardiner* (1902) 1 Ch. 191.

7 *Pitamber* v. *Cassibai* (1886) 11 Bom. 272. It is by no means clear that, on its own ground, the decision was correct. In England we should not ascribe much diligence, not to say good faith, to a vendor of a mortgaged house who professed not to know where the title-deeds were and made no inquiry of the mortgagee.

8 *Supra*.

9 It is remarkable that none of the illustrations to the section relate to contracts for sale of land.

10 Per Farran C.J. in *Nagardas* v. *Ahmedkhan* (1895) 21 Bom. 175, at p. 185.

11 (1907) 32 Bom. 165.

12 (1899) 2 Ch. 320, C.A. See note 52, *supra*.

13 In England in a case where the exception in *Engell* v. *Fitch* applies, and the purchaser can recover damages for loss of bargain, he cannot also recover his conveyancing costs, since he would have to bear these in any case: *Re Daniel* (1917) 2 Ch. 405 (Sargant J.). It is not clear from the report in *Ranchhod's Case* whether there is any conflict with this logical principle, as the judgment gives no precise indication of the type of costs and expenses in question.

14 (1874) L.R. 7 H.L. 158.

15 Per Macleod J., 32 Bom. 165, at p. 171. See also per Tendolkar J. in *A.E.I. Mansoor* v. *Abdul Mahomed*, 1949 A.B. 154. There may be cases where it is an implied contract that a vendor whose title proves defective without any default of his own shall be liable only for expenses: *Vallabhdas* v. *Nagardas* (1921) 23 Bom.L.R. 1213; 92 I.C. 143. In practice the assessment of damages for a defective title may have to be rough, see *Harilal Dalsukhram* v. *Mulchand* (1928) 52 Bom. 883; 113 I.C. 27; 1928 A.B. 427.

16 *Nabinchandra* v. *Krishna* (1911) 38 Cal. 458, at p. 465.

17 *Jai Kishen Das* v. *Arya Priti Nidhi Sabha* (1920) 1 Lah. 380; 58 I.C. 757: *Mangal Singh* v. *Dial Chand*, 1940 A.L. 159; 188 I.C. 383.

18 *Sakharam* v. *Jairam*, 1933 A.N. 263, where the authorities are reviewed.

19 *Ha Hla Po* v. *Ma Sein Nu*, 1940 A.R. 146; 189 I.C. 23.

Court[20] has held that a manager of a joint Hindu family who has agreed to sell immovable property belonging to himself and the minor members of the family, is personally liable under this section for damages for failure to perform the contract when it is found that it is not binding on the minors, there being no necessity for the sale. It was also held that this liability was not affected by the fact that there was no misrepresentation on the part of the manager as to the necessity for sale, nor by the fact that the purchaser knew that he was buying from a manager of a joint family which comprised minors, and that the Court may refuse specific performance against the minors.[21] Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money paid for it.[22] But in special circumstances, where the buyer in effect had notice of difficulties arising from an adverse claim, the High Court of Bombay held him not entitled to recover damages for loss of profit on a contract to re-sell at an advanced price.[23] Similary as to a vendor who has caused or materially contributed to the loss by his own fault, such as delay in answering requisitions.[24] The defendants by an agreement granted to the plaintiff an option to purchase some landed property. In breach of the agreement they cancelled the option and sold the property to another person. The damages to which the plaintiff was entitled was not merely the difference between the market price and the sale price but also the profit which he would have made by developing the land of which scheme the defendant had knowledge.[25]

Where a lessee's covenant to deliver up the premises in good repair is broken at the end of the term, the measure of damages would on strict principle be the amount by which the value of the reversion is diminished; but the difficulty and inconvenience of this calculation have led to the adoption, as the practical measure in such cases, of the reasonable cost of putting the premises into the state of repair in which they ought to have been left.[26] In the case of a breach during the term the measure is, according to the more general standard, the diminution in the value of the reversion; and where the covenant is in a sub-lease expressed to be such, the intermediate lessor's liability to the superior lessor on the covenants in the original lease will be taken into account for this purpose.[27] Where the lessor commits a breach of a covenant to repair, the lessee may repair the premises and obtain damages, and it is not a condition precedent to recovery that he should actually have spent the money.[28]

In lieu of specific performance.—In the case of a breach of contract to sell house and surgery damages given in lieu of specific performance are to be assessed on the value of the land of the date of judgment and should include such loss as the plaintiff would suffer on not getting the surgery which was included in the sale.[29]

As to liability for loss of, or damage to, property delivered to common carriers, see the Carriers Act, 1865; and as to the liability of a railway company, see the Indian Railways Act, 1890.

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20 *Adikesavan Naidu* v. *Gurunatha* (1918) 40 Mad. 338; 39 I.C. 358; 1918 A.M. 1315 (F.B.).
21 And see note 62, *supra*.
22 *Nagardas* v. *Ahmedkhan* (1895) 21 Bom. 175; *Venkataswami* v. *Venkayya*, 1953 A.M. 529. In view of this unanimous current of authority the failure of an attempt to dispute it in Sind; *Ramsingh Kundansingh* v. *Sajan Damji*, 1927 A.S. 120; 101 I.C. 704, was hardly worth recording.
23 *Dhanrajgirji Narsinggirji* v. *Tata Sons*, 49 Bom. 1; 26 B.L.R. 858; 92 I.C. 225; 1924 A.B. 473. In this case the view was expressed that the rule in *Bain* v. *Fothergill*, *supra*, note 61, was not necessarily excluded by s. 73 "in a proper case". On the facts of the case it would seem that nothing more than could be recovered under the rule was recoverable under s. 73, and therefore the reference to the rule seems superfluous.
24 *Shamsudin Tajbhai* v. *Dahyabhai Maganlal* (1923) 48 Bom. 368; 84 I.C. 947; 1924 A.B. 357. Such cases do not affect the general rule, e.g. *Parma Nand* v. *Ghulam Hussain Shah*, 1929 A.L. 416; 116 I.C. 449.
25 *Cottrill* v. *Steyning & Little Hampton* (1966) 1 W.L.R. 753.
26 *Joyner* v. *Weeks* (1891) 2 Q.B. 31, C.A.
27 *Conquest* v. *Ebbetts* (1896) A.C. 490.
28 *Bansi Sah* v. *Krishna Chandra*, 1951 A.P. 508.
29 *Malhotra* v. *Chaudhary* (1979) 1 All E.R. 186, 204.

Interest by way of damages.—The interest Act, 1839, provides for the payment of interest by way of damages in certain cases.[30] Under that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing from the time when the amount becomes payable where a time is fixed for payment, or where no time is fixed, from that date on which demand of payment is made in writing giving notice to the debtor that interest will be claimed.

There have been numerous decisions, often conflicting, on the question whether interest could or could not be given under s. 73, illustration (n), where it is not recoverable under the Interest Act.[31] The rule of English Common Law, and therefore, presumably of India apart from the Interest Act, is "that interest is not due on money secured" even "by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments".[32] "At common law interest was not payable on ordinary debts, unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts" [33] Section 73 is merely declaratory of the common law principle as to measure of damages and interest cannot be allowed at common law by way of damages for wrongful detention of debt.[34] The view taken by the learned authors of this work was that there did not seem to be any sufficient ground for reading into illustration (n) to the present section an intention to abolish this rule and supersede the Interest Act, 1839. This view has been affirmed by the Privy Council. In *Bengal-Nagpur Railway Co.* v. *Ruttunji*[35] their Lordships made the following observations with reference to illustration (n) in s. 73: "The illustration, however, does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on

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30 The Act consists of a single section which runs as follows:

"Whereas it is expedient to extend to the territories under the Government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the Statute 3rd and 4th William IV, chapter 42, section 28 and concerning the allowance of interest in certain cases:

"It is therefore hereby enacted that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law."

S.28 of 3&4 Will. IV, c.42 has now been repealed by the Law Reform (Miscellaneous Provisions) Act 1934; s.3; but this repeal will not of course affect the Indian Act of 1839. 3 and 4 Will. IV, c.4 is usually known as Lord Tenterden's Act, as to which see *L.C. & D.R. Co.* v. *S.E.R. Co.* (1893) A.C. 429.

31 A rough classification of the decisions for and against the views that interest could be recovered under s. 73 ill. (n) is given below: I. Interest recoverable: *Ghanshiam Singh* v. *Daulat Singh* (1896) 18 All. 240: *Mahamaya Prasad* v. *Rama Khelawan* (1911) 15 Cal. L.J. 684; *Khetra Mohan* v. *Nishi Kumar* (1917) 22 C.W.N. 488; *Anrudh Kumar* v. *Lachhmi Chand* (1928) 50 All 818; 115 I.C. 114; 1928 A.A. 500; *Abdul Jalil* v. *Mohammad Abdul Salam,* 1932 A.A. 505; (1932) All. L.J. 733; 139 I.C. 158; *Bishambhar* v. *Jag Prasad,* 1933 A.A. 455; (1933) All.L.J. 963; 146 I.C. 804; *Muthuswami* v. *Veeraswami,* 1936 A.M. 486; 70 Mad. L.J. 433; 163 I.C. 251; but see *Jwala Prasad* v. *Hoti Lal* (1924) 46 All 625; 79 I.C. 1049; *Ismail Hasan* v. *Mehdi Hasan* (1924) 46 All. 897; 80 I.C. 63; also *Surja Narain* v. *Pratab Narain* (1899) 26 Cal. 955, at pp. 964-5. II. Interest not recoverable: *Kamalammal* v. *Peeru Meera Levvai Rowther* (1897) 20 Mad. 481; *Bura* v. *Mailia Shah* (1901) Punj. Rec. No. 104: *Arjan Das* v. *Hakim Raj* (1913) Punj. Rec. No. 39, at p. 154; *Kalyan Sahai* v. *Lachminarain,* 1951 Raj. II: *Ram Lal Singh* v. *Harihar Prasad,* 1955 A.P. 254.

32 *Page* v. *Newman* (1829) 9 B. & C. 378, 381; 33 R.R. 204, 206; and see the English authorities reviewed by Lord Herschell, *L.C. & D.R. Co.* v. *S.E.R. Co.* (1893) A.C. 429, 437, *sqq.*

33 Lindley L.J., S.C. in C.A. (1892) 1 Ch. 120, at p. 140.

34 *Bengal Nagpur Rly. Co.* v. *Ruttanji Ramji,* 65 I.A. 66; (1938) A.P.C. 67; *Jamal* v. *Moolla Dawood & Son,* 43 I.A. 6; *see also Maine & New Brunswick Electrical Power Co. Ltd.* v. *Hart* (1929) A.C. 631, (1929) A.P.C. 185 (case under New Brunswick Statute where the provision is identical with Indian Interest Act).

35 65 I.A. 66, at pp. 72-3; (1938) 2 Cal. 72; 173 I.C. 15; 1938 A.P.C. 67; *Mohammad Bux* v. *Zahrul Haque* (1944) 23 Pat. 940, 1945 A.P. 196; *Sheikh Mehtab* v. *Dharamrao* (1945) Nag. 252, 1944 A.N. 330.

a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment." It has been held that the Privy Council decision only prevents the recovery of interest where there has been mere wrongful detention of a debt, and does not preclude the recovery of interest as part of the damages for a breach of contract.[36] It is submitted that this proposition is not correct and is not in accord with the decision of the Privy Council and the Supreme Court. The Supreme Court has held that interest cannot ordinarily be awarded when the contract does not provide for it and the requirements of the Interest Act are not fulfilled.[37] Nor can it be awarded as damages in cases of breach of contract, which was held by the Supreme Court as "well settled".[38] With reference to the words "interest shall be payable in all cases in which it is now payable by law" occuring in the proviso in the Interest Act, their Lordships observed that the proviso applied to cases in which the Courts of Equity exercised jurisdiction to allow interest.[39]

Interest on damages—Inflation.—Interest on damages is awarded to compensate the plaintiff for being deprived of them till judgment whereas the award of an increase in damages for increase on account of inflation was to preserve the real value of the damages (A case of personal injury in tort).[40]

Interest *pendente lite* being within the discretion of the court should be fixed in accordance with circumstances and practice of the court and should not be too high. 4 per cent was allowed in this case.[41] Interest prior to the commencement of suit is claimable either under agreement or usage, trade, or under a statutory provision or under the Interest Act for a sum certain where notice is given. Interest is also awarded in some cases by Courts of Equity, e.g. where money is obtained by fraud or retained by fraud, a Court of Equity will order it to be returned with interest,[42] also where money is wrongfully withheld, e.g. where a person is instrumental in keeping money idle in court[43] or an amount of money advanced as price and the seller fails to perform his part of the contract,[44] also where earnest money is withheld for a long time unreasonably.[45]

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36 *Digbijai Nath* v. *Tirbeni Nath Tewari* (1946) All. 56, 1946 A.A. 12; *Jagal Kishore* v. *Parmeshwar Singh,* 1951 A.P. 348, 351, per Meredith J. (Ramaswami J. *dubitante* at p. 352); *Haji Mohammed Khaja* v. *Akber Ali,* 1955 A.Hyd. 150.

37 *Seth Thawardas Pherumal* v. *Union of India* (1955) 2 S.C.R. 48; (1955) A.S.C. 469; *Sagarmal Poddar* v. *Amir* (1966) A.A. 103; *Jethmal Madanlal* v. *Nevatia & Co.* (1962) A.A.P. 350.

38 *Mahabir Prashad* v. *Durga Dutta* (1961) A.S.C. 990; (1961) 3 S.C.R. 639; *Bengal Nagpur Rly Co. Ltd.* v. *Ruttanji Ramji,* 65 I.A. 66; (1938) A.P.C. 67 refd. to; *London Chatham & Dover Ry. Co.* v. *South Eastern Ry.* (1893) A.C. 429; *Union of India* v. *Ramjas Ram* (1963) A. Raj. 1.

39 See for these cases Chitty on Contracts, 21st ed., Vol. 2, p. 434, II (23rd Ed.), para 1117 (24th Ed.), para 1622; *Bengal Nagpur Railway Co. Ltd.* v. *Ruttanji Ramji,* 65 I.A. 66; (1938) A.PC. 67; *Mahabir Prasad* v. *Durga Dutt* (1961) 3 S.C.R. 639; (1961) A.SC. 990. See also *Trojan & Co.* v. *Nagappa Chettiar* (1953) S.C.R. 789, 1953 A.S.C. 235; *Haji Mohammed Khaja* v. *Akber Ali,* 1955 A. Hyd. 150 (cases of fraud). The former English law with regard to the awarding of interest has been substantially altered and extended by the Law Reform (Miscellaneous Provisions) Act, 1934, which gives the Court power to award interest on any debt as damages at such rate as it may think fit on the whole or any part of the period between the date when the cause of action arose and the date of judgment.

40 *Pichete* v. *British Railway Engineering Ltd.* (1979) 1 All E.R. 774, 782, 788 (H.L.); Denning MR in *Coleson* v. *Knowles* (1977) 2 All E.R. 820, 823 disapprd.

41 *Mahabir Prasad Rungta* v. *Durga Das* (1961) 3 S.C.R. 639; (1961) A.S.C. 990.

42 *Bengal Nagpur Railway Co. Ltd.* v. *Ruttanji Ramji,* 65 I.A. 66; (1938) A.P.C. 67; *Mahabir Prasad Rungta* v. *Durga Das* (1961) 3 S.C.R. 639, 646; (1961) A.S.C. 990, 993; *Trojan & Co. Ltd.* v. *Nagappa Chettiar* (1953) S.C.R. 789.

43 *Purushottam* v. *Amruth Ghee & Co.* (1961) A.A.P. 143.

44 *Official Receiver* v. *Baneshwar Prasad* (1962) A.P. 155 (interest allowed on amount advanced as price and there was a breach of contract of settlement of land and sale of trees); *Rameshwardas Poddar* v. *Paper Sales Ltd.* 1944 A.B. 21; *Digbijainath* v. *Tribeni Nath* (1946) A.A. 12, (1946) All. 56 reld. on.

45 *Sat Prakash* v. *Bodhraj* (1958) A.Punj. 111.

Interest—Promissory note.—In the absence of a stipulation in a promissory note for payment of interest, it cannot be demanded unless a special basis for it is shown.[46]

Money had and received by the defendant to the use of the plaintiff may be recovered with interest if there is some special relationship between the parties, e.g., solicitor and client.[47] Where a trustee is chargeable with interest as for breach of trust, the rate of interest with which he is charged is 5 per cent, unless his conduct is such that he is made to pay compound interest.[48] The vendor of land is entitled to require the purchaser to pay interest on his purchase-money from the date when he takes, or might safely take, possession of the land.[49] This principle is applied to the expropriation of land under statutory powers,[50] but not to the requisitioning of goods.[51] No interest is allowable on salary paid to a dismissed Government servant under orders of the court pending proceedings under Article 226 challenging an order of dismissal and which was subsequently refunded by the servant on the dismissal of the proceedings.[52] A State collecting sales tax illegally is not liable to pay interest thereon either by way of damages or restitution under section 151, C.P.C.[53]

But in the case of breach of a contract of sale the Court may now award interest to a seller suing for the price and to buyer suing for refund: the Indian Sale of Goods Act, 1930, s. 61.[54]

Rate of interest.—The rate of interest awarded by Courts in England has been held by those Courts to reflect the current commercial rates.[55] It was observed in 1973 that the rate awarded should broadly represent the rate at which the successful party would borrow the sum awarded over the period in question and it would be guided by a judgment debt which would be a good guide.[56]

Interest: Foreign currency.—When interest is awarded in a foreign currency the rate of interest should be that prevailing in the commercial market of that country.[57]

Solicitor and Client; Barrister and Client; Architect and Client; Medical Practitioner; Accountant and Client.—An action against a solicitor is always one for breach of contract.[58] A solicitor is liable in contract for negligence in investigation of title; a client purchasing real property on such advice will be entitled to damages the measure being the difference between the price of property with a good title and its value with a defect. The plaintiff is under no obligation to sell the property to quantify the damages.[59] In an action against a solicitor for negligence, the court has to decide—

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46 *Rabiram* v. *Harishchandra* (1973) A. Or. 84.
47 See Chitty: On Contracts (23rd Edn.) para 1117 (24th Ed.) para 1622; *Barclay* v. *Harris* (1915) 85 L.-J.K.B. 115
48 *Gordon* v. *Gonda* (1955) 2 All E.R. 762, 767.
49 *Birch* v. *Joy* (1852) 3 H.L.C.565; *International Ry.* v. *Niagara Parks Commission* (1941) A.C. 328 (agreement for the transfer of a railway as a going concern): *Re Priestley's Contract* (1947) Ch. 469.
50 *Inglewood Pulp co.* v. *New Brunswick Electric Power Commission* (1928) A.C. 492.
51 *Swift & Co.* v. *Board of Trade* (1925) A.C. 520.
52 *Shamlal* v. *State of U.P.* (1968) A.A. 139.
53 *Gangaraju & Sons* v. *State of Andhra Pradesh* (1965) A.A.P. 60.
54 As to the former Indian law, see *Kandappa* (or *Ramalinga) Mudaliar* v. *Muthuswami Ayyar* (1928) 5C Mad. 94; 99 I.C. 609; 1927 A.M. 99.
55 Chitty: On Contracts 24th Ed. Para 1623. *The Mecca* (1968) pp. 665, 672; (1968) 2 All E.R. 731; (1968) 3 WLR 497.
56 *Cremer* v. *General Carriers S.A.* (1974) 1 WLR 341, 355.
57 Chitty: On Contracts (24th Ed.) Para 1623 & 1944. See also *Miliamgos* v. *George Frank (Textiles Ltd.)* No. 2 (1975) 3 WLR 477 and (1976) 39 M.L.R. 196.
58 *Cook* v. *S.* (1967) 1 All E.R. 299, 302; (1967) 1 W.L.R. 457 (C.A.); *Groom* v. *Crocker* (1939) 1 K.B. 194; (1938) 2 All E.R. 394 applied: *Clark* v. *Kirby Smith* (1964) Ch. 506; (1964) 3 W.L.R. 239; (1964) 2 All E.R. 835.
59 *Pilkington* v. *Wood* (1953) Ch. 770; (1952) 2 All E.R. 810. See under "measure of damages" *supra* page 559, n. 98.

"Has the plaintiff lost some right of value, some chose in action of reality and substance?..... it is the duty of the court to determine the value as best as it can."[60]

In *Clark's case*[61] the plaintiff framed his action in tort against a solicitor for his negligence to apply for grant of a new tenancy under Part II of the Landlord and Tenant Act, 1954, with the result that the plaintiff did not obtain a new tenancy and was faced with a claim for dilapidations. The landlord had given notice of his intention not to oppose the grant of a new tenancy; it was clear therefore that the loss was a direct and foreseeable result of the neglect of the solicitor. For this the plaintiff was awarded nominal damages. Plowman J. held the sum paid for dilapidations and the cost for negotiating settlement was not recoverable in contract; and that a claim against a solicitor for negligence did not lie in tort.[61]

Said Plowman J.—

"I do not accept the argument that the *Hedley Byrne* case[62] is an authority for saying that the liability of a solicitor to his client for negligence is a liability in tort. A line of cases going back for nearly 150 years shows, I think, that the client's cause of action is in contract and not in tort: see, for example, *Howell* v. *Young*[63] (a case in 1826) and *Groom* v. *Crocker*[64] where Sir Wilfried Greene M.R. said: 'In my opinion, the cause of action is in contract and not in tort. The duty of the appellants was to conduct the case properly on behalf of the respondent as their client, subject to any proper exercise by the insurers of the right of control conferred upon them by the policy. The relationship of solicitor and client is a contractual one'—he refers to the cases—'It was by virtue of that relationship that the duty arose, and it had no existence apart from that relationship.' I think that all those words apply equally to the relationship between architect and client. I can see no reason why they should not, and I can see nothing in the relationship of architect and client which can be said to give rise to the kind of status obligation which arised from the origins of the common law in the case of master and servant, common carrier, innkeeper, bailor and bailee."

Solicitor's negligence.—In *Pilkington's case,*[65] the court awarded damages against a solicitor for his negligence in regard to defect in title of property purchased by the plaintiff with the advice of the solicitor; the measure of damages being the difference between the price at the time of conveyance with a good title and its value with a defect. The plaintiff was not under a duty to resell in order to quantify the damages. But the plaintiff was held not entitled to other damages because the plaintiff can claim for such loss which at the time of contract was reasonably foreseeable as liable to result from the breach which depended on the knowledge then possessed by parties or at least by the party who later commits the breach.[66]

A solicitor instructed to draw up a will failed to advise his client that a beneficiary's spouse could not attest the will. A beneficiary's husband did attest it which attestation the solicitor had failed to notice with the result that the gift to the beneficiary was void. The beneficiary sued for damages for negligence. The solicitor pleaded that he was liable to his client and only in contract and not in tort. It was held that the solicitor was liable to the beneficiary in tort and to his client in contract and tort; and there was sufficient proximity between the solicitor and an identified third person (the beneficiary). The beneficiary was held entitled to recover her financial loss but plaintiff's expenses for investigating her claim upto the date of the issue of the writ could not be recovered as damages but only as costs.[67]

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60 *Kitchen* v. *Royal Air Force* (1958) 2 All E.R. 241 applied in; *Buckley* v. *N.U.G. & M.W.* (1967) 3 All E.R. 767 (a case of negligence of a Trade Union to give legal aid to a member); *Pilkington* v. *Wood* (1953) Ch. 770; (1952) 2 All E.R. 810.

61 *Clark* v. *Kirby Smith* (1964) Ch. 506; (1964) 3 W.L.R. 239; *Howell* v. *Young* (1826) 5 B. & C. 256; 8 Dowl & Ry. 14 refd. to in *Groom* v. *Crocker* (1939) 1 K.B. 194, 205; (1938) 2 All E.R. 394, 401; 54 T.L.R. 861 (C.A.).

62 *Hadley Byrne* v. *Heller & Partner Ltd.* (1963) 2 All E.R. 575; (1963) 3 W.L.R. 101 (H.L.).

63 (1826) 5 B & C 256; 8 Dowl. & Ry. 14 (K.B.).

64 (1939) 1 K.B. 194, 205; (1938) 2 All E.R. 394; 54 T.L.R. 861 (C.A.).

65 *Pilkington* v. *Wood* (1953) Ch. 770; (1953) 2 All E.R. 810.

66 *Ibid; Vitoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (1949) 2 K.B. 528; (1949) 1 All E.R. 997.

67 *Ross* v. *Counters* (1979) 3 All E.R. 580, 588 et seq.; *Donoghue* v. *Stevenson* (1932) All E.R. Rep. 1; *Ministry of Housing & Local Government* v. *Sharp* (1970) 1 All E.R. 1009; *Midland Bank Trust Co. Ltd.* v. *Hett, Stebbrs & Kemp* (1978) 3 All E.R. 571 appld. *Groom* v. *Crocker* (1938) 2 All E.R. 394 folld.

Damages have been awarded against a solicitor for failing to take steps in a non-molestation proceedings and thus the molestation of his client continued.[68]

Solicitors' negligence—liability in tort.—A solicitor owes a duty to client under the general law to use that care and skill on which, he knows his client would rely. Further he owes a duty not to injure his client by failing to do that he had undertaken to do and which at the solicitor's invitation the client had relied on him to do. Further there was no rule of law which confined a solicitor's duty under a retainer to contractual duty alone and there was no rule of law which precluded claim of a client in tort for the solicitor's failure to use care and skill required of a solicitor.

Therefore where a solicitor failed to register an option in favour of a client and thus the client lost the option, the solicitor will be liable in tort though not in contract in the circumstances of the case.[69]

The House of Lords in a case dealing with the liability of a Barrister for negligence has observed that public interest requires a solicitor should not be liable to be sued for negligence in carrying out work in litigation which would have been carried out by counsel if counsel had been engaged in the case.[70] A client is not entitled to damages for mental distress against a solicitor as his claim lies in contract not in tort.[71] But see *Heywood* v. *Wellers* (1976) Q.B. 466.

Advice of Counsel, if a defence. A solicitor, in a claim against him for damages for negligence in the conduct of a divorce suit, set up wrong advice of counsel as breaking the chain of causation of damage.

It was held there was no such interruption.[72]

Relationship of Accountants and Clients:

In *Candler* v. *Crane Christmas & Co.*[73] a firm of accountants prepared a company's accounts and balance-sheet negligently as a consequence of which the plaintiff suffered loss. He sued for loss on the ground of negligence or alternatively for breach of duty,

the Court of Appeal held that in the absence of contractual or fiduciary relationship the defendants owed no duty to the plaintiff to exercise care in preparing the accounts.

The House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[74] held that a person seeking information or advice from another who is not under contractual or fiduciary obligations to give the advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or his skill or judgment were being relied on, and that person chooses to give the information or advice without clearly specifying that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply. See *Rondel's case* (1967) 3 All E.R. 993, 1032 (Lord Upjohn).

Lord Devlin approved of the statement of Denning L.J., in his dissenting judgment in *Candler* v. *Crane Christmas & Co.* about circumstances in which he says a duty to use care in making statements exists. The judgment of the House of Lords shows that a duty to exercise proper care may arise out of special relationship of a general character, e.g. the relationship of

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68 *Heywood* v. *Wellers* (1976) Q.B. 446; (1976) 2 WLR 101; (1976) 1 All E.R. 300.

69 *Midland Bank Trust Co. Ltd.* v. *Hett Stubbs & Kemp.* (1978) 3 All E.R. 571, 595-6; *G & K Ladenbach U.K. Ltd.* v. *Grawley & De Reya* (1978) 1 All E.R. 682 (case of land purchase).

70 *Rondel* v. *Worsley* (1967) 3 W.L.R. 1666, 1678, 1690, 1708; (1967) 3 All E.R. 993.

71 *Cook* v. *S.* (1966) 1 All E.R. 248, 257, affirmed on appeal (1967) 1 All E.R. 299, 302; *Groom* v. *Crocker* (1939) 1 K.B. 194; (1938) 2 All E.R. 394; An action against a Solicitor is always one for breach of contract and *Bailey* v. *Bullock* (1950) 2 All E.R. 1167 applied; 36 Halsbury's Laws of England (3rd Edn.) 96.

72 *Cook* v. *S.* (1966) 1 All E.R. 248, 255 on appeal (1967) 1 All E.R. 299. This question does not seem to have been raised.

73 (1951) 1 All E.R. 426. But Denning L.J. disented and was of the opinion that the accountants owed a duty of care not only to their own clients but also to those who they know will rely on their accounts in the transactions for which those accounts are prepared.

74 (1951) 1 All E.R. 426, 433.

a solicitor and client, or of banker and customer, or out of a particular relationship created *ad hoc.*[75]

Barrister and Client.—Up to the decision of the case of *Hedley Byrne & Co.* the law was considered to be that a barrister could not be sued for negligence which was a corollary of the rule that there was no contractual relationship between a barrister and his client and therefore a barrister could not sue for his fees. This rule applies to English barristers in foreign countries where advocates can recover fees by action[76] but it does not extend to work not involving relationship of counsel and client; e.g. acting as an arbitration[77] or as a returning officer in an election.[78] A barrister cannot be sued for compromising a suit without the authority of the client[79] nor can a suit lie against him for recovery of a fee paid for arguing a case which he does not attend[80] nor for damages for non-attendance.

The House of Lords considered the position of a barrister in *Rondel* v. *Worsley*[81] which was a case of alleged negligent conduct in a "dock brief." The House of Lords in deciding whether an action for negligence would lie decided that the immunity which a barrister enjoyed was due to the public necessity and public policy and not due to any rule of barrister's inability to sue for his fees and a distinction was made between the barrister's work in court and other work and immunity was held to extend to his work in court. But the same immunity or public duty applies when drawing pleadings or conducting subsequent stages in a case as applies to counsel's conduct during the trial. And there will be cases where the same will apply when the litigation is pending. But there are extensive fields of advisory work or work in drafting or revising documents where that does not apply.[81] Said Lord Upjohn—

"that so far as civil proceedings are concerned gross negligence is not known to the English Common Law... Counsel will only be guilty of *crassa negligentia* or gross negligence by some really elementary blunder—see *Purves* v. *Landell.*"[82]

The rule of English Law that a Barrister cannot enter into a contract of hiring for professional services does not apply to India and therefore a Barrister from England appearing in an Indian case in India receiving fees is liable to pay income tax. Therefore an agency can be formed between a Solicitor and non-resident Barrister.[83]

Negligence of Counsel.—A claim for damages for injury in a motor car accident became statute barred as a result of erroneous advice of a Barrister and the injured person brought an action for damages against the solicitor and the Barrister. The Court of Appeal held the immunity of a Barrister from liability for advise given, applied in the case. On appeal the House of Lords by a majority held that a barrister's immunity was an exception to the liability of a professional person who held himself out as a qualified person to exercise care and skill reasonably and it could not be extended beyond what was absolutely necessary in the interest of administration of justice. Accordingly a barrister's immunity regarding pretrials which were so intimately connected with his conduct of cause in Court that they would be termed preliminary decisions as to the way the cause was to be conducted in Court when the cause

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75 *Hedley Byrne & Co. Ltd.* v. *Hellers & Partners Ltd.* (1963) 2 All E.R. 575, 611; *Le Brasseur & Oakley in re,* (1896) 2 Ch. 487, 494 (Lindley L.J.): (he can recover neither from his client nor from the solicitor): see *Wells* v. *Wells* (1914) Probate 157; *Re May* (1858) 4 Jur. N.S. 1169; *Robertson* v. *Macdonogh* (1880) 6 L.R. Ir. 433; Halsbury's Laws of England, 3rd Edn. Vol. 3, 46; and Winfield on Tort, 7th Edn. page 185; All refd. to in *Rondel* v. *Worsley* (1967) 3 W.L.R. 1666, 1690 and their soundness not accepted; *Scudder* v. *Prothero & Prothero,* The Times March 16, 1966 doubted.

76 *R.* v. *Doutre* (1884) 9 App. Cas. 745, 752.

77 *Hoggins* v. *Gordon* (1842) 3 Q.B. 466.

78 *Egan* v. *Guardians of Kensington Union* (1841) 3 Q.B. 935n.

79 *Swinfen* v. *Lord Chelmsford* (1860) 5 H. & N. 890.

80 *Robertson* v. *Macdonogh* (1880) 6 L.R. Ir. 433.

81 (1967) 3 W.L.R. 1666, 1677, 1691, 1704, 1723 (It should start at that letter before action where taxation of party and party costs starts—Lord Upjohn); *Swinfen* v. *Lord Chelmsford,* 5 H. & N. 890, refd. to.

82 12 Cl. & F. 91 appd.

83 *Barendra Prasad Roy* v. *I.T. Officer* (1973) Tax L.R. 1198, 1201; 77 Cal.W.N. 396, 400.

would be in Court was held inapplicable. As the barrister's advice and pleadings prevented the cause coming to Court, it could not be read to have that connection and therefore not within the scope of immunity of a barrister from a suit for negligence. The appeal was allowed.[84]

Solicitor pleading in Court.—A Solicitor acting as Advocate in Court enjoys the same immunity as a barrister.[85]

Medical Practitioner.—An error of clinical judgment by an obstetrician did not of itself amount to negligence. Therefore the evidence that the medical practitioner had pulled the foetus with medical forceps too long and too hard would not constitute negligence.[86]

Consulting Engineer.—A Consulting Engineer employed to design a storage building (a warehouse) for oil drums which had to be moved about on fork lift trucks is required to use professional skill and care so as to make the building free of vibrations and the floors fit for the purpose indicated. The floor designed was defective and so was the building and required a large sum of money to remedy the defects. The Engineer was held liable[87] for damages for breach of warranty and breach of their duty to use skill and care.

Auditor.—An auditor employed to value the price of shares of a company, knowing that the price determined by him, was to be paid under a contract of sale, is liable in damages to the seller or the buyer if he valued them negligently. In order in establish immunity from actions, he had to show that there was a dispute between the parties which was remitted to him to resolve in a judicial manner and the parties had agreed to accept his decision.[88]

Failure to pursue a claim on behalf of a Union.—A trade union was under a contractual obligation to a paid-up member in relation to legal assistance if the secretary was reasonably satisfied that member should take legal action. In such a case a member must show in an action for breach of contract that he had lost a right of action with reasonable prospect of success. If there is no such prospect, there would be no breach of contractual duty.[89]

Where a person with knowledge of the defect of the vendor's title deliberately purchases it in order to speculate on litigation, he cannot be granted damages for breach of covenant of title.[90]

Where the seller refuses or is unable to deliver possession of the property contracted to be sold, the purchaser is entitled to rescind the contract and recover earnest money paid by him. He is not required to bring a suit for specific performance.[91]

Transferee with notice of agreement of sale or defect of title.—*A* agreed to sell certain shares to *B*, but subsequently sold them to *C*, who had notice of the previous agreement. *B* sued *A* and *C* for damages, consisting of the dividends paid on those shares. During the

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84 *Saif Ali* v. *Sydney Mitchell & Co & P.* (1978) 3 All E.R. 1033, 1039-40, (H.C.) (1977) 3 All E.R. 744 revd; *Rees* v. *Sinclair* (1974) 1 N.Z.L.R. 180, 187 (dictum adopted); *Rondel* v. *Worsley* (1967) 3 All E.R. 993 considered.

85 *Saif Ali* v. *Sydney Mitchell & Co* (1978) 3 All E.R. 1033, 1039-40.

86 *Whitehouse* v. *Jordan* (1980) 1 All E.R. 650 (C.A.).

87 *Greaves & Co (Contractors) Ltd.* v. *Baynham Meikle & Ptner* (1975) 3 All E.R. 99, 104 (C.A.) (1974) 3 All E.R. 666 affd.; *Bolan* v. *Friern Hospital Management* (1957) 2 All E.R. 118, 121 applied; *East Ham Corporation* v. *Ballmard Sunley & Sons* (1966) A.C. 406; (1966) 3 All E.R. 619; (1965) 3 WLR 1096 (Negligence of an Architect).

88 *Arenson* v. *Casson Beckman Ruthey & Co.* (1975) 3 All E.R. 901 (H.L.) Re *Hopper* (1867) 2 Q.B. 367; *Sutcliffe* v. *Thachrah* (1974) 1 All E.R. 859 applied; *Finnigen* v. *Allen* (1943) 1 All E.R. 493 doubted; *Arenson* v. *Arenson* (1973) 2 All E.R. 235 (C.A.) revd.

89 *Buckley* v. *National Union of G. & M.W.* (1967) 3 All E.R. 767.

90 *Bhagyathammal* v. *Dhanabhagyathammal* (1981) A.M. 303; *Padayachi* v. *Natesa* (1967) Mad. 93; (1967) A.M. 461 folld.

91 *Chandhari Ram Babu Singh* v. *Dalip Kumar* (1981) A.M.P. 158; *Vuddandam* v. *Venkatekameswara Rao* (1951) A.M. 470; *Anandi Lal* v. *Abdul Hussain* (1964) A. Raj. 240 reld. on.

pendency of the suit, *C* transferred the shares to *D*. It was held that *C* could not avoid liability for damages by transferring the shares to *D*.[92]

Breach of promise of marriage.—The analogy of the latitude allowed in England in assessing damages for breach of a contract to marry is not applicable to the breach of a promise made by the father of Mahomedan girl to give her in marriage. All that the plaintiff is entitled to as against the father is the return of ornaments, clothes and other presents made by the plaintiff to the girl.[93] The right to recover these is recognised by the Mahomedan law. Apart from that law the presents may be recovered under either s. 65 or this section.[94]

Salvage by salvors and storage.—Where a Salvor salvaged the cargo on a stranded ship and carried the goods to a safe port and stored them, the responsibility of the post salvage expenses is of the shipowners and not of the cargo owners. In this case the ship had abandoned the voyage after the vessel was stranded. On both the plea of bailment and the plea of promissory estoppel the salvors (plaintiffs) failed.[95]

An aggrieved party is entitled to recover compensation for any loss suffered and substantiated by him.[96]

A claim for compensation for damage to betel nuts caused by sea water while the goods were being transferred from boats to the sea-going steamer at Nagapattnam port for carriage to Penang in Malaysia was entertained by a Civil Court at Nagapattnam and decreed against the insurance company and this decree was upheld by the Supreme Court.[97]

A student entered into a bond with a State Government which agreed to pay and paid his education expenses for the U.S.A., the condition being that after finishing his studies in U.S.A. he would serve the State for a fixed period but if he was not given employment within six months of his return, he would be free to seek service elsewhere. He finished his education and with the permission of the State stayed on in U.S.A. for practical training at his own expense. Before finishing his training he returned for domestic reasons and stayed in India for 6 months and again returned to U.S.A. to finish his training with the State's permission. He finished his training and got employed in U.S.A. and so did not return to India. It was held that the State could claim compensation mentioned in the bond. The fact that he was permitted to stay on for practical training in U.S.A. did not show waiver by the State Government and staying for six months after his return on account of domestic reasons and his being permitted to return for finishing his training also did not show that he was waiting for the State to offer him an appointment.[98]

The section applies only where a contract has been broken.—This would seem to need no proof or even statement, yet judicial affirmation of it has been necessary. A toll contractor who suffers loss in his income by reason of the discontinuance of the traffic, owing to plague regulations made by Government consequent upon the outbreak of plague in the locality, has no cause of action against the Government to recover damages as on a breach of contract.[99] There is no breach of contract involved in making the regulations; and one may add that an action would not have been possible in any Western country. We fail to see how the pleader

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92 *The Bank of India Ltd* v. *Jamsetji Chinoy* (1950) 77 I.A. 76, (1950) Bom. 606, 1950 A.P.C. 90.

93 Cf. *Vishanji Bhanjee* v. *Gangashanker,* 1953 A.Kutch 26—disappointed suitor awarded Rs. 250/- as *solatium* against the girl's father.

94 *Abdul Razak* v. *Mahomed Hussen* (1918) 42 Bom. 499; 38 I.C. 771; *Khimji Kuverji* v. *Lalji Karamsey* (1941) Bom. 211; 43 Bom.L.R. 35: 1941 A.B. 129.

95 *China Pacific S.A.* v. *Food Corporation of India* ("The Winson") (1980) 3 All E.R. 556, 561, 562, 567 (P.C.).

96 *Special Officer Amaravathi* v. *Thirumalaswami* (1937) 2 Mad. L.J. 361, 371.

97 *Chinnaswami Nadar* v. *Home Insurance Co.* (1981) A.S.C. 1528.

98 *M. Sham Singh* v. *State of Mysore* (1972) A.SC. 2240.

99 *Secretary of State* v. *Abdul Rahim* (1902) 4 Bom. L.R. 874. The suggestion of an implied warranty to maintain the existing amount of traffic is the least absurd way of putting the claim, but absurd still. *Rameshwar Poddar* v. *Paper Sales Ltd.* (1943) 45 Bom.L.R. 957, 211 I.C. 155. 1944 A.B. 21.

can have seriously thought he could make out a contract either actual or constructive between the plaintiff and the Government.

Nature and measure of damages.—The measure of damages in contract is compensation for the consequences which follow as a natural and probable consequence of the breach; or in other words which could reasonably be foreseen.[1] Both in tort and in contract the measure of damages depends on what may be reasonably foreseen.[2]

Tort.—Just as in the law of torts, so also in the law of contract damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence. But a breakdown in health is not a reasonable consequence of a solicitor's negligence and something going wrong with the litigation consequent thereupon. It can be foreseen that there will be injured feelings, mental distress, anger and annoyance but for none of these can damages be recovered.[3] "But where is the line to be drawn" the answer was given by Lord Wright in *Hay (or Bourhill)* v. *Young*[4]: Only where "in the particular case the good sense of the... judge decides."

A contract of sale and purchase of jute goods brought about by a broker had an arbitration clause. One of the parties brought a suit for damages for libel arising out of those transactions. It was held that the claim although laid in tort was inextricably connected with the transactions between the parties and bring that part of the claim also within the arbitration clause.[5]

"Damages compensatory".—Damages are compensatory and not punitive.[6] They are compensation for natural and probable consequence of the breach, i.e. which could reasonably be foreseen.[7] As the function of damages is similarly compensatory and not retributive, this principle is applicable to torts as well as contracts.[8]

The rule is well settled, said the Supreme Court, that damages due either for breach of contract or for tort are damages, which so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. In the absence of special circumstances the measure of damages cannot be the amount of loss ultimately sustained by the injured party.[9]

In tort rules of remoteness of damages are wider. In *Addis* v. *Gramophone Co. Ltd.*[10] the House of Lords held that aggravated damages cannot be awarded in an action for breach of contract.

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1 *Cook* v. *S.* (1967) 1 All E.R. 299, 302; (1967) 1 W.L.R. 457 (C.A.).

2 *Cook* v. *S.* (1967) 1 All E.R. 299, 303; (1967) 1 W.L.R. 457 (C.A.); *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (1961) A.C. 388; (1966) 1 All E.R. 404 applied. (In tort too the measure of damages is the reasonable foreseeability of the consequences): *Re Polemis and Furness Withy & Co. Ltd.* (1921) 3 K.B. 506; (1921) All E.R. Rep. 40 not applied. (In tort damages could be recovered for all direct consequences.) See *supra* foreseeable, pp. 554 sqq.

3 *Cook* v. *S.* (1967) 1 All E.R. 299, 303 (C.A.); (1967) 1 W.L.R. 457; *Groom* v. *Crocker* (1939) 1 K.B. 194; (1938) 4 All E.R. 394; *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488; (1908-10) All E.R. Rep. 1 applied.

4 (1943) A.C. 92, 110; (1942) 2 All E.R. 396, 406; *King* v. *Phillips* (1953) 1 Q.B. 429, 442; (1953) 1 All E.R. 617, 624; *Cook* v. *S.* (1967) 1 All E.R. 299, 303; (1967) 1 W.L.R. 457.

5 *Lalchand Dharamchand* v. *Alliance Jute Mills Co. Ltd.* (1973) A.Cal. 243, 248.

6 *Namayya* v. *Union of India* (1958) A.A.P. 533.

7 *Cook* v. *S.* (1967) 1 All E.R. 299, 302; (1967) 1 W.L.R. 457 (C.A.): *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (1961) 1 All E.R. 404 appd.; *Re Polemis & Furness Withy & Co. Ltd.* (1921) 3 K.B. 561; (1921) All E.R. Rep. 40 not applied; *Union of India* v. *Tribhuwandas Lalji* (1971) A.D. 120, 122.

8 *British Transport Commission* v. *Gourley* (1956) A.C. 185; (1955) 3 All E.R. 796 (a case of tort).

9 *Trojan & Co.* v. *Nagappa Chettiar* (1953) S.C.R. 789, 799; (1953) A.S.C. 235, 238 (for facts on this case see *infra*); *Mc. Connel* v. *Wright* (1903) 1 Ch. 546 and *Peek* v. *Derry*, 37 Ch.D. 541 refd. to; *Sally Wertheim* v. *Chicoutini Pulp Co.* (1911) A.C. 301 (P.C.); *British Transport Commission* v. *Gourley* (1956) A.C. 185; (1955) 3 All E.R. 796 (a case of tort). *Board of Trustees of Port of Calcutta* v. *Dhanrajmal Gobindram* (1978) A.Cal. 369, 371.

10 (1909) A.C. 488; (1908-10) All E.R. Rep.1

Damage to a building.—The broad and fundamental principle of damages is that the party injured must be placed in the same position as if the wrong had not been committed. Therefore damages must be assessed at the date when considering the circumstances the damages could be repaired rather than on the date of the damage occurring (a case of damage to a building).[11]

Damages are the compensation which an injured party may be entitled to get on an adjudication by a court of law, but he does not get them by reason of any existing obligation on the part of the party, in breach of contract, who has no pecuniary liability till the Court has determined the question of breach and the amount of compensation therefor. It will not be correct to say that the Court determines[12] pre-existing liability.

Thus where on the failure of the lessee in a mining contract, to pay the lease money the lease of the mine was resold and the Collector started proceedings to recover damages caused to the State without determining its quantum according to law and started recovering proceedings for the total lease money, it was held that the Collector could not do so without making a determination of damages according to law.[13]

Damages—no loss proved.—The plaintiff a firm of old car dealer purchased car and sold it at a profit to the defendant. But the defendant before the car was delivered repudiated the contract. The dealer then sold it at a higher price. But brought an action against the defendant for the difference between the price at which he had purchased and the price at which he had sold it to the defendant. It was held that there was no available market for second hand cars but since the plaintiff had suffered no loss he was not entitled to any damages.[14]

Measure of damages—a case of fraud.—Where a person is induced by the fraud of another to purchase shares the measure of damages which he is entitled to recover from the seller is the difference between the price of the shares paid by him and the real price on the date when the shares were purchased. The market rate of the shares on the date when the fraud was practised would be their real price in the absence of any other circumstance. If the market was vitiated or in a state of flux or panic in consequence of the fact which was fraudulently concealed then the real value has to be determined from the evidence adduced.[15]

In the case of *Trojan & Co.* the defendants, a firm of stock brokers, sold on April 5 certain shares to the plaintiff at Rs. 77 by a fraudulent representation, e.g. not disclosing the fact that the shares were owned by one of the partners and also that they (the defendants) had received intimation that there was going to be sharp decline in the price of shares. The shares were resold at Rs. 47, i.e. at a loss on April 20. The price on April 20 was held not to be the true value of the shares on April 5. The real question for determination was what the price of the shares on April 5 would have been if all the buyers and sellers knew the facts about the stock exchange.[15]

A was dismissed by one department of Government and was then employed by another department. In his suit against the Government his dismissal was declared illegal and he then claimed salary from that department also. It was held he could not claim salary from two departments.[16]

Contributory negligence.—The doctrine of contributory negligence is applicable in cases of contract under which may be implied an agreement to exercise skill or care expected of reasonably competent persons exercising the trade or calling.[17]

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11 *Dodd Properties (Kent) Ltd* v. *Canterbury City Council* (1980) 1 All E.R. 928 (C.A.).
12 *Iron & Hardware (India) Co.* v. *Shamlal & Bros.* (1954) A.B. 423 apprd. in *Union of India* v. *Raman Iron Foundry* (1974) A.SC.; 1265, 1273; *Jones* v. *Thompson* (1858) L.J.Q.B. 234; *O'Dridcoll* v. *Manchester Insurance Co.* (1915) 3 K.B. 499; approved; *Milkha Singh* v. *Gopala Krishna* (1956) A.Pj. 174.
13 *Masum Hussain* v. *State of Madhya Pradesh* (1981) ASC 1680.
14 *Lazenby Garages Ltd.* v. *Wright* (1976) 2 All E.R. 770.
15 *Trojan & Co.* v. *Nagappa Chettiar* (1953) S.C.R. 789; (1953) A.S.C. 235.
16 *State of U.P.* v. *Debi Prasad* (1966) A.A. 129.
17 *Queens Bridge Motors & Engineering Co.* v. *Edwards* (1964) Tas. S.R. 93; see *Quinn* v. *Burch Bros. (Builders) Ltd.* (1966) 2 W.L.R. 430 (for facts see *infra*).

A plaintiff may following the defendant's breach suffer through his own voluntary act. Thus where through the default of the defendant a contractor was employed who had inadequate equipment and the plaintiff used it despite its inadequacy and injured him, it was held that though the defendant's act did not cause the accident it only gave the plaintiff an opportunity to injure himself. This was despite his appreciation of the risk involved.[18]

In order to succeed in his claim for damages for premature cancellation of contract the plaintiff must show that the cancellation was wrongful. But where the evidence shows that it was the plaintiff's breach of contract that led to cancellation, the cancellation will not be wrongful.[19]

Where the plaintiff-appellant company itself committed a breach of its obligation by not providing facilities for loading, it cannot claim demurrage or damages for delay in loading.[20]

Damages—Substantial damages.—There are many authorities which establish that substantial damages can be claimed where a breach is proved even though the calculation of damages is "not only difficult but incapable of being carried out with certainty or precision." In all these cases, however, the extent of breach was established. There was complete failure on one side to perform the contract.[21] But where the breach is partial and the extent of failure is unascertained, only nominal damages are awarded.[22] If the market rate on the date of breach is not proved, the plaintiff will be entitled to nominal damages.

Nominal and small damages.—Small amount of damages is not necessarily nominal damages. Nominal damages means that there is an infraction of a legal right and though it gives no right to any real damages yet gives the right to a verdict because of the infringement.[23] Nominal damages are usually 40 *sh*. The normal use of nominal damages is to establish the infringement of plaintiff's legal right.[24] It may even be just 1 *sh*.,[25] where there is no basis for ascertainment of the amount. The High Courts of Calcutta[26] and Patna[27] have held that nominal damages do not connote a trifling amount. It is submitted this is an erroneous view. Nominal damages mean a small sum of money, e.g. 40 *sh*[28]

Damages—quantum of.—The Supreme Court does not investigate *de novo* into the quantum of damages when no ground was taken in that regard before the High Court and no specific ground was taken in the Supreme Court regarding the quantum of damages. But as the High Court had reduced the profit of 15% of the contract price awarded by the trial Court on the ground of its being a guessing without giving any tangible reason for the same, the Supreme Court reversed, restoring the quantum awarded by the trial court.[29]

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18 *Quinn* v. *Burch Bros (Builders Ltd.)* (1966) 2 Q.B. 370; (1966) 2 W.L.R. 1017; (1966) 2 All E.R. 283.
19 *G.L. Kilikar* v. *State of Kerala* (1971) A.SC. 1196.
20 *Timblo Irmaos Ltd* v. *A.M. Sequeira* (1977) 2 SCR 451; (1977) A.SC. 734, 739.
21 *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (1938) 91 C.L.R. 286, 301, referred to *Chaplin* v. *Hick* (1911) 2 K.B. 786, at p. 791; (1911-13) All E.R. Rep. 224, 227. See also cases dealing with damages for loss of publicity; *Marbe* v. *George Edwardes (Daly Theatre)* (1928) 1 K.B. 269; *Herbert Clayton & Jack Waller Ltd.* v. *Oliver* (1930) A.C. 209; *Withers* v. *General Theatre Corporation* (1933) 2 K.B. 536. In all these cases, however, the extent of the breach was established. There was a complete failure on one side to perform the contract.
22 *Tramways Advertising Pty. Ltd.* v. *Luna Park* (1938) 61 C.L.R. 286, 301.
23 *The Mediana* (1900) A.C. 113, 116.
24 Chitty on Contracts (24th Edn.) paras 1553.
25 *Tramways Advertising (Pty.) Ltd.* v. *Luna Park,* 61, C.L.R. 286.
26 *Pravudayal* v. *Ramkumar* (1956) A.Cal. 41; *Rollin* v. *Steward* (1954) 14 C.B. 595; and *Wilson* v. *United Counties Bank Ltd.* (1920) A.C. 102 refd. to.
27 *Brahmdeo Narain Singh* v. *Notified Area Committee* (1965) A.P. 179.
28 Halsbury's Laws of England (4th Ed.) Vol: 12, pàra 1114, p. 417. The cases referred to by the learned judges were not cases of nominal damages.
29 *Mohammad Salamat Ullah* v. *Government of Andhra Pradesh* (1977) A.SC. 1481, 1482; (1968) 2 And. L.T 326 revd.

Damages payable in foreign currency.—The question of the *quantum* of damages actually to be awarded by a Court has to be determined by the application of *lex fori*[30] under this rule the damages awarded in foreign cur-ency had to be converted into English currency even when stemming from a breach of contract whose proper law was that of the foreign country.[31] This rule, criticised by the Court of Appeal,[32] has been discarded by the House of Lords on the ground that the basis of the rule—of the stability of pound sterling no longer exists.[33] See also under s. 38 (payment in foreign currency).[34]

Waiver of Breach.—Where the State allowed time to a contractor who had not completed the work within stipulated time, to complete the work contracted for and the final bill was prepared without any penalty and also the work was not got completed by another contractor, the State must be deemed to have waived its claim for compensation.[35]

Liability under Bombay Port Trust Act.—Where machinery imported by the plaintiff was taken charge of at the port of discharge and the goods were substantially damaged when being carried on a trolly due to negligence of the employees of the Board of Bombay Port Trust and the plaintiff sued for damages for loss due to negligence and breach of statutory duty, the Supreme Court held that the Board was not liable because of S87 of the Bombay Port Trust Act which provides for one month previous notice before filing of the suit and because the employees appointed under the Act were protected against acts of malfeasance, misfeasance and non-feasance.[36]

Under s. 73 a party complaining of breach of Contract can claim damages on proof thereof; similarly under section 75 where the language makes that clear s. 74 is intended to meet a different situation. It is a kind of exception to s. 73.[37]

Liquor Licence.—A licence to sell liquor is in the nature of a permit to carry on the trade of selling liquor and the fee paid is for such permission. It is not conditional on the maintenance of the supply of liquor by the Government nor contingent on the licensee being in a position to carry on the business every day.[38]

Compensation for breach of contract where penalty stipulated for.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, *or if the contract contains any other stipulation by way of penalty,* the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation[39] not exceeding the amount so named *or, as the case may be, the penalty stipulated for.*

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30 *D'Almedia Arujo Luda* v. *Becker & Co. Ltd.* (1953) 2 Q.B. 329, 338; *Chaplin* v. *Boys* (1971) A.C. 356, 378, 371-2; (1969) 3 W.L.R. 322; (1969) 2 All E.R. 1085.

31 *Manners* v. *Pearson* (1898) 1 Ch. 581; *Tomkinson* v. *First Pennsylvania Banking & Trust Co.* (1961) A.C. 1007; (1960) 2 W.L.R. 969; (1960) 2 All E.R. 332.

32 *Schorsch Meter GmbH* v. *Hemmin* (1975) Q.B. 476.

33 *Miliangos* v. *George Frank (Textile) Ltd.* (1976) A.C. 443, 445-6. See also *The Holcyon the Great* (1975) 1 W.L.R. 515.

34 Payment in Foreign Currency; Chitty on Contracts (24th Ed.) para 1944.

35 *State of Rajasthan* v. *Chandra Mohan Chopra* (1971) A. Raj. 229, 231; 1971 21 Raj. 301.

36 *Trustees of Bombay Port Trust* v. *Premier Automobiles Ltd* (1981) ASC 1982, 1987; (1971) A.B. revd.

37 *B.N. Mathur* v. *Union of India* (1974) A.M. 233, 238 an unreported case quoted and relied on.

38 *Ka Ron Lanong* v. *State of Assam* (1959) A. Assam 75.

39 This section does not overlap or extend s. 73; there must be something in the nature of a penalty: *Meyyappa Chetty* v. Nachammal Achi, 123 I.C. 343; 1929 A.M. 783, is unintelligible as reported.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the (Central Government)[40] or of any (State Government),[41] gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do and act in which the public are interested.

Illustrations

(a) *A* contracts with *B* to pay *B* Rs. 1,000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practices as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He foreits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.[42]

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200, payable by five yearly instalments of Rs. 40, with a stipulation that in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.[43]

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40 These words were substituted for "Government of India" by the A.O.

41 These words were substituted for "Local Government" by the A.O.

42 This illustration really covers *Sheo Prasad* v. *Sanaullah* (1929) All.L.J. 894; 115 I.C. 639; 1929 A.A. 556, rightly decided on common sense; and *Yenna Tatayya* v. *Kakarla Gangayya,* 1927 A.M. 965; 105 I.C. 789; *Asha Devi* v. *Champa Devi,* 1953 A.A. 559.

43 So as to a similar clause in a "chit-fund" bond: *Ramalinga Adaviar* v. *Meenakshisundaram* (1924) 47 Mad L.J. 833; 85 I.C. 261; 1925 A.M. 177; *Subbiah Pillai* v. *Shanmugham Pillai,* 1928 A.M. 245; 108 I.C. 319. A provision in a *Kuri* entitling the stake holder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable; *Kannan Nambiar* v. *Subramania* (1941) Mad. 486; (1940) 2 Mad.L.J. 927; 196 I.C. 291; 1941 A.M. 231.

"The Indian Legislature by enacting 74 has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."[44]

The Supreme Court in *Fateh Chand's case* has said: "S.74 declares the law as to liability upon breach of contract where compensation is by agreement of parties predetermined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party. It merely declares the law that notwithstanding any term in the contract for determining the damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.."[45]

Section 74 provides for the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any other stipulation by way of penalty. In the latter case, the measure of damages is by section 74, reasonable compensation not exceeding the penalty stipulated for.[46]

S.74 requires proof of general damages as distinguished from proof of actual or quantum of damages.[47] In a *Madras* case the section was stated to be applicable even where there was no loss. It is submitted that this is not the correct position.[48]

Liquidated and unliquidated damages.—So far as the law in India is concerned there is no qualitative difference in the nature of liquidated and unliquidated damages as S. 74 eliminates the somewhat elaborate refinement made under the Common Law between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty, which under the Common Law is a stipulation *in terrorem* and a genuine pre-estimate of damages is regarded as liquidated damages and is binding.

A claim for liquidated damages stands on the same footing as a claim for unliquidated damages. A claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon the damages assessed. A party in breach of contract does not incur *eo instanti* a pecuniary liability nor does the injured party become entitled to claim a debt. He is only entitled to sue for damages and have them adjudicated upon.[49]

Penalty and liquidated damages.—This section boldly cuts the most troublesome knot in the common law doctrine of damages: *Fateh Chand* v. *Balkishen Das* (1964) 1 S.C.R. 515, 526 (per Shah J.); (1963) A.SC. 1405, 1410. By the common law parties may name a penal sum as due and payable on a breach of contract, that sum being, according to the true intention of the parties, only a maximum of damages. In that case the real damages, and no more, are recoverable. On the other hand, they may by consent assess a fixed measure of damages, liquidated damages as they are called, to avoid the difficulty that must often be found in setting a pecuniary value on obligations not referable, on the face of them, to any commercial standard. So far this looks very well. The trouble is that even now the Courts have not arrived at clear or certain rules for deciding to which of these two classes a given stipulation for a penal

44 *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515, 526 (per Shah J.); (1963) A.S.C. 1405, 1411; *Hardip Singh* v. *Hira Films* (1960) A. Punj. 637; *Special Officer Amaravathi* v. *Thirumalaswamy* (1973) 2 Mad L.J. 361, 372-3. *Amin Chand Bhola Singh* v. *Jullundur Supply Co.* (1953) A. Punj. 166 dist.

45 *Fateh Chand* v. *Balkishandas* (1964) 1 SCR 515, 530; (1963) A.SC. 1405, 1412.; *Nareshchandra Sanyal* v. *Calcutta Stock Exchange Assn. Ltd.* (1977) A.SC. 422, 428.

46 *Fateh Chand* v. *Balkishendas* (1954) 1 S.C.R. 515, 526-7; (1963) A.S.C. 1405, 1410-11, quoted in *Sree Hanuman Cotton Mills* v. *Tata Aircraft Ltd.* (1970) A.SC. 1986, 1997: (1970) 3 SCR 127. See *Lekh Singh* v. *Dwarka Nath* (1929) A.L. 249; and *Lachhmandas* v. *Bhoja Ram* (1925) A.L. 284 (where it was observed that sum stipulated should be paid as damages unless exorbitant, unconscionable or inquitable). *Geo Pictures Ltd.* v. *Neelkandam Gopalkrishna* (1971) A Ker. 274; *Mahadeo Prasad* v. *Siemens Ltd.* 60 Cal 1, 379; (1934); A Cal. 285 diss. from *Madhava* v. *Kasargod Muncipality* (1973) Ker 493, 497; *Dinanath* v. *Malvi Moody* (1930) A.B. 21, *Hindustan Shipyard Ltd.* v. *Appalaswami* (1963) A.AP. 71 reld. on. *Dharam Chand Soni* v. *Sushil Kumar Chakravarti* (1981) A. Cal. 323, 324.

47 *Matilal Nath* v. *Bengal Chemical & Pharmaceutical Works* (1971) 2 Cal. 454, 457; *Mahadeo Prasad* v. *Siemens (India) Ltd.* (1934) A.Cal. 285.

48 *Special Officer, Amaravathi* v. *Thirumalaswami* (1973) 2 Mad L.J. 361, 362.

49 *Webb* v. *Stenton* (1883) 11 Q.B.D. 518; *People* v. *Aguello* (1869) 37 Calif. 524 (defines debt) quoted with approval in *Kessoram Industries* v. *Commissioner of Wealth Tax* (1966) 2 SCR 688; (1966) A.SC. 1370; *Union of India* v. *Raman Iron Industries* (1974) A.SC. 1265. 1271: (1974) 3 SCR 556.

or seemingly penal sum belongs. The only thing that is quite certain is that the use of the words "penalty" or "liquidated damages" is not decisive; and that even the addition of negative words purporting to exclude the other alternative, for example "as liquidated damages and not as a penalty",[50] will not make it so. Two causes appear to have conspired to produce this anomalous result: a well-meant but perhaps not wholly well-informed endeavour to imitate the equitable doctrine of giving relief against forfeiture,[51] and, re-inforcing this, a logical or arithmetical repugnance of the common law (perhaps connected with the canonical prohibition of usury.[52] to admit that a greater sum of money can ever be due for the breach of an obligation to pay a smaller one. "That a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms".[54] Accordingly a conventional larger sum agreed upon as payable in the event of failure to pay a smaller sum, or in such an event among others, is treated as penal only. Further, it is understood that "where a sum is made payable by a contract to secure performance of several stipulations the damages for the breach of which respectively must be substantially different....that sum is *prima facie* to be regarded as a penalty, and not as liquidated damages."[55] The truth is that here, as in some other branches of the law, what once was a rule of policy overriding the intention of the parties has been turned into an artificial and more or less arbitrary rule of construction. The nearest approximation to a general test yet arrived at is that so-called liquidated damages will not be recoverable in full when the Court thinks this would be extravagant or unconscionable, having regard to the circumstances of the particular case.[56] But it is quite needless to enter in this place upon the somewhat confusing application of the resulting distinctions, for the manifest purpose of the present section is to get rid of all these questions by carrying out the tendency of the English authorities to its full consequences.[57]

There may, again, be a conventional sum which is neither damages nor penalty, but, as it has been called a "liquidated satisfaction"[58] the agreed price of liberty to do or omit something. In such a case there is merely a conditional or alternative promise which, if not open to any other objection, will take effect according to its terms.

Compromise decree.—It has been held by a Full Bench of the High Court of Allahabad that the section applies to a compromise decree and that it is open to a Court executing such a decree to go behind it if it contains a stipulation which is by way of penalty.[59] In a compromise

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50 In *Kemble* v. *Farren* (1829) 6 Bing. 141; 31 R.R. 366, a sum expressly declared by the parties to be "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof," was held to be a penalty.

51 See per Jessel M.R., *Wallis* v. *Smith* (1882) 1 Ch.D. 243, 256.

52 It must be remembered that in the Middle Ages, and even later, usury meant not taking exorbitant interest, but taking interest at all.

54 *Kemble* v. *Farren* (1829) 6 Bing. 141, at p. 148.

55 A.L. Smith L.J., *Wilson* v. *Love* (1896) 1 Q.B. 626, 631; *Cooden Engineering* v. *Stanford* (1952) 2 All E.R. 915.

56 *Clydebank Engineering Co.* v. *Castaneda* (1905) A.C. 5 (an appeal from Scotland, but the Scottish law does not differ on this point from the English); *Webster* v. *Bosanquet* (1912) A.C. 394 (Jud. Comm. from Ceylon). See *Mahadeoprasad* v. *Siemens (India) Ltd.* (1934) 60 Cal. 1379; 149 I.C. 858; 1934 A Cal. 285; *Motilal Nath* v. *Bengal Chemical & Pharmaceutical Works* (1971) 2 Cal. 454, 457.

57 That this is now fully settled, see *Panna Singh* v. *Arjan Singh,* 33 C.W.N. 949; 117 I.C. 485; 1929 A.P.C. 179 (1929) All.L.J. 791; *Mahadeoprasad* v. *Siemens (India) Ltd.* (1933) 60 Cal. 1379; 149 I.C. 858; 1934 A.Cal. 285; *Landom Trust* v. *Hurrell* (1955) 1 All E.R. 839; *Fatehchand* v. *Balkishendas* (1964) 1 S.C.R. 515, 526; (1964) A.SC. 1405, 1411. But see *infra* where "penalty" & "liquidated damages" have been discussed.

58 See *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886) 11 App. Ca. 332, at p. 347.

59 *Mohiuddin* v. *Kashmiro Bibi* (1933) 55 All. 334; 142 I.C. 419 ; 1933 A.A. 252, overruling a contrary decision of the same Court: *Raghunandan Prasad* v. *Ghulam Ala-ud-din Beg* (1924) 46 All. 571; 79 I.C. 916; 1924 A.A. 689; *Subbayya* v. *Pedayya* (1937) 169 I.C. 345; 1937 Mad. 234; *Shyam Sundar* v. *Indramoni Das,* 1951 A. Or. 46; *Chinnaswami* v. *Cheru,* 1953 A.T.C. 464; *Nanalal* v. *Shiv Singh,* 1954 A.M.B. 84; *Mangal Singh* v. *Bajrang Bali,* 1955 A.Peps. 110.

The principle that Courts can relieve against penalties even in consent decrees was accepted in *Waman Vishwanath* v. *Yeshwant* (1948) Bom. 654, 50 Bom.L.R. 688, 1949 A.B. 97, but it was held on the particular facts that there was no penalty. So also in *Ahmed Allahrakhio* v. *Amin* (1946) Kar. 132, 1946 A.S. 150, 222 I.C. 454, but the remedy was barred by laches.

decree the claimant agreed to take a lesser sum to be paid by instalments on particular dates and in default in whole claim of the plaintiff was to become payable. This was not a penalty which is in the nature of a punishment or an infliction.[60]

Where in a compromise decree the default clause making the whole amount of the decree remaining unpaid payable was penal in nature and the decree did not make the punctuality of the instalments as essence of the contract, the Court[61] can relieve the judgment-debtor against rigour of the clause by condoning the default in payment of the impugned instalments.

A compromise decree is a contract to which s.74 applies. And even though a penalty clause in a contract may not be illegal it is subject to the provisions of s.74 and the Court will in proper cases give relief.[62]

Penalty in a document if a bond.—In a contract to supply *rab* there was a condition that in case of failure of the supplier to supply the stipulated quantity of *rab* by a certain date and in case of default he was to pay 50% of the profits by way of damages. It was held by a Full Bench of Allahabad High Court[63] that it should be read that he will pay reasonable compensation not exceeding the sum mentioned in the document and also that such a document is an agreement and not a bond.

The original section has been amended by the Indian Contract (Amendment) Act, 1899. The italicised words indicate the portion newly added in the section. Illustrations (d), (e), (f) and (g), were also inserted by the same Act. The marginal note to the section has also been altered, it originally stood thus: Title to compensation for breach of contract in which a sum is named as payable in case of breach".[64] There is no doubt that, as the section originally stood, it was intended to do away with the distinction between a penalty and liquidated damages.[65] The sole object of the section appears to have been to provide for the class of cases to which *Kemble* v. *Farren*[66] belongs, and in which the distinction between 'liquidated damages' and 'penalty' has given rise to so much difference of opinion in the English Courts".[67] A third type of named sum has appeared in English case-law in the House of Lords decision in *Cellulose Acetate Silk Co. Ltd.* v. *Widnes Foundry*.[68] This is a sum named, which is, in the words of Lord Atkin, 'all the party is prepared to pay.' There *P* agreed to erect and deliver an acetone recovery plant. The penalty for delay was to be £20 a week. There was a delay of thirty weeks. *D* claimed £5,850, his actual damages, but the Court awarded him only £600. The

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60 *Chinna* v. *Chuni Lal* (1957) A.Raj. 378; *F. Kari Poddar* v. *Harishankar Mills* (1957) A.P. 542; *Abdul Ghani Sab* v. *Nanjunda Setty* (1962) A.Mys. 9.; *Jhurailal* v. *Mohan Das Bose* (1972) A.A. 457.

61 *Deepchand Mini* v. *Ticamchand Mini* (1974) A.Cal. 222, 225; *Gomathinayagam Pillai* v. *Pataniswami* (1967) A.SC. 868; *Fatehchand* v. *Balkishandas* (1963) A.SC. 1405; *Jadabendra Nath Mishra* v. *Manorama Debya* (1970) A.Cal. 199; *Kandarpa Nag* v. *Banwari Lal Nag*. 33 Cal.L.J. 244; (1921) A. Cal. 356 reld. on; *C.F. Angadi* v. *Y.S. Hirannaya* (1972) A.SC. 239; *Vyankatarao Laxmanji* v. *Shamrao Ganpatrao* (1952) A.N. 185; *Nanalal Verma & Co. Ltd.* v. *Gordhandas Jerambhai* (1965) A. Cal. 547 disting.

62 *Nanjibhai* v. *Ramkishen* (1977) A.MP. 112, 114; *Attarbai* v. *Mishr*[illegible] 318; *Bahadur Singh* v. *Gulab Devi* (1975) Jab. L.J. 649 folld.

63 *Mahabir Prasad* v. *Peer Bux* (1972) A.A. 466, 469 F.B.; *Mohiuddin* v. *Kashmiro Bibi* (1933) A.A. 252 F.B.

64 The first paragraph of the section stood as follows before the amendment: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

65 *Mackintosh* v. *Crow* (1883) 9 Cal. 689, at p. 692, per Wilson J.; *Vengideswara Putter* v. *Chatu Achen* (1881) 3 Mad. 224, 228; *The Brahmaputra Tea Co. Ltd.* v. *Scarth* (1885) 11 Cal. 545, 550; *Deno Nath* v. *Nibaran Chandra* (1899) 27 Cal. 421, 423; *Nait Ram* v. *Shib Dat* (1882) 5 All. 238, 241; *Dilbar Sarkar* v. *Joysri Kurmi* (1898) 3 C.W.N. 43, 45. It is said to be a common error to suppose the operation of this section to be confined to unreasonable agreements, as obviously it is not; *Jagannath* v. *Vishnu*, 1927 A.N. 284; 96 I.C. 382.

66 (1829) 6 Bing. 141.

67 Per Sargent C.J. in *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 111.

68 (1933) A.C. 20.

Court found that it must have been obvious to the parties at the time of their agreement that the actual damage to *D*, in the event of delay, would far exceed the named figure, but that sum was all that *P* was prepared to pay. An Indian Court would inevitably reach the same conclusion on the wording of s. 74. The solution seems to be a just one. It does appear, however, that the rigid application of s. 74 to charterparties might lead to injustice. In England the words 'penalty estimated amount of freight' have been held not to limit general damages, but to be 'worthless and unenforceable': *Watts* v. *Mitsui*.[69] In India, such words would, by virtue of s. 74, inevitably have a limiting effect. The amended section does not apply to covenants in a lease of which the breach involves forfeiture.[70] A stipulation in a lease that brick works on the land will be forfeited if not removed on the expiry of the lease or within three months thereafter, is not a penalty.[71]

Liquidated Damages and Penalty—Distinction.—As in a number of cases Indian courts have referred to the distinction between penalty and liquidated damages, it has been considered expedient to deal with them at this place. Whether a stipulated sum is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances as they existed at the time of the contract and not the breach thereof.[72]

Penalty.—The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, the essence of liquidated damages is a genuine covenanted pre-estimate of damages. The question is one of construction of a contract to be judged as at the time it was made.[73] Its being described as penalty or liquidated damages is relevant but not decisive.[74]

Penalty was defined by Porter J. to mean

"I promise to pay so much money if I break certain terms of the contract."[75] Thus, "(a) it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.... (c) There is a presumption (but no more) that it is penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".[76]

The question of penalty arises only when the agreed damage is disproportionately more than the actual damage suffered on any breach.[77]

In an agreement of sale the purchaser was to be paid a sum of Rs. 90,000/- on default by

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69 (1917) A.C. 227, H.L.

70 *Krishna Shetti* v. *Gilbert Pinto* (1919) 42 Mad. 654; 50 I.C. 898.

71 *Karnani Industrial Bank Ltd.* v. *Bengal Province,* 1949 A.Cal. 47.

72 *Public Works Commissioner* v. *Hills* (1906) A.C. 368; *Webster* v. *Bosanquet* (1912) A.C. 394; *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.* (1915) A.C. 79, 87; (1914-15) All E.R. Rep. pp. 739, 741-2; *Aswathanarayaniah* v. *Sanjeeviah* (1965) A.AP. 33.

73 *Phonographic Equipment* (1958) *Ltd.* v. *Muslu* (1961) 1 All E.R. 626; (1961) 1 W.L.R. 1379, 1385 following Lord Dunedin's dictum in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79, 87; (1914-15) All E.R. Rep. 739, 741; *Clyde Bank Engineering & Shipbuilding Co.* v. *Don Jose Ramos* (1905) A.C. 5; *Union of India* v. *Vasudeo Aggarwal* (1960) A.P. 87, 91; *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515, 526; (1963) A.S.C. 1405, 1411; see n. 69 *supra; N.C. Sanyal* v. *Calcutta Stock Exchange Ltd.* (1971) A.S.C. 422, 428.

74 *Farren* v. *Kemble* (1829) 6 Bing. 141; 33 R.R. 366; "Liquidated damages" held as "penalty" and *vice versa* in *Elphinstone* v. *Monkland Iron & Coal Co. Ltd.* (1886) 11 App. Cas. 332.

75 *Gaumount British Pictures Corporation* v. *Alexander* (1936) 2 All E.R. 1686, 1693.

76 *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79, 87; (Per Lord Dunedin): (1914-15) All E.R. Rep. 739, 745; *Phonographic Equipment (1958) Ltd.* v. *Muslu* (1961) 1 W.L.R. 1379, 1385 (C.A.); (1961) 3 All E.R. 626; *Cooden Engineering Co. Ltd.* v. *Stanford* (1953) 1 Q.B. 86; (1952) 2 All E.R. 915; *Elphinstone* v. *Monkland Iron & Coal Co.* (1886) 11 App. Cas. 332, 342; *Inter Office Telephone Co. Ltd.* v. *Robert Freeman Co.* (1958) 1 Q.B. 190, 194; (Lord Watson) in *Lord Elphinstone* v. *Monkland Iron,* 11 App. Cas. 332, 342.

77 *Robophone Facilities Ltd.* v. *Blank* (1966) 3 All E.R. 128, 137 (C.A.)

the vendor. This was held to be unreasonable and therefore a penalty. In this case there was no proof of actual damage.[78]

Penalty—Less determinable.—Where a sum is mentioned in a contract by way of liquidated damages for the breach of contract but the loss suffered can be determined in terms of money, the loss must be proved by the plaintiff.[79]

Where a sum is named as damages for breaches however varying in importance but of such an uncertain nature that they cannot be accurately ascertained or the sum stipulated is taken as an average or mean figure of losses probably incurred in different events, it may be recoverable as liquidated damages.[80]

Graduated sums.—Courts have upheld graduated sums for default of varying services in building contracts and other similar contracts—breaches[81] such as delays of various lengths or varying with number of items. But absence of graduation will make the sum penal.[82]

Limit.—Where a sum is stipulated as a limit for a breach it will not be a penalty nor will it be a penalty even if no limit is fixed, if it is similar in effect because it fixes an exact sum. If the parties could foresee that the damages will be greater in such a case the Courts will construe it as an agreed limitation on the extent of the liability.[83]

Test of penalty.—(a) It will be penalty if the sum named is extravagant and unconscionable.[84]

(b) It is penalty if the breach consists in paying of money and the sum stipulated is greater than the sum which ought to have been paid.[85]

(c) There is a presumption (but nothing more) that where a single lump sum is payable as compensation on the happening of one or more events some of which cause serious damage and others trifling[86] the sum named will be a penalty. On the other hand:

(d) Where it is practically impossible to make a precise pre-estimate of damage a sum stipulated as damages is a true bargain between the parties.[87]

(e) Even when a precise pre-estimate of the damage is possible the parties may fix a sum in the contract to avoid the trouble and expense assessment[88] The fact that a precise pre-estimate

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78 *Jaswant Rai* v. *Abnash Kaur* (1974) 1 Del. 689, 706.

79 *Nagpur Nagrik Sahakari Bank* v. *Union of India* (1981) A.A.P. 153, 161; *Fateh Chand* v. *Balkrishan Das* (1963) A.S.C. 1405; *Union of India* v. *R.D. & C. Co.* (1973) A.SC. 1098, folld.; *Chunilal* v. *Mehta & Sons* v. *C.S. & M. Co. Ltd.* (1962) ASC 1314 disting.

80 Chitty: On Contracts (24th Ed.) Para 1605; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79, 99; *English Hop Growers Ltd.* v. *Dering* (1925) 2 K.B. 174, 182.

81 *Elphinstone* v. *Monkland Iron & Coal Co. Ltd.* (1886) 11 All. App. Cas. 332.

82 *Public Works Commissioners* v. *Hills,* 1906 A.C. 368.

83 Chitty: On Contracts (24th Ed.) Para 1609 but for charter party contracts; See para 1610.

84 *Clydebank Engineering* v. *Don Jose Ramos* (1905) A.C. 6, 17.

85 *Kemble* v. *Farren* (1829) 6 Bing. 141.

86 *Elphinstone* v. *Monkland Iron & Coal Co. Ltd.* (1886) 11 App. Cas. 332, 342; *Michel Habib Raji Ayoub* v.*Sheikh Suleiman* (1941) 1 All E.R. 507, 510; *Gooden Engineering Co. Ltd.* v. *Stanford* (1953) 1 Q.B. 86, 98. In such cases separate amounts must be fixed for each possible event). *Imperial Tobacco Co.* v. *Parslay* (1936) 2 All E.R. 515. See also *Interoffice Telephones Ltd.* v. *Robert Freeman Co. Ltd.* (1958) 1 Q.B. 190, 194.

87 *Clydebank Engineering Co. Ltd.* v. *Don Jose Ramos* (1905) A.C. 11 *Webster* v. *Bosanquet,* 1912 A.C. 394, 398; *Special Officer* v. *Thirumalaswami* (1973) 2 Mad. L.J. 361, 362-3. *English Hop Growers Ltd.* v. *Derring* (1928) 2 K.B. 78; *Imperial Tobacco Co. Ltd.* v. *Parslay* (1936) 2 All E.R. 515, 519.

88 *Diestel* v. *Stevenson* (1905) 2 K.B. 345.

of damages is difficult strengthens the presumption that the agreed sum is a genuine attempt to estimate the damages to avoid the difficulties of a trial.[89]

Penalty and liquidated damages cannot be taken as such on merely being so described. A penalty is a sum of money so stipulated *in terrorem* and liquidated damages are a genuine practimate of damages. They are to be so judged on the facts of each case. In the absence of proof of damages or any breach of obligations, no sum of money named in a contract can be claimed.[90]

Liquidated damages.—"Liquidated damages" means that it shall be taken as the sum which the parties have by the contract assessed as damages to be paid whatever may be the actual damage.[91] A fixed figure of damages, which is not assessed for all circumstances but is graduated to correspond with passage of time between the making of contract and of its breach, is a proper estimate of the damages to be anticipated from the breach and is recoverable as liquidated damages.[92]

Liquidated damages named, a genuine pre-estimate, cannot be interfered with.

Plaintiff cannot get damages unless he has proved loss and cannot get more than what is named.[93]

A clause in a hire-purchase contract whereby an alleged penalty begins to abate after the sixth month disappears at the eighteenth month, is more like an attempt to pre-estimate the loss from depreciation than the fixing of a penalty.[94]

But the House of Lords in *Bridges Case* held such a clause to be a penalty.[95] A clause in an artiste's agreement suspending salary upon her failure to appear and perform does not prevent the employers from recovering damages for breach of contract as well as suspending her salary. The suspension of salary is not a penalty.[96] A sum which is payable in pursuance of a contractual obligation is different from a sum payable on a breach of contractual obligation. The former is not a penalty.[97]

A sum which is liable to fluctuate according to extraneous circumstances is not liquidated damages.[98]

But where the contract provided a sum of £250 as payable upon the breach of any one of the covenants the Court of Appeal held it to be a penalty since it was an arbitrary and substantial sum payable for defaults of different importance some of which may cause trifling damages.[99]

Cases illustrative of liquidated damages and penalty.—Where, in the case of a hire-purchase contract in respect of a car the hirer has paid 4/5ths of the contract amount,

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89 *Dunlop Pneumatic Tyre Co.* v. *New Garages Motor Co. Ltd.* (1915) A.C. 79; *Robophone Facilities Ltd.* v. *Blank* (1926) 1 WLR 1428, 1447; *English Hop Growers Ltd.* v. *Derring* (1928) 2 K.B. 174.

90 *State of Orissa* v. *Calcutta Co. Ltd.* (1981) A. r. 206.

91 *Wallis* v. *Smith* (1882) 21 Ch.D. 243, 267 (Cotton L.J.). relied on in *Manian Patter* v. *The Madras Railway Co.* (1906) 29 Mad. 118. Cf. *Younie* v. *Tulsiram*, 46 C.W.N. 522.

92 *Robophone Facilities Ltd.* v. *Blank* (1966) 3 All E.R. 128, 137, 140. But see *Bridge* v. *Campbell Discount Co. Ltd.* (1962) A.C. 600; (1962) 2 W.L.R. 439, 454; (1962) 1 All E.R. 385, 391, 395.

93 *Karamchand Thapar & Bros.* v. *Jethanandani* 76 CWN 338, 342.

94 *Phonographic Equipment (1958) Ltd.* v. *Muslu* (1961) 1 W.L.R. 1379; (1961) 3 All E.R. 626 (C.A.).

95 *Campbell Discount Co. Ltd.* v.*Bridge*, subnominee Bridge v. *Campbell Discount Co. Ltd.* (1962) A.C. 600; (1962) 1 All E.R. 385; (1962) 2 W.L.R. 439 H.L., where the House of Lords held such a clause to be a penalty approving *Cooden E.C. Ltd.* v. *Stanford* (1953) 1 Q.B. 86; (1952) 2 All E.R. 915.

96 *Gaumont British Picture Corporation* v. *Alexander* (1936) 2 All E.R. 1686, 1693.

97 *Tool Metal Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, 688; (1955) 1 W.L.R. 761.

98 *Public Works Commissioners* v. *Hills* (1906) A.C. 368, 376.

99 *Ford Motors Co.* v. *Armstrong* (1915) 31 TLR 267 (by majority).

forfeiture of the hire-purchase money and the seizure of the car is a penalty within section 74.[1]

An agreement for supply of 500 bales of jute between an Indian company and a British company contained a clause for payment of "liquidated damages" for default at the difference between the contract rate and rate on the day following the default plus 10 *sh*. per ton and also a provision for arbitration in accordance with the bye-laws of the London Jute Association. The arbitrators in London on disputes having arisen gave an award for liquidated damages as given in the agreement, i.e. the difference in rates plus 10 *sh*. per ton.

The Supreme Court held that the stipulation was valid as also the award. Both these sections (Ss. 73 and 74) provide for reasonable compensation and section 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract.[2]

Where a jungle (forest) was sold for Rs. 60,000/- and in case of default in carrying out the stipulation of the agreement the party in default was to pay Rs. 50,000/- as damages, this sum was held u/s 73 to be by way of penalty and not liquidated damages. Further as the buyer had invested no money and had not incurred any loss, he was not entitled to any damages.[3]

In an agreement between Dunlops and a selling agent of their goods, there was an agreement whereby the latter agreed to pay £5 for each and every tyre, tube or cover offered in breach of the agreement between the parties. This sum was taken as one for liquidated damages as there was nothing unreasonable, unconscionable or extravagant. The agreement provided that the agent will not tamper with manufacturers' marks; not to sell at less than list prices; not to supply to persons on company's suspension list; not to exhibit or export without Dunlop's assent.[4]

Penalty or liquidated damages Onus on plaintiff.—The plaintiff has to prove that the amount of damages stipulated whether by way of liquidated damages or penalty is a reasonable pre-estimate of damages and he cannot be awarded a sum greater than the one stipulated.[4]

In hire purchase agreement.—A hire-purchase agreement in respect of a juke box provided for payment of rent, for cost of repairs, and an agreed sum by way of depreciations equal to 50% of the total hire-purchase price. After 3 months the hirer fell in arrears and the juke box was repossessed by the owner and the agreement was terminated. The owner claimed the depreciation minus the amounts paid by the hirer. The hirer pleaded that the claim by way of depreciation was a penalty but was held not to be so.

Dealing with contracts of hire-purchase Herman L.J. observed.[6]

"The court, in my judgment, should be slow to interfere with bargains entered into freely and without pressure. I am not satisfied that this bargain can be properly described as harsh and unconscionable, and unless it passes that test, I am of opinion that the court should allow it to stand."

In *E.P. Finance Co. Ltd.* v. *Dooley,*[7] Veale J. observed that although *Campbell Discount Co. Ltd.* v. *Bridge*[8] did not refer to *Phonographic Equipment Ltd.* v. *Muslu*[9] with disapproval, the whole ratio decidendi was contrary to that in *Muslu's case* and that case was therefore not binding. *Lombank Ltd.* v. *Cook*[10] was also not followed. In *Bridges case.*[11]

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1 *Tirathraj Pandey* v. *Amar Credit Corpn.* 72 C.W.N. 243, 271. Halsbury's Laws of England Vol. 19 (3rd Edn.), page 546 not appd; *Sterne* v. *Beck* (1863) 1 Ed. G.J. & S. 595 dist.
2 *Shiva Jute Baling Ltd.* v. *Hindley & Co. Ltd.* (1960) 1 S.C.R. 569, 579; (1959) A.S.C. 1357.
3 Gurbax Singh v. *Begum Rafiya* (1979) A.MP. 66, 69.
4 *Dunlop Pneumatic Tyre Co.* v. *New Garage* (1915) A.C. 79, 88; (1914-15) All E.R. Rep. 739.
5 *George Pictures Ltd.* v. *Neelakandaru Gopalkrishnaru* (1971) A. Ker. 271; *Narasimha Rao* v. *Supdt. of Excise* (1974) A.AP. 157, 167.
6 *Phonographic Equipment (1958) Ltd.* v. *Muslu* (1961) 3 All E.R. 626; (1961) 1 W.L.R. 1379, 1387.
7 (1963) 1 W.L.R. 1313, 1323; (1964) 1 All E.R. 527.
8 (1962) A.C. 600; (1962) 2 W.L.R. 439 (H.L.).
9 (1961) 1 W.L.R. 1379.
10 (1962) 1 W.L.R. 1133; (1962) 3 All E.R. 491 (Winn J.), not followed. (In this case the wording of the clause was identical with *Muslu's* case).
11 *Campbell Discount Co. Ltd.* v. *Bridge* (1961) 2 W.L.R. page 596 (C.A.) on app. (1962) 2 W.L.R. 439;

the hirer of a car under a hire-purchase agreement after making all initial payment and paying one monthly instalment informed the company that he could not keep up the instalments and asked for instructions where to return the car and did return the car to the dealer. The finance company thereupon claimed compensation for the depreciation as provided in clause (9) in the agreement. The Court of Appeal held that the letter of the hirer was in exercise of option to terminate the agreement and that the claim on depreciation was not a penalty, but compensation to the owners for hirer's exercise of option to terminate the contract before the expiry of hiring period. The depreciation clause provided that, if the agreement was for any reason terminated before the vehicle became the hirer's property, the hirer "shall forthwith... pay to the owners... by way of agreed compensation for depreciation of the vehicle such further sums as may be necessary to make the rentals paid and payable equal to two-thirds of the hire-purchase price."[12]

The House of Lords on appeal held that the amount claimed under this clause was not a genuine pre-estimate of damages but a penalty.[13] The Court of Appeal had held that even if the amount of compensation for depreciation under a hire-purchase agreement were to be held to be penal, the hirer would not be entitled to equitable relief, unless the agreement clause is shown to be so harsh and unconscionable that it ought not be enforced.[12] It had also held that if the present state of the law as to penalties is such that the honest man who terminates his contract is in a worse position than the man who breaks his contract, then that unsatisfactory position must be remedied by the legislature, for the courts cannot interfere on equitable grounds with ordinary contracts freely entered into which have turned out harshly for one of the parties.[14]

The House of Lords on appeal took a different view of the letter of the hirer returning the car and of clause 9(b) of the agreement and held the clause to be a penalty clause and not a genuine pre-estimate of damages or liquidated damages because the car was a second-hand car and depreciation was the longest for the short time it was in possession of the hirer and progressively got smaller the longer it remained in his possession. It was also held that there was no exercise of option by the hirer under the agreement, i.e. no option to terminate but he was compelled to break it, which is what his apologetic letter amounted.[13] In *E.P. Finance Co. Case*[15] a similar pre-estimate of the damage due to depreciation clause was held not to be a genuine pre-estimate, as according to that clause the depreciation payments decreased from the six months to nil at the 31st month and therefore the clause was a penalty clause and unenforceable.

In cases[16] where the penalty clause fails as a penalty and where there is no repudiation by the hirer, the question of damages in favour of the owner is governed by *Financing Ltd.* v. *Baldock*.[17] A clause in a hire-purchase agreement entitling an owner to determine the hiring, taking possession of the truck and recovering two-thirds of the total hiring cost minus the instalments paid or the instalments due which ever is more is penal. Therefore, on non-payment of two instalments the owner having taken possession of the vehicle can claim damages for breach upto the date of termination only and not thereafter because non-payment does not amount to repudiation of the agreement by the hirer but the termination is by the owners.[18]

Where the hirer in a hire-purchase agreement pays some instalments and repudiates thereafter he is liable to pay to the owner the total amount of the hire minus the instalments

12 (1962) A.C. 600; (1962) 1 All E.R. 385 (*Bridge* v. *Campbell etc.*); *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79; 30 T.L.R. 625, H.L.; *Associated Distributors Ltd.* v. *Hall* (1938) 2 K.B. 83; 54 T.L.R. 433; (1938) 1 All E.R. 511, C.A. appd.
Campbell Discount Co. Ltd. v. *Bridge* (1961) 2 W.L.R. 596, 603, 605 (C.A.); Dicta in *Stockloser* v. *Johnson* (1954) 1 Q.B. 476; (1954) 2 W.L.R. 439; (1954) 1 All E.R. 630, C.A. considered. *Maynard* v. *Moseley* (1676) 3 Swanst. 651, 655 (refd. to); reversed by H.L. on appeal (1962) 2 W.L.R. 439, 442, 446; (1962) A.C. 600; (1962) 1 All E.R. 385.

13 *Bridge* v. *Campbell Discount Co. Ltd.* (1962) 2 W.L.R. 439 (H.L.); (1962) A.C. 600; (1962) 1 All E.R. 385.

14 *Campbell Discount Co. Ltd.* v. *Bridge* (1961) 2 W.L.R. 596, 597 (C.A.) but see on app. (1962) A.C. 600; (1962) 2 W.L.R. 439; (1962) 1 All E.R. 385.

15 *E.P. Finance Co. Ltd.* v. *Dooley* (1963) 1 W.L.R. 1313; (1964) 1 All E.R. 527; *Phonographic Equipment* v. *Muslu* (1961) 1 W.L.R. 1379 not followed in view of *Campbell Discount Co. Ltd.* v. *Bridge* (1962) A.C. 600; (1962) 2 W.L.R. 439; (1962) 1 All E.R. 385.

16 *E.P. Finance Co. Ltd.* v. *Dooley* (1963) 1 W.L.R. 1313, 1323; (1963) 2 W.L.R. 379 (C.A.) on appeal.

17 (1963) 1 All E.R. 443; at p. 453 (Leave to appeal to House of Lords refused).

18 *Financing Ltd.* v. *Baldock* (1963) 2 W.L.R. 359, 369; (1963) 1 All E.R. 443; (1963) 2 Q.B. 104.

already paid, that being the measure of damages for the breach of the agreement where the hirer retains the article hired.[19]

A professional football player received a sum of money on an insurance for total disability on the express agreement that "he will take no part as a playing member of any form of professional football in future." In the event of infringement he was subject to a "penalty" of the amount paid to him.

This was held not to be a penalty but the obligation was to reimburse the underwriters what they had paid on the basis proved to be false by events. The payment there was neither a fine nor a penal payment.[20]

Although courts will not enforce a penalty clause or a clause for payment of fine, they will give effect to a clause which provides for a genuine pre-estimate of damages. Therefore a clause imposing a penalty of between 2 and 10 per centum above the market value is not an extravagant or unconscionable payment but a genuine pre-estimate of damage since it was known to the trade that there are additional losses not covered by *prima facie* measure of damage.[21] A clause in an advertising agreement that in the event of any instalment or a part thereof remaining unpaid for a period of four weeks or in the event of the advertiser being in any way in breach of the contract then the whole amount remaining due on the contract shall become payable was held merely a provision for acceleration of payment of the stipulated price, in the event of the advertiser failing to pay any instalment timously.[22] Nor can a party act in a manner to unnecessarily penalise the other party. There is an element of public policy which requires limitation of the contractual rights of the innocent party. If it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it. So it might be said that if a party has no interest to insist on a particular remedy he ought not to be allowed to insist on it. And just as a party is not entitled to enforce a penalty so he ought not to be allowed to penalise the other party by taking the course when another is equally advantageous to him.[23]

A clause in a hire-purchase agreement entitling recovery of 100 per cent of hire-purchase price in all circumstances and at whatever time the default takes place, cannot be regarded as a genuine or reasonable pre-estimate of the damage resulting from the breach of an agreement and is unenforceable.[24]

Andhra Pradesh Liquor Vend Rules.—

1. The issue price fixed as compensation for short lifting of quota is liquidated damages.
2. Under R.15 in case of short lifting of quota the State can set off its price against the liquor vendor.
3. Even if the Government has not taken action under R. 15 of the Vend Rules it can set off the price of the short fall at the end of the Excise year. And if the amount of compensation is more than the deposit, the shortfall can be claimed by the State.
4. The burden of proof of penalty is on the defaulting party.[25]

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19 *P. Muhammad Ali* v. *A.P.R. Marudappan* (1972) A.M. 152; *National Cash Register Co.* v. *Stanley* (1921) 3 K.B. 292 disting.

20 *Alder* v. *Moore* (1961) 2 W.L.R. 426 (C.A.) (Devlin L.J. dist.).

21 *Robert Stewart & Sons Ltd.* v. *Carapanayoti & Co. Ltd.* (1961) 2 W.L.R. 34; Dictum of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79, 86; Lord Halsbury & Lord Davey in *Clydebank Engineering & Shipping Co. Ltd.* v. *Don Jose Ramos Yzquierdo* (1905) A.C. 9, 15 applied; *George Pictures Ltd.* v. *N. Gopalakrishnara,* (1971) A.Ker. 274 (plaintiff to prove reasonable pre-estimate of damages).

22 Per Lord Reid in *White & Carter (Councils) Ltd.* v. *McGregor* (1961) 2 W.L.R. 16, 20, p. 25 (Lord Morton of Henryton); (1962) A.C. 413; (1961) 3 All E.R. 1178; (1962) S.C. (H.L.) 1.

23 Per Lord Reid in *White & Carter (Councils) Ltd.* v. *McGregor* (1962) 2 W.L.R. 17, 23 (H.L.); (1961) 3 All E.R. 1178, 1183.

24 *Anglo Auto Finance Co. Ltd.* v. *James* (1963) 1 W.L.R. 1042, 1047 (C.A.). The House of Lords refused appeal p. 1049. Observations of Lord Radcliffe in *Campbell Discount Co. Ltd.* v. *Bridge* (1962) A.C. 600, 623, 625; (1962) 1 All E.R. 385 (H.L.); (1962) 2 W.L.R. 439 applied.

25 *V. Narsimha Rao* v. *Supdt. of Excise* (1974) A.AP. 157, 167 (F.B.).

Penalty.—A clause in a hiring contract providing that termination of agreement for any reason other than that specified in the clause shall make the hirer liable to payment of rentals already accrued—no credit being given for payments already made—"and also by way of liquidated or agreed damages a sum equal to fifty per centum of the rentals which would thereafter have become payable" was held not to be a penalty. The plaintiffs had proved their bargain and the loss was no more than the agreed damages.[26]

A hirer of a car under a hire-purchase agreement found himself unable to pay the instalments, after having paid the initial deposit. He wrote to the owner to that effect and enclosed the keys, the log book and gave its location. The owner took possession of the car and sued for enforcement of the agreement as to instalments.

The Court of Appeal held the letter was not an exercise of option to determine the agreement and in the absence of consensual termination of the agreement the owner must be taken to have terminated the agreement and it would be entitled to only one instalment. There could be no penalty without a breach of contract.[27]

A contract for the supply of rifles and ammunition was subject to impossibility due to *force majeure* clause and the seller in that case was to refund the whole amount minus a fixed sum by way of liquidated damages or compensation for expenses, etc. The purchaser paid £100,000 but thereafter he neither paid the purchase price nor took delivery. The vendors elected to treat the contract as at an end. The purchaser brought an action for return of the money paid, i.e. £100,000 minus the sum agreed as above.

This claim was sustained on the principle that the law confers on the purchaser the right to recover his money. To enable the purchaser to keep it there should in the contract be some language showing that the parties so agreed. The vendor cannot in law retain the goods and the money irrespective of any relation to the amount of damages.[28]

A clause in a hiring agreement for exhibition of a film provided a fee for extra exhibition at four times the fee payable for exhibition at the times and places authorised by the agreement. This was held not to be a penalty as it might be intended to discourage additional showing of the film. That does not make the clause a penalty clause.[29]

Chit Funds.—A default clause in a Chit Fund providing for payment of remaining instalments by a lump sum, denial of dividend or share in reduction and interest at 12% on arrears is penal.[30]

In the case of Chit Funds the Court[31] has to see the special circumstances of the bargain between the parties, the justifiable necessity for its adoption, the generality of the situation in which such a contract is forged, have all to be considered before the Court can give relief. The stake-holder accepts a heavy responsibility and has also to protect the other subscribers and their interests. Therefore any stipulation for the payment of total unpaid instalments on the default of one payment in the sequence cannot be viewed as penal. But past payments of instalments cannot be treated as liquidated damages representing a genuine pre-estimate decided by the parties.

Kuri Wari.—In Chit Funds a subscriber winning a prize is really a debtor who pays the debt in instalments with the condition that in case of default the concession of instalment payment is liable to be withdrawn. Therefore the *Kuri* security stipulating to recovery of the un-

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26 *Robophone Facilities Ltd.* v. *Blank* (1966) 3 All E.R. 128, 137 (Lord Denning M.R. (*contra*)); *Inter-office Telephones Ltd.* v. *Roberts Freeman Co. Ltd.* (1957) 3 All E.R. 479 applied. The principle of the breach of contract for sale applied to contracts of hiring.

27 *United Dominions Trust Ltd.* v. *Ennis* (1967) 1 W.L.R. 1; (1967) 2 All E.R. 345.

28 *Dies and another* v. *British & International Mining & Finance Corporation Ltd.* (1939) 1 K.B. 724. Benjamin on Sale (7th Ed.) pp. 989, 994, 995 appd.

29 *Metro Goldwyn-Mayer Pty. Ltd.* v. *Greenhorn* (1966) 86 W.N. (Pt. 1) N.S.W. 468; *International Leasing Corpn. (Vic.) Ltd.* v. *Aiken* (1966) 85 W.N. (Pt. I) (N.S.W.) 766.

30 *K.S. Raghvan* v. *Iswara Pattar Gramam,* (1972) A. Ker. 21.

31 *Sri Visalam Chit Fund Ltd.* v. *P.N. Srinivas Mudliar* (1975) 88 Mad. L.W. 415, 418, 421.

paid balance in a lump sum is not penalty and not unconscionable. The same applies to interest.[32]

Restraint of Trade.—In covenants in restraint of trade the sum payable for a breach has been treated as a sum stipulated for a breach although it is capable of being broken more than once or in more ways than one. In *Dunlop Tyre case* the damage stipulated for every breach was upheld.[33]

The appellant was trained at Kasauli as a bacteriologist at the respondent's expense which came to over Rs. 8000/-. He had agreed to serve the respondents for 5 years otherwise he was to pay the respondents the expense incurred and a sum of Rs. 2000/- as damages. He served for 2 years and 9 months and then left. The Court awarded Rs. 4000/- out of the expenses incurred and in the circumstances held Rs. 2000/- to be a genuine pre-estimate of damages.[34]

Purchase by instalments.—The Court of Appeal held in *Stockloser* v. *Johnson*[35] that where in a purchase by instalments there was a forfeiture of instalments paid on default of payment of an instalment the Court had an equitable jurisdiction to relieve against forfeiture even after rescission of the contract by the seller if it would be oppressive and unconscionable for the seller to retain all the instalments. Readiness and willingness to pay the balance is a condition precedent.[36]

But if the buyer has had use of the subject-matter of the contract for a period, the Court may not easily hold the seller's conduct unconscionable and the Court may treat it as of the same category as a penalty. But the Court may be more reluctant to order recovery of money by the party in breach.[37]

The Court of Appeal following the principle applicable to leases of land extended the same principle to instalment contracts containing forfeiture clauses i.e. to extend time for payment on terms.[38]

If in a contract of a sale by instalments there is no foreiture clause the buyer may upon rescission by the seller recover the instalments paid or any part repayment subject to seller's counter claim for damages.[39] Thus where the default was by the buyer of goods, he was held entitled to recover a substantial payment (not in the nature of a deposit) made by him subject to deduction of actual damage suffered by the seller for breach of contract. If the Court allowed the whole prepayment to be retained by the seller that would be by way of penalty-not liquidated damages.

Court will grant relief[40] against forfeiture where the provision for forfeiture is penal in the circumstances and relief will be granted if justice demands and on terms which are equitable. Where time for payment had been extended and could be further extended; relief will be given

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32 *P.K. Achutan* v. *State Bank of Travancore* (1975) A. Ker. 47, 51 & 53; *Vaithinatha Iyer* v. *Govindaswami* (1922) A.M. 67; *Sankuni Menon* v. *Empire of India Assurance Co.* (1932) A.M. 241 reld. on; *Wallingford* v. *Mutual Society* (1880) 5 App. Cas 585 refd. to; *Varughese Varughese* v. *Mathew Joseph* (1972) A. Ker. 61 over ruled.

33 *Dunlop Penumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79; (1914-15) All E.R. Rep. 739.

34 *Matilal Nath* v. *Bengal Chemical & Pharmaceutical Works* (1971) 2 Cal. 454, 457.

35 (1954) 1 Q.B. 476.

36 *Starside Properties* v. *Mustapha* (1974) 1 W.L.R. 816; (1974) 2 All E.R. 567, 574.

37 Chitty: On Contracts (24th Ed.) Para 1613; relying on; *Starside Properties Ltd.* v. *Mustapha* (1974) 1 W.L.R. 816.

38 *Starside Properties Ltd.* v. *Mustapha* (1974) 1 W.L.R. 816. See also *Campbell Discount Co. Ltd.* v. *Bridge* (1961) 1 Q.B. 445.

39 Chitty: On Contracts (24th Ed.) Para 1614; *Palmer* v. *Temple* (1839) 5 A&E 508; *Mayson* v. *Clanet* (1924) A.C. 980; *Stockloser* v. *Johnson* (1954) 1 Q.B. 476, 483, 489.

40 *Starslide Properties Ltd.* v. *Mustapha* (1974) 2 All E.R. 567, 574 (L.A.).

for no distinction could be made between cases of extensions for nonpayment of rent and other cases where relief was sought.

Relief from Improvident or Oppressive Contracts and against Forfeiture.—Common law can only relieve parties from improvident or oppressive contracts in very limited circumstances (per Lord Reid).[41] Courts' jurisdiction to relieve against penalties depends on "a question not of words or forms of speech but of substance and of things". It cannot really depend point of construction, though it is often spoken of as so depending. Even a penal bond is in a sense a guarantee for the due performance of the contract. In right setting a sum of money can be a penalty even though it arises from an obligation that is essentially a guarantee.[42] Lord Denning in *Campbell Discount Co. Ltd.* v. *Bridge*[43] was of the opinion that the courts have power to grant relief against the penal sum contained in a minimum payment clause no matter for what reason the hiring is terminated and no just distinction can be drawn between the case where the hirer is in breach and where he is not. In a Scotch case it was observed by Lord Hodson:

> "Equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract."[44]

The High Court of Australia has held that where the sum of money is a deposit and the contract provides for its forfeiture on default there is no equity on the part of the purchaser to get a refund of the whole or any portion of the deposit.[45] In *Stockloser* v. *Johnson*,[46] two opposite views were expressed in the Court of Appeal. By Denning L.J. it was said that where the terms of a contract are found to be harsh as to be of a penal nature, equity of restitution is not lost by a party in default simply because he is not able and willing to perform the contract. Equity operates not because of a party's default but because it is unconscionable for the other party to unjustly enrich himself at the defaulter's expense. Romer L.J. held that no such equity exists unless there has been unconscionable conduct at the time the contract was entered into. "Courts should be slow to interfere with bargains entered into freely and without pressures."[47] Romer L.J.'s view was accepted by the Court of Appeal in *Campbell Discount Co. Ltd.* v. *Bridge*.[48] The court, said Diplock L.J., should not be astute to descry a "penalty clause" in every provision of a contract which stipulates sum to be payable by one party to the other in the event of a breach by the former.[49] But, in House of Lords *Stockloser's case*[46] was not mentioned in the speeches nor in the arguments.[50] Lord Radicliffe[51] there said:

> " 'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other", and that courts of equity never undertook to serve as a general adjuster of men's bargains.

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41 *White & Carter (Councils) Ltd.* v. *McGregor* (1962) 2 W.L.R. 17, 24.

42 *Campbell Discount Co. Ltd.* v. *Bridge* (1962) 2 W.L.R. 439; 454, per Lord Radcliffe; (1962) A.C. 600; (1962) 1 All E.R. 385; Lord Davey's observations in *Clydebank* case (1905) A.C. 6, 15 refd. to. See the observations of the Court of Appeal in (1961) 2 W.L.R. 596, 603, 605.

43 (1962) 2 W.L.R. 439, 460 (H.L.); (1962) A.C. 600; (1962) 1 All E.R. 385, 399; *Associated Distributors Ltd.* v. *Hall* (1938) 2 K.B. 83 not rightly decided. Cf. *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515; (1963) A.S.C. 1405.

44 *White & Carter (Councils) Ltd.* v. *McGregor* (1962) 2 W.L.R. 17, 37 (per Lord Hodson).

45 *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457; *Coates* v. *Sarich* (1964) W.A.R. 2, 8: see *Contra Maula Bux* v. *Union of India* (1970) A.S.C. 1955.

46 (1954) 1 Q.B. 476, 492, 495; (1954) 1 All E.R. 630 C.A.; *Mussen* v. *Van Diermans Land Co. Ltd.* (1938) Ch. 253 Expd. Cf. *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515; (1963) A.S.C. 1405; *Gurubax Singh* v. *Begum Rafia* (1979) A.M.P. 66, 69.

47 *Phonographic Equipment (1958) Ltd.* v. *Muslu* (1961) 3 All E.R. 626; (1961) 1 W.L.R. 1379, 1387 (C.A.), See n. 85, p. 580.

48 (1961) 1 Q.B. 445; (1961) 2 W.L.R. 546 (C.A.); (1961) 2 All E.R. 97.

49 Per Diplock L.J. in *Robophone Facilities Ltd.* v. *Blank* (1966) 3 All E.R. 128, 142.

50 *Galbraith* v. *Mitchenall Estates Ltd.* (1964) 3 W.L.R. 454; at p. 461.

51 *Campbell Discount Co.* v. *Bridge* (1962) A.C. 600, 626; (1962) 1 All E.R. 385 subnomine *Bridge* v. *Campbell Discount Co. Ltd.*

On account of non-payment of rent, a caravan was repossessed by the owner who determined the agreement on that ground and also retained the initial payment. The hirer claimed the return of the initial payment on the ground of its being a penalty and not a genuine pre-estimate of damage.

The court held that the condition permitting the owner to retain the caravan and initial payment, in the absence of any express or implied term to the contrary was unduly harsh, but the hirer was not in a position to carry out the terms of the contract and the owner had not been guilty of fraud, sharp-practice or unconscionable conduct at the time of entering into the contract and there being no equity in the hirer to compel the return of the initial payment, the hirer could not recover.[52]

Equity relieves against penalties when the intention of the penalty is to secure payments of a sum of money or attaining of some other object and when the events upon which the penalty is made payable can be adequately compensated by payment of interest or otherwise; e.g. relief against penalty in a money bond, penal sums made payable on breach of bonds, bonds to pay by instalments or doing or omitting to do a particular act.[53] Where under a contract, conveyance or will, a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right and in the absence of fraud, accident or surprise, equity will not relieve against the breach of the terms.[54]

A sale deed and an agreement for reconveyance of the property were executed on the same date. The latter was subject to two conditions one of which the original vendor did not punctually perform and the vendee refused to reconvey. It was held that the court could not relieve the plaintiffs against the forfeiture clause because option of repurchase is in the nature of a concession and can be exercised on strict fulfilment of the conditions contained therein and the right of repurchase is lost and cannot be specifically enforced in those conditions.[54]

Forfeiture of deposit by vendor.—A vendor is not entitled as part of his right and remedy at law or in equity to retain the deposit where the purchaser was not guilty of unreasonably long delay before the vendor rescinded the contract and it was not his delay but the advent of another purchaser that had caused the vendor to rescind the contract.[55]

Forfeiture of deposit—large sum.—Mere largeness of a deposit in a transaction of large dimensions is not a ground for not forfeiting the deposit in case of the failure of the purchaser to complete the contract of sale. In this case the deposit was £88,500/- where the transaction was of £885,000/-. This case was not fit for relief from forfeiture on the facts. It was held to be an ordinary deposit and not by way of penalty.[56]

"Any claim for a sum of money".—The words "any claim for the payment of a sum of money" in clause 18 of the standard form of contract D.G.S. & D.68 read with the heading merely provides an additional mode of recovery and this right can be exercised by a party for a sum presently due and payable by the other party as explained above and a sum claimed as damages is not such a sum. And therefore the party claiming damages can not, without getting the amount assessed by a proper forum, get the right to set it off against other sums due to the party in breach.[57]

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52 *Galbraith* v. *Mitchenall Estates* (1966) 3 W.L.R. 454; *Stockloser* v. *Johnson* (1954) 1 Q.B. 476; (1954) 1 All E.R. 630 applied. But see *Campbell Discount Co. Ltd.* v. *Bridge* (1962) A.C. 600; (1962) 1 All E.R. 385.

53 Halsbury's Laws of England. Vo. 14 (4th Edn.) para 1449, 1450; pp. 975, 976 referred to: *Kilmer* v. *British Columbia Orchard Lands Ltd.* (1913) A.C. 319; *Devendra Prasad* v. *Surendra Prasad,* 63 I.A. 26; (1936) A.P.C. 24.

54 *Simrathmull* v. *Nanjalingiah* (1963) A.S.C. 1182, 1184; (1962) Supp. 3 S.C.R. 476; Halsbury's Laws of England, Vol. 14 (3rd Edn.) page 622, refd. to; *Shanmugam Pillai* v. *Annalakshmi Ammal* (1950) A.F.C. 38; (1949) F.C.R. 537; *David* v. *Thomas* (1830) 39 E.R. 195 refd. to; see also under Options in Leases & Sales in s. 7, *supra.*

55 *Cole* v. *Rose* (1978) 3 All E.R. 1121, 1129-30

56 *Universal Corp.* v. *Five Ways Properties Ltd.* (1978) 3 All E.R. 1131, 1157-9.

57 *Union of India* v. *Raman Iron Foundry* (1974) A.SC. 1265, 1271; (1974) 3 S.C.R. 556.

Stipulations for interest[58].—By far the largest number of cases decided under the original paragraph related to stipulations providing for interest. Those stipulations may be divided into the following five classes.—

I. Stipulations for payment on interest at a higher rate on default on the part of the debtor to pay the principal or part thereof or interest on the due date, and these may again be subdivided into

(a) Stipulations for payment of enhanced interest form the *date of the bond,* and

(b) Those for payment of such interest from the date of *default:*

II. Stipulations for payment on default of compound interest, which may be divided into

(a) Stipulations for payment of compound interest at the same rate as simple interest, and

(b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased rate of interest and compound interest at that rate;

III. Stipulations for payment of interest at a specified rate if the principal or a part hereof is not paid on the due date;

IV. Stipulations for payment of interest at a lower rate if interest paid on due dates;

V. Stipulations for payment of interest from the date of the bond, but at an exorbitant rate.

There has been considerable conflict in the decisions of the several High Courts on the section in its original form, especially as regards stipulations comprised in Class I. That section applied only to contracts in which a sum was *named* as the amount to be paid in case of the breach thereof, and the conflict arose owing to different interpretations put upon the expression "*named.*" The section has been amended to put an end to the divergent views taken by the Courts, and is now "amplified so as to make it apply in terms to all stipulations by way of penalty, whether the penalty consists of a sum named or not".[59]

The stipulations comprised in the above classes and the effect of the amendment are considered below.—

1. Stipulations for enhanced rate of interest.—Such a stipulation occurring in a contract may be of a twofold character: (1) it may either provide for payment of interest at an increased rate from the *date of the contract* on failure of the debtor to pay on the due date the interest or principal or an instalment of principal, or (2) it may provide for payment at a higher rate from the *date of default* only. Thus if *A* borrows Rs. 1,000 from *B* on 1st June, 1902, *A* may give a bond to *B* for the repayment of the loan on 1st June 1903, with interest at 12 per cent per annum, with a stipulation either that in case of default interest shall be payable at the rate of 25 per cent from the *date of the bond,* namely, 1st June, 1902, *or* from the *date of default,* namely, 1st June, 1903. In the former case it has been held that the stipulation *always*[60] amounts to a penalty, and the provisions of s. 74 apply, so that the Court may relieve the debtor, and

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58 The *deorha* clause usual in mortgages in Oudh, for payment of an increased principal sum for redemption wholly or in part in lieu of interest, is not penal: *Lal* v. *Hira Jan Berin,* 1926 A.O. 502, 96 I.C. 538.

59 See Bombay Government Gazette, 1898, Part VI, p. 36 (Statement of Objects and Reasons).

60 The leading case on the subject is *Machintosh* v. *Crow* (1883) 17 Bom. 106, 113, 114, the cases will be found summarised in *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 113, 114, and in *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15, 17. In the former case it is stated that a stipulation for a higher rate of interest is "generally" a penalty, in the latter that it has "always" been held as a penalty. The current of decisions justifies the use of the latter expression.

award only such compensation to the creditor as it considers reasonable.[61] In the latter case, where the increased rate of interest is stipulated to have operation only from the date of default, the provision has not generally been regarded as a penalty.[62] The section as it stood before the amendment required as one essential condition that there should be "a sum *named* in the contract as the amount to be paid in case of breach." Where the stipulation for the higher rate of interest is to operate from the date of the bond, there is invariably in such a case "a sum *named* in the contract as the amount to be paid in case of breach." Thus in the illustration given above *A* would be liable on default to pay *B* Rs. 1,250, though, if he repaid the loan on the due date, the principal with interest would have amounted to Rs. 1,120 only. But no such sum can be said to be *named* in the contract, where the increased rate is to commence from the date of default, for "at the moment of the breach no larger sum can be exacted by the creditor." The distinction between the two classes of cases was thus stated by the Madras High Court:—

> "By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate, with a stipulation that in default the debtor shall *thenceforward* pay a higher rate of interest, is strictly enforceable. In such an agreement no question of penalty arises, because it imposes an[63] obligation on the debtor to pay a larger sum than what was originally due. In the words of s. 74 of the Contract Act, no sum is *named* as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money become less favourable. By the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand where the stipulation is that on default the higher rate shall be payable from the *date of the original obligation,* the debtor does on default become immediately liable for a larger sum, viz., the difference between the enhanced and the original rate of interest already due."[64]

It has been stated above that a stipulation for an increased rate of interest from the *date of default* is not generally a penalty; but such a stipulation *may* in some cases be penal. Whether it is a penalty or not is a question of construction. "It is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty" [65] In each of these cases the decision of the question depends, in effect, upon the construction of the document, and upon ascertaining what the parties really intended by it.[66] "Such a contract as to interest must, we think, be held valid where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person or the like considerations".[67] For "it is of the utmost importance as regards contracts between adult persons not under disability and at arm's length that the Courts of law should maintain the performance of the contracts according to the intention of the parties".[68] On the other

61 *Muthura Persad* v. *Luggun Kooer* (1883) 9 Cal. 615; *Sungut Lal* v. *Baijnath Roy* (1886) 13 Cal. 164; *Kalachand Kyal* v. *Shib Chunder* (1892) 19 Cal. 392; *Rameshwar Prosad Singh* v. *Rai Sham Kishen* (1901) 29 Cal. 43, 50; *Sajaji* v. *Maruti* (1889) 14 Bom. 274; *Trimbak* v. *Bhagchand* (1902) 27 Bom. 21; *Vengideswara* v. *Chatu Achen* (1881) 3 Mad. 224; *Vythilinga* v. *Sundarappa* (1882) 6 Mad. 167; *Nanjappa* v. *Nanjappa* (1888) 12 Mad. 161; *Gopaludu* v. *Venkataratnam* (1894) 18 Mad. 175; *Khurram Singh* v. *Bhawani Baksh* (1881) 3 All. 440; *Kharag Singh* v. *Bhola Nath* (1881) 4 All 8; *Narain Das* v. *Chait Ram* (1884) 6 All. 179. See also *Rasaji* v. *Sayana* (1869) 6 B.H.C.A.C. 7; *Bichook Nath* v. *Ram Lochun* (1873) 11 B.L.R. 135; *Sunder Koer* v. *Rai Sham Krishen* (1907) 34 I.A. 9; 34 Cal. 150, 157; *Sesanka Sekhar* v. *Dinanath,* 1952 A.P. 271; *Mangal Singh* v. *Bajrang Bali,* 1955 A. Peps. 110.

62 *Mackintosh* v. *Hunt* (1877) 2 Cal. 202; *Mackintosh* v. *Crow* (1883) 9 Cal. 689; *Deno Nath* v. *Nibaran Chandra* (1899) 27 Cal. 421, 425; *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15; *Dullabhdas* v. *Lakshmandas* (1889) 14 Bom. 200; *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106; *Jaganadham* v. *Ragunadha* (1886) 9 Mad. 276; *Periasami Thalavar* v. *Subramanian Asari* (1904) 14 Mad. L.J. 136; *Tek Chand* v. *Morice* (1877) Punj. Rec. No. 5; *Honda Mal* v. *Muhammad Baksh* (1879) Punj. Rec. No. 61.

63 *Sic,* a manifest error for "no".

64 *Nanjappa* v. *Nanjappa* (1888) 12 Mad. 161, 166, 167; *Ramalingam Chettiar* v. *Subramania Chettiar* (1927) 50 Mad. 614; 103 I.C. 394.

65 *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1906) 29 Mad. 491, 496; *P.C. Pal* v. *K.A.L.R. Firm* (1923) 1 Rang. 460; 76 I.C. 835; 1924 A.R. 46; *Mahammad Raja* v. *Naderajjama* (1932) 59 Cal. 613; 135 I.C. 791; 1932 A. Cal. 53; *Habibul Nabi* v. *Narapan Singh,* 1934 A.P. 16; *Ganga Prasad* v. *Bishunath Singh* (1933) 138 I.C. 184; 1933 A.O. 81; *Venkataramanaswamy Permanand Bhandar Ltd.* v. *Fatima Bi* (1971) A. Mys. 250; *Aswathanarayaniah* v. *Sanjeeviah* (1965) A.AP. 33 folld.

66 Per Maclean C.J. in *Deno Nath* v. *Nibaran Chandra* (1899) 27 Cal. 421, 424; followed (though not cited) in *Sohna Mal* v. *Imam Din,* 1929 A.L. 515; 114 I.C. 444.

67 *Surya Narain Singh* v. *Jogendra Narain Roy* (1892) 20 Cal. 360, 364, per Pigot J. cited in 26 Cal. 300, at p. 310.

68 *Wallis* v. *Smith* (1882) 21 Ch.D. 243, cited on 27 Cal. 421, at p. 424.

hand, the stipulation will be held penal, so as to relieve the debtor from his contractual obligation, if "the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties"[69] or where there are equitable considerations which would render the bargain unconscionable. But the relief, where a proper case was made out for it, was granted by the Court in its equitable jurisdiction, and not under s. 74, for the section as it stood before the amendment was held not to apply to the class of stipulations now under consideration[70] The relief granted, however, was the same whether it was under the Court's equitable jurisdiction or under the provisions of the section.[71] And as to the Usury Laws Repeal Act, 1855 (repealing usury laws) it was held that it did not affect the equitable jurisdiction of Courts to relieve against a penalty.[72] Where the date from which enhanced interest is chargeable is not given in a bond, the intention is that it would be chargeable from the date of default: *Venkata* P. *Bhandar Ltd.* v. *Fatima Bi,* (1971) A. Mys. 250.

Effect of the Indian Contract (Amendment) Act, 1899.—The section as it stood before the amendment applied only to those stipulations for enhanced interest when a sum was *named* in the contract as the amount to be paid in case of breach. It was held not to apply to any stipulation for increased interest when the higher rate commenced from the *date of default*. Relief, therefore, where such a stipulation was penal, was given and not under the provisions of the section, but in the exercise of the Court's equitable jurisdiction. The section as it now stands brings within its operation all stipulations in the nature of a penalty, as will be seen from the words "any other stipulation by way of penalty." The result, therefore, is that in the case of a stipulation for a higher rate of interest from the *date of default* relief will now be granted, wherever such a stipulation is penal under the provisions of this section,[72] and it will not be necessary for Courts to resort to their equitable jurisdiction to grant relief on that score: In other respects, the law as to stipulations for enhanced rate of interest remains what it was under the old section. The Explanation to the section is simply a legislative recognition of the proposition laid down in the undermentioned cases[73] that a stipulation for enhanced interest from the date of default *may* be a stipulation by way of penalty.[74] Illustration (d), which was added in the Act by the Amending Act of 1889, is an instance of such a stipulation. The increase of interest from 12 to 75 per cent is of itself so exorbitant as, in the language of Sargent C.J., "to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties".[75] But a stipulation in a mortgage bond that if the mortgagor fails to pay interest at the end of every month at the agreed rate, which was Rs. 1-12 per cent per mensem, the mortgagee shall be entitled to claim either interest at the rate of Rs. 2 per cent per mensem with effect from the date of default or payment of the whole of the principal and interest payable on the date of default, is not by way of penalty. The stipulation only means this, that the mortgagor is to pay a small increase in the rate of interest in return for the mortgagee not exercising forthwith the right to recover at once the whole amount due.[76]

On the whole the law as to enhanced rate of interest under the section as amended may now be stated as follows:—

(a) A stipulation for increased interest from the date of the bond is *always* in the nature of a penalty, and relief will be granted against it.

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69 Per Sargent C. J. in *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 113, 114; and see *Kisanlal* v. *Kisansingh,* 1927 A.N. 284; 103 I.C. 148; *Venkata P. Bhandar Ltd.* v. *Fatima Bi.* (1971) A. Mys. 250. (If no date for enhancement given presumption is in favour of date of default).

70 *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106; *Pardhan Bhukhan Lal* v. *Narsing Dyal* (1898) 26 Cal. 300; *Ramendra Roy* v. *Serajuddin Ahamed* (1898) 2 C.W.N. 234; *Manoo Bepari* v. *Durga Churn Saha* (1898) 2 C.W.N. 333; *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15.

71 *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15, at p. 19.

72 See *Velchand* v. *Flagg* (1911) 36 Bom. 164; 13 I.C. 853; *Najaf Ali Khan* v. *Muhammad Fazal Ali Khan,* 1928 A.A. 255; 107 I.C. 249.

73 *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, at pp. 113-4; *Pardhan Bhukhan Lal* v. *Narsing Dyal* (1898) 26 Cal. 300, at p. 310.

74 *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (1901) 25 Mad. 343, 347.

75 *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 113, 114.

76 *P.C. Pal* v. *K.A.L.R. Firm* (1923) 1 Rang. 460; 76 I.C. 835; 1924 A.R. 46.

(b) A stipulation for increased interest from the date of default *may* be a stipulation by way of penalty, and whenever it is so relief will be granted under the section as amended, and not independently of it as before the amendment. Whether such a stipulation is penal is a question of construction dependent upon the considerations set out above.

It should be stated that the current of decisions in Calcutta and Madras laying down the distinction between a proviso for retrospective enhancement of interest and a proviso for enhanced interest from the date of default, and treating the former as a penalty, was for sometime broken owing to a decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh.*[77] That case related to the construction of a decree which was founded on a *solehnama* between the parties and to the right of the appellant to execute to the extent of the provisions of that decree when properly construed. The decree was for payment of money by instalments with interest at 6 per cent, and it was construed to provide for three contingencies, one of which was that on default of payment of the first instalment interest should be paid at 12 per cent *from the date of the decree.* The Privy Council held that the stipulation for the higher rate of interest from the date of the decree was not a penalty, and added that, even if it were so, the stipulation was not unreasonable, inasmuch as it was a mere stipulaton for interest at 12 instead of 6 per cent per annum in a given state of circumstances. Following this decision, it was held in some cases[78] that a stipulation in a contract for a higher rate of interest from the *date of the contract* is not unenforceable, and that it cannot be treated as a penalty, but must be interpreted, as other parts of a written contract should be interpreted, according to the expressed intention of the parties. Those cases, however, are no longer of authority, and in later cases[79] the decision of the Privy Council was held not to be applicable to the class of cases under consideration,[80] and the Courts reverted to the former view they had taken of s. 74 as originally enacted. So far as the Allahabad High Court goes, there have been only two cases[81] under the old section since the Privy Council decision, and that decision was followed in both of them. In the later of the two cases it was held by a Full Bench of that Court that s. 74 as originally enacted did not apply to an agreement to pay alternative rates of interest whether the higher rate was payable from the date of the contract or from the date of default, on the ground that it could not be said in either case that there was a sum *named* in the contract as the amount to be paid in case of breach.[82] The Explanation to the amended section read with illustration (d) makes it clear beyond all doubt that the section as amended applies to stipulations for

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77 (1883) 10 I.A. 162; 10 Cal. 305.

78 *Baij Nath Singh* v. *Shah Ali Hosain* (1886) 14 Cal. 248; *Basavayya* v. *Subbarazu* (1888) 11 Mad. 294; *Narayanasami Naidu* v. *Narayana Rau* (1893) 17 Mad. 62. See also *Arjan Bibi* v. *Asgar Ali* (1886) 13 Cal. 200, 203, where the note of discord was first struck; see also *Arulu Mastry* v. *Wakuthu Chinnayen* (1864) 2 M.H.C. 205.

79 *Kalachand Kyal* v. *Shib Chunder* (1892) 19 Cal. 392, overruling *Baij Nath Singh* v. *Shah Ali Hosain* (1886) 14 Cal. 248; *Baid Nath Das* v. *Shamanand Das* (1894) 22 Cal. 143; *Pardhan Bhukhan Lal* v. *Narsing Dyal* (1898) 26 Cal. 300; *Deno Nath* v. *Nibaran Chandra* (1899) 27 Cal. 421; *Rameshwar Prosad Singh* v. *Rai Sham Kishen* (1901) 29 Cal. 43; *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15; *Nanjappa* v. *Nanjappa* (1888) 12 Mad. 161 (no reference is made in this case to the earlier case of *Basavayya* v. *Subbarazu* (1888) 11 Mad. 294, which followed the Privy Council decision); *Gopaludu* v. *Venkataratnam* (1894) 18 Mad. 175; *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (1901) 25 Mad.343; *Annamalai Chetty* v. *Veerabadran Chetty* (1902) 26 Mad. 111.

80 For reasons see *Nanjappa* v. *Nanjappa* (1888) 12 Mad. 161, at pp. 165, 166; *Kalachand Kyal* v. *Shib Chunder* (1892) 19 Cal. 392, at p. 396; *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, at p. 112.

81 *Banwari Das* v. *Muhammad Mashiat* (1887) 9 All. 690; *Banke Behari* v. *Sundar Lal* (1893) 15 All. 232.

82 See also *Baij Nath Singh* v. *Shah Ali Hosain* (1886) 14 Cal. 248, where Mitter J. said: "In either of the cases mentioned above no amount is *named* in the contract as the amount to be paid in case of breach. It is true that on the date when the breach took place the amount that under the contract would be due on that date to the creditor could be ascertained by arithmetical calculation, but that is not a case where it can be said that that amount is *named* in the contract as the amount to be paid in case of a breach. Then, again, the amount which may be ascertained by such calculations is not the whole amount which is named in the contract as the amount to be paid in case of a breach, even if it be conceded that the use of the word "named" does not make any difference. The whole amount which in consequence of the breach would be payable to the creditor cannot be precisely ascertained on the date of the breach even by arithmetical calculation, because the breach continues so as the money is not repaid after due date, and, therefore, to use the language used in the judgment of Mr. Justice Wilson, "no one can say at the time of the breach what the sum will be.' "

alternative rates of interest, and the newly added words "any other *stipulation* by way of penalty" are wide enough to comprise cases in which no sum may be named as the amount to be paid in case of breach.[83] And it is now held by the High Court of Allahabad under the revised section that a stipulation for enhanced interest as from the date of the bond is a stipulation by way of penalty.[84]

A provision for reduction of interest if paid in advance is not penal.[85] In a less simple case,

A lends money to *B* at interest at Rs.2-8-0 per cent per month. Subsequently, on a settlement of accounts between the parties, it is agreed that *A* should charge interest at the rate only of 8 annas per cent per month on the balance due, if the same was paid within a certain date; but if not so paid, *B* should pay the balance with interest at the original rate of Rs. 2-8-0 per cent per month.

The stipulation for the payment of interest at Rs. 2-8-0 per cent per month in default of payment of the balance within the fixed period is not by way of penalty.

"Here the higher rate of interest was only that *originally payable* under the bond: and the new bargain was merely a concession to the (debtor) of which he failed to take advantage. This is not the case of a lower rate of interest being mentioned in the bond, with a provision that, if the debt be not paid, a higher rate shall prevail as from the date of the loan".[86]

II. Stipulations for compound interest[87].—The charging of compound interest is not by itself extortionate or unreasonable.[88] A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a penalty within the meaning of this section.[89] But a stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty within the meaning of this section, and would be relieved against. As observed by the Privy Council in *Sundar Koer* v. *Rai Sham Krishen,*[90]

"compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty."

Thus where a bond provided that interest should be payable at the end of each year at the rate of Rs. 1-4 per cent per mensem, and that in default compound interest should be paid at the increased rate of Rs. 3-2 per cent per mensem, it was held that the stipulation was one by way of penalty, and the Court allowed compound interest at the same rate as simple interest.[91]

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83 In *Annamalai Chetty* v. *Veerabadram Chetty* (1902) 26 Mad. 111, it was assumed that the section as amended applied to cases of alternative rates of interest.

84 *Brij Bhukhan* v. *Sami-ud-din* (1902) 25 All 169.

85 *Admr-Gen. of Burma* v. *Moolla* (1927) 5 Rang. 573; 105 I.C. 592; 1928 A.R. 19 (elementary learning in England).

86 *Kirti Chunder Chatterji* v. *Atkinson* (1906) 10 C.W.N. 640; *Sant Ram* v. *Nand Lall,* 1955 A. Peps. 122.

87 "The Courts do not lean towards compound interest, they do not award it in the absence of stipulation; but where there is a clear agreement for its payment it is, in the absence of disentitling circumstances, allowed": *Hari Lahu Patil* v. *Ramji Valad Pandu* (1904) 28 Bom. 371, at p. 377.

88 *Radhasoami Satsang Sabha* v. *Hanskumar* (1959) A.M.P. 172.

89 *Ganga Dayal* v. *Bachchu Lal* (1902) 25 All. 26; *Surya Narain* v. *Jagendra Narain* (1892) 20 Cal. 360. *Bhola Nath* v. *Fateh Singh* (1883) 6 All. 63; *Janki Das* v. *Ahmad Husain* (1902) 25 All. 159; *Mul Singh* v. *Kishan Gopal* (1904) Punj. Rec. No. 58; *Lekhi Chand* v. *Pear Chand* (1917) 2 Pat. L.J. 283; 39 I.C. 106; *Abdul Ali* v. *Puran Mal* (1914) Punj. Rec. No. 82, p. 289; 25 I.C. 560; *Malli Chettiar* v. *Veeranna Tevan* (1921) 41 Mad. L.J. 470, 69 I.C. 812; *Gurmukh Singh* v. *Dial Singh* (1934) 150 I.C. 878; 1934 A.L. 321.

90 (1906) 34 I.A. 9, at p. 18; 34 Cal. 150, at p. 158; *Mangat Rai* v. *Babu Singh,* 103 I.C. 437; 1927 A.L. 445; 8 Lah. 721; 9 Lah.L.J. 301; *Bhushana Rao* v. *Subbayya* (1936) 41 C.W.N. 18; 164 I.C. 27; 1936 A.P.C. 283.

91 *Baid Nath Das* v. *Shamanand Das* (1894) 22 Cal. 143, 155, 156; followed in *Rameswar Prosad Singh* v. *Rai Sham Kishen* (1901) 29 Cal. 43, 51; *Annamalai Chetty* v. *Veerabadram Chetty* (1902) 26 Mad. 111; *Behari Lal* v. *Asaram,* 105 I.C. 477; 1927 A.L. 445; 9 Lah. L.J. 301.

But a Full Bench of the Madras High Court has held that it is not an inflexible rule of law that in such cases compound interest at the original rate should be allowed. The rate of interest to be allowed by way of compensation is a matter in the discretion of the Court.[92]

Similarly it was laid down in a Allahabad case that a stipulation that in default of payment of interest when due the debtor should pay an increased rate of interest as well as compound interest amounts to a penalty.[93] The ground of the decision was that the two stipulations put together could not be regarded as a fair agreement with reference to the loss sustained by the lender by reason of the breach of the contract. By the terms of the bond in that case the interest was to be at the rate of 9 per cent per annum, and was payable yearly, and there was a proviso that if it was not paid when due it should be increased to 15 per cent per annum, and should be calculated as compound and not as simple interest.[94] This case was dissented from by the Madras High Court. The bond in that case provided that, if any instalment of interest (which was 2 per cent per mensem) was not paid on the due date, the debtor should pay compound interest at the same rate "from the expiry of the instalment," and that if the principal was not paid within a year, he should "from that date" pay interest at an enhanced rate, namely, 3 per cent per mensem. The Court said that the only question was whether an agreement to pay an increased rate of interest as well as compound interest amounted to a penalty, and held that there was nothing penal in the bond, putting the decision on the ground that, if parties enter into extortionate bargains with their eyes open, they are not entitled to the relief unless the unfair nature of the transaction was not known to them, advantage having been taken of youth, ignorance, or credulity.[95]

No reference was made in either of these cases to s.74 of the Act. It is submitted that the facts in the two cases were quite different and gave rise to different questions. In the Allahabad case the debtor became liable on default to pay a higher rate of interest not from the *date of default,* that is, the date on which the instalment of interest *became due,* but, so far as it appears from the report, from the date of the commencement of each instalment of interest.[96] This stipulation would of itself be now regarded as penal independently of the condition for payment of compound interest. But the liability on default under the terms of the bond was not only to pay the enhanced rate from the date of the commencement of each instalment, but also compound interest at that rate—a stronger case than the one which merely provides for compound interest at a rate higher than simple interest. In the Madras case, on the other hand, the first stipulation for compound interest at the same rate as simple interest was lawful, though the second stipulation for payment of interest at an increased rate from the *date of default*[97] may or may not be one by way of penalty according to the circumstances of the case (see Explanation to the section above).

The distinction has been explained by the Privy Council:

"The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of

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92 *Rama Krishnayya* v. *Venkata Somayajulu,* 1934 A.M. 31; 148 I.C. 467 (F.B.), where the authorities are reviewed and discussed.

93 *Dip Narain Rai* v. *Dipan Rai* (1886) 8 All. 185.

94 The Court reduced the interest to Rs. 9 per cent per annum reckoned at compound interest with yearly rests up to the due date of payment.

95 *Appa Rau* v. *Suryanarayana* (1887) 10 Mad. 203. The terms of the bond as respects interest were as follows: "Should I so fail to pay the amount of interest, I shall pay the interest as per 2 per cent per month, as stated above, on the amount of the interest also from the expiry of the instalment. I shall pay the principal, the amount of interest due, and the amount of of interest thereon within one year. Should I fail to clear a year hence the whole amount due to you, I shall pay you the whole of the amount due together with interest on it from the date at the rate of 3 per cent per month." See *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1906) 29 Mad. 491, at p. 496.

96 The terms of the bond are not set out in the report. The only other construction would be that the higher rate was to be paid from the date fixed for the *payment of the instalments* with compound interest, in which event the case would be one of payment of compound interest at a rate higher than that of simple interest.

97 The words in the bond are "from that date", which obviously mean "from the expiration of the year" being the period of the loan.

default, it is always to be considered as a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute".[98]

A provision, whereby a debtor has to pay compound interest on an instalment not paid in time, will not be a penalty but if on default compound interest is to be paid on the whole amount it will be a penalty.[99]

A stipulation that interest in arrear shall be capitalised and added to the principle sum and that the whole shall carry interest at the *contract* rate is not by way of penalty.[1]

III. Stipulations for payment of interest if principal not paid on due date.—We next proceed to consider cases where the bond does not provide for the payment of two rates of interest, one lower and the other higher, but for the payment of interest at one specified rate if the principal money or part thereof is not paid within a stipulated period. The decisions on the subject are not quite uniform and require examination. But before doing so it may be as well to note the provisions of the Usury Laws Repeal Act, 1855, as they have a close bearing on the subject. That Act abolished all usury laws, and s. 2 thereof provides that.

"in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon at such a rate as the Court shall deem reasonable."

It will have been observed from what has preceded that the provisions of the Act of 1855 do not apply, and the Court will not decree interest at the agreed rate where the agreement provides for alternative rates of interest and the stipulation for the higher rate of interest is one by way of penalty. Such stipulations would now come within the scope of s. 74, and the provisions of the said Act are so far modified by that section.[2] Where, however, there is a stipulation for a single rate of interest, the question arises whether the provisions of s. 2 of the Usury Laws Repeal Act invariably apply to all such cases, so that the Court should award the agreed rate of interest, or whether any relief could be granted where such rate appears to the Court to be penal, and if so whether this could be done under s. 74 as now amended. In *Motoji* v. *Shekh Husen,*[3] where a promissory note, after stipulating for payment by monthly instalments *wihtout interest*, provided for interest at the rate of 75 per cent per annum in default of payment of any one instalment, it was held by the High Court of Bombay that the stipulation for interest was a penalty. In *Pava* v. *Govind*[4] a promissory note provided for repayment of principal *without* interest within three months from the date thereof, and that in default interest should be paid at 75 per cent per annum. It was held by the same Court, following *Motoji* v. *Shekh Husen*[5] that the rate of interest was a penalty, and that the Usury Laws Repeal Act, 1855 did not destroy the equitable jurisdiction of the Courts to relieve against a penalty.[6] In

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98 *Sundar Koer* v. *Sham Krishen* (1906) 34 I.A. 9, 17; 34 Cal. 150. Cp. *Bishen Chand* v. *Narain Singh,* 110 I.C. 311; 1928 A.L. 857.

99 *Ramana* v. *Buthamma* (1958) A.A.P. 598; (1957) I.L.R. Andh. Pra. 790; *Ramamurthi* v. *Subbarao* (1939) A.M. 481 reld. on.

1 *Sarju Prasad* v. *Beni Madho* (1883) All. W.N. 208.

2 The contrary view taken in *Baij Nath Singh* v. *Shah Ali Hosain* (1886) 14 Cal. 248, and *Banke Behari* v. *Sundar Lal* (1893) 15 All. 232, 236 *et seq.*, cannot now be sustained.

3 (1869) 6 B.H.C.A.C. 8.

4 (1873) 10 B.H.C. 382.

5 With which case, it was said, the case was on all fours; ib. 383, *supra,* note 63.

6 In *Dullabhdas* v. *Lakshmandas* (1889) 14 Bom. 200, Scott J. said that the case of *Pava* v. *Govind,* dealt with an agreement which, on default in payment of the original rate, imposed the enhanced rate on the defaulting party *from the date of the original debt*. In *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, on the other hand, Sargent C.J. said that an examination of the facts in *Motoji* v. *Shekh Husen* and *Pava* v. *Govind* left no doubt that the Court was in that case dealing with *prospective* enhancement of interest. See also *Hakma Manji* v. *Meman Ayab* (1870) 7 B.H.C. 19, where the same view was taken. It may be noted that *Umarkhan* v. *Salekhan* was referred to a Full Bench, and the Divisional Bench, in making the order of reference, said: "Having regard to the conflict of decisions between *Pava* v. *Govind* ... on the one hand and *Dullabhdas* v. *Lakshmandas* on the other, we think it right to refer it to a Full Bench to decide whether a clause in a bond enhancing the rate of interest on default of payment of the principal

Bansidhar v. *Ali Khan*[7] the defendant agreed to repay to the plaintiff a loan of Rs. 50 on a certain date, and in default to pay interest at Re. 1 per day, that is, at the rate of Rs. 730 per cent per annum. It was held by the High Court of Allahabad that, looking at the entire instrument, the amount of interest appeared to be in the nature of a penalty because "one rupee per diem for failure to pay Rs. 50 is, as interest, an extortionate amount for which no adequate consideration is shown, and which no man would contract absolutely to pay." As to s. 2 of the Usury Laws Repeal Act, it was said that if the terms of that section strictly applied in every case it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of "interest" might not be carried. In a later Allahabad case[8] a stipulation to pay the amount of a bond on a certain day without interest and in default to pay interest at the rate of 24 per cent per annum was held to be not penal on the ground that the interest claimed was "contract interest." The Court added that, even if it had been penal, the rate was not so exorbitant that the Court would be justified in reducing it. None of these cases was decided with reference to s. 74. In *Vythilinga* v. *Ravana*[9] the defendant agreed to repay a loan of Rs. 10 within fifteen days, and in default to pay interest at the rate of one anna per rupee per diem, that is, at the rate of Rs. 2,250 per cent per annum. The Madras High Court held that the stipulation for interest was penal, one of the learned Judges holding that the case was covered by s. 74, and the other doubting whether that section affected the case at all, but both following an earlier decision[10] of the same Court, which, however, was a case of alternative rates of interest.

In *Arjan Bibi* v. *Asgar Ali*[11] the bond provided for the repayment of the loan within a certain period, and in default for interest from the date of the bond at 150 per cent per annum. The High Court of Calcutta awarded interest at the agreed rate, holding that the agreement was one for payment of interest within the meaning of s. 2 of the Usury Laws Repeal Act, 1855, and did not fall under s. 74, as there was only one rate of interest agreed to be paid, and the bond did not provide for the payment of two rates of interest. The same view has been taken by the Chief Court of the Punjab.[12] In *Sankaranarayana Vadhiyar* v. *Sankaranarayana Ayyar*[13] the bond provided for the payment of the principal by the twelve instalments, and it was provided that in default the debtor should pay the whole amount of the loan on demand with interest at the rate of 180 per cent per annum. The Madras High Court held, dissenting from *Bansidhar* v. *Bu Ali Khan,*[14] and approving *Arjan Bibi* v. *Asgar Ali,*[15] that, only one rate of interest having been provided for, the case was not governed either by s. 74 as it formerly stood, or by the amended section, and that the plaintiff was entitled to interest at the agreed rate under Usury Laws Repeal Act, as that rate could not be said to be exorbitant, "having regard to relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil".[16] In *Prayag* v. *Shyam Lal*[17] it was held by the

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debt and interest at the time fixed is to be regarded as a penalty." How the two decisions were conflicting it is not easy to see; for *Pava* v. *Govind* was not a case of alternative rates of interest (see this statement borne out in *Banke Behari* v. *Sunder Lal* (1893) 15 All. 232, at p. 255) while in *Dullabhdas* v. *Lakshmandas* there were two rates of interest, and the higher rate was payable from the date of default, and the Court held it was not a penalty. In the Full Bench case, Sargent C.J. was inclined to think that the decision in *Pava* v. *Govind* could be supported on the ground that the enhanced rate of interest in that case was such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties: 17 Bom. p. 113, at p. 114.

7 (1880) 3 All 260; *Chuhar Mal* v. *Mir* (1880) 2 All 15, where the interest payable on default was Rs. 3-2-0 per cent per mensem, and the Court held that it was penal. In *Maya Ram* v. *Naubat* (1885) All W.N. 62, the rate was 24 per cent per annum, and it was held to be not penal.

8 *Kunjbeharilal* v. *Ilahi Bakhsh* (1883) 6 All. 64.

9 (1882) 6 Mad. 167.

10 *Vengideswara* v. *Chatu Achen* (1881) 3 Mad. 224.

11 (1886) 13 Cal. 200.

12 *Gokal Chund* v. *Khwaja Ali* (1890) Punj. Rec. No. 32. But see *Kanhaya Lal* v. *Narain Das* (1894) Puni. Rec. No. 99.

13 (1901) 25 Mad. 343; *Chinna* v. *Pedda* (1902) 26 Mad. 445. (The rate of interest in this case was 12 per cent per annum).

14 (1880) 3 All. 260. See note 70 above.

15 (1886) 13 Cal. 200.

16 25 Mad. pp. 346, 349.

17 (1903) 31 Cal. 138. See also *Krishna Kumar* v. *Brojo Nath Roy* (1903) 7 C.W.N. 876, where a loan of

High Court of Calcutta that simple or compound interest (which was 75 per cent per annum in the case) is not in itself penalty. The interest in that case ran from the date of the bond, and was not payable on default only of payment of the principal sum as in the preceding cases. The case, therefore, does not belong to the group of cases now under examination, but it is noted here, as the Court said that the case was governed by the revised section.

It will have been seen that in *Motoji* v. *Shekh Husen,*[18] *Pava* v. *Govind,*[19] *Bansidhar* v. *Bu Ali Khan,*[20] and *Vythilinga* v. *Ravana,*[21] cited above, the exorbitant rate of interest was of itself regarded as penal. On the other hand, in *Arjan Bibi* v. *Asgar Ali*[22] *and Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar,*[23] the Court declined to grant any relief, though the rate of interest in one case was 150 per cent per annum, and in the other it was 180 per cent. The effect of these two decisions as well as the decisions in *Prayag* v. *Shyam Lal*[24] is that, the rate of interest having been agreed upon between the parties, it should be allowed under the provisions of the Usury Laws Repeal Act and the mere fact that the rate of interest is exorbitant is no ground of relief unless the transaction amounts to an "unconscionable bargain." The principle of these decisions, it is submitted, is not sound, for, following it to its logical consequences, any rate of interest, however exorbitant, would not be regarded as penal. The correct principal, it is conceived is the one laid down in the first group of the cases mentioned above, namely, that relief should be granted whenever the rate of interest appears to the Court to be penal notwithstanding the provisions of the Act. This view had been adopted by the High Court of Calcutta in *Miajan Patari* v. *Abdul Juhhar,*[25] where it was held, dissenting from *Arjan Bibi* v. *Asgar Ali*[26] and *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar,*[27] that a stipulation for the payment of interest at the rate of 75 per cent per annum from the date of the bond, on failure to pay the principal sum in two instalments on the dates fixed, was in the circumstances of the case a penalty. There are later decisions to the same effect by a Full Bench of the Madras High Court,[28] who held, dissenting from *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar,*[27] that where no interest is payable until default, but interest at an exorbitant rate is payable as from the date of default, the Court has power to treat the latter stipulation as a penalty; and by the High Court of Bombay, following its previous opinion,[29] and by the Lahore High Court.[30]

Before the amendment of the section relief was properly granted by Courts in the class of cases under consideration in the exercise of their equitable jurisdiction, for s.74 as originally enacted could not apply to the case. Whether after the amendment relief should be granted under the amended section is open to some doubt. On the one hand, the section as now amended extends to "any... stipulation by way of penalty," and this expression is wide enough to cover the class of cases now under consideration, and this is now the opinion of almost all

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Rs. 300 carried compound interest at the rate of Rs. 5 per month, and interest was awarded at that rate.

18 (1869) 6 B.H.C.A.C. 8.
19 (1873) 10 B.H.C. 382.
20 (1880) 3 All. 260.
21 (1882) 6 Mad. 167.
22 (1886) 13 Cal. 200.
23 (1901) 25 Mad. 343.
24 (1903) 31 Cal. 138.
25 (1906) 10 C.W.N. 1020; *Khagaram Das* v. *Ramsankar Das* (1915) 42 Cal. 652; 27 I.C. 815; *Abdul Majeed* v. *Khirode Chandra Pal* (1915) 42 Cal. 690, pp. 698-699; 29 I.C. 843; *Upendra Lal* v. *Mehrai Bibi* (1916) 21 C.W.N. 108; 36 I.C. 404; *Nabo Kumar* v. *Syed Abdul* (1916) 21 C.W.N. 112; 36 I.C. 721, the last two being cases under the Bengal Tenancy Act, 1885.
26 (1886) 13 Cal. 200.
27 (1901) 25 Mad. 343.
28 *Mutukrishna* v. *Sankara Lingam* (1913) 36 Mad. 229; 18 I.C. 417.
29 *Velchand* v. *Flagg* (1911) 36 Bom. 164; the view taken in *Kishan* v. *Sitaram,* 104 I.C. 191; 1927 A.N. 338, seems too narrow. In *Mahammad Raja* v. *Naderajjama* (1932) 59 Cal. 613; 135 I.C. 791; 1932 A.Cal. 53, the Calcutta High Court preferred its decision in *Miajan Patari* v. *Abdul Juhhar, supra,* note 88, to that in *Arjan Bibi* v. *Asgar Ali, supra,* note 89.
30 *Maula Baksh* v. *Labhu Shah,* 1935 A.L. 873; 157 I.C. 200.

the High Courts.[31] On the other hand, the subject-matter of the section relates to what is known in English law as the doctrine of penalty and liquidated damages, and stipulations for interest of the class we are now dealing with do not fall under either of those two heads. If so, we venture to think that where a proper case is made out for relief the Courts could grant it as before under their equitable jurisdiction. The question is not, however, of much practical importance, for the relief, however granted, would be the same in its nature and extent.

It may be added that practically in all States of India there now exists debt legislation regulating the rate of interest and compound interest on simple money debts and also on secured debts. It has also introduced the Hindu law rule of *damdupat* in many States and therefore much of the above discussion becomes a matter of historical interest in regard to debt transactions excepting those debts which are expressly or by necessary implication excluded from the purview of those laws.

IV. Stipulations for payment of interest at a lower rate if interest paid regularly on due dates.—Where a bond provides for payment of interest at 24 per cent per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 18 per cent per annum, the creditor is entitled on failure of payment of interest on the due date to interest at the higher rate of 24 per cent per annum. Such a clause is not in the nature of a penalty.[32] This principle was applied to a consent decree, by which the full claim was decreed but which provided for the payment of a lesser sum if paid within a stated time.[33] In a Calcutta case the stipulation was for payment of interest at 9½ per cent, to be reduced to 7½ per cent on punctual payment, but the scheme for liquidation of the mortgage debt which was a material part of the mortgage deed showed that interest was calculated at 7½ per cent only. Upon these facts the Court held that the stipulation for payment of 9½ per cent was a penalty, and it allowed interest at 7½ per cent and further interest upon interest at 7½ per cent in respect of payment not punctually made.[34]

V. Stipulations for payment of interest from date of bond, the rate of interest being exorbitant.—The question to be considered under this head is, whether a stipulation for payment of interest can be deemed a "stipulation by way of penalty" within the meaning of this section, if the bond provides for payment of interest at one rate from the date of the bond, provided the rate is high and exorbitant. This may be put in the form of an illustration thus: *A* borrows Rs. 500 from *B* on 15th October, 1917, and gives him a bond for that amount, promising to pay the principal with interest thereon at the rate of 75 per cent per annum on 15th January, 1918. *A* does not repay the loan on 15th January, 1918. *B* sues *A* to recover the amount of the loan with interest at 75 per cent per annum. Is *B* entitled to interest at the rate of 75 per cent per annum, or has the Court power under this section to reduce the rate of interest? It is assumed that *B* was not in a position to dominate the will of *A* within the meaning of s. 16 above[35] and that the only question to be considered is whether the Court has power *under the present section* to reduce the rate of interest. It has been held by the High Court of Calcutta that there being a *breach* of the contract by *A* as contemplated by this section, the only other point to consider is whether the stipulation to pay interest at the rate of 75 per cent per annum is a "*stipulation by way of penalty*" within the meaning of this section. Whether

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31 *Mutukrishna* v. *Sankar* (1913) 36 Mad. 229; 18 I.C. 417; *Khagaram Das* v. *Ramsankar Das* (1915) 42 Cal. 652; 27 I.C. 815; *Velchand* v. *Flagg* (1911) 36 Bom. 164; *Ajodhya Prasad* v. *Gobind Missir*, 1946 A.P. 404, 224 I.C. 65.

32 *Kutub-Ud-Din* v. *Bashir-Ud-Din* (1910) 32 All. 448; *Fitz-Holmes* v. *Bank of Upper India, Ltd.* (1923) 4 Lah. 258; 77 I.C. 523; 1923 A.L. 548; *Wallis* v. *Smith* (1882) 21 Ch.D. 261; *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685, at p. 702. This rule, which is based upon English authority, and was admitted by Lord Hatherley to be a 'fine distinction', has been stigmatised as no distinction at all, except in words and in legal results, for the objective situation is the same as in the case where the debtor has to pay 18 per cent increased from the date of default to 24 per cent, namely the debtor has to pay 18 per cent interest if paid promptly, otherwise 24 per cent: Dr. Glanville Williams, 61 L.Q.R. at p. 79.

33 *Popular Bank of India* v. *Charanji Lal* (1947) All. 201, 231 I.C. 275; 1947 A.A. 136.

34 *Shyampeary* v. *The Eastern Mortgage & Agency Co.* (1917) 22 C.W.N. 226, at pp. 241-245; 40 I.C. 865.

35 See notes to s. 16, "*Unconscionable bargains*".

the stipulation to pay interest at the rate of 75 per cent per annum is a stipulation by way of penalty is, according to that Court, a question of fact depending on the circumstances of each case, and if the Court finds that the rate of interest is of a penal character, the Court has power under this section to grant relief.[36] On the other hand, it has been held by the High Court of Madras that the present section does not apply to cases like the above, the reason given being that there cannot be a stipulation by way of penalty unless there is another antecedent promise. "If the promise is to pay a certain sum on a particular day and *in default* of payment on that day to pay interest, then the agreement to pay interest may be a stipulation by way of penalty.[37] The Madras decisions, it is submitted, are correct. It appears from the judgments of the Calcutta High Court that the only portions of the present section which that Court considered material for the determination of the question before them were (1) "when a contract has been broken," and (2) "If the contract contains any other stipulation by way of penalty." The learned Judges do not seem to have taken into consideration the words "in case of such breach" and the words "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused *thereby* to receive from the party who has broken the contract reasonable compensation not exceeding...the penalty stipulated for." These words read with what precedes indicate unmistakably that the penalty stipulated for is one payable "in case of breach," in other words, a penalty which arises *in default* of performance. The language of illustrations (d), (e), (f) and (g) also points the same way. The view is further strengthened if it be remembered that the compensation contemplated by this section is that paid for the breach of the contract. In the case put above the contract is to repay the amount of the loan with interest. The breach takes place if *A* fails to pay the loan with interest. There is no sum named in the contract as the amount to be paid "in case of such breach," nor does the contract contain any *other* stipulation by way of penalty, that is penalty payable *in case of such breach*. To such a case, it is respectfully submitted, the present section does not apply. It seems preposterous to say that 75 per cent per annum or any lower rate of interest which the Court may award is *"compensation"* for breach of the contract. The Patna High Court has taken much the same view as the Madras High Court.[38] It is not necessary, however, to pursue this matter any futher, for cases of the kind now under consideration arising since the enactment of the Usurious Loans Act, 1918, will be dealt with under that Act. That Act empowers the Court to relieve against exorbitant interest where (1) the interest is excessive, and (2) the transaction was substantially unfair: see s. 3 of the Act. It has been amended by several State Legislatures usually in the interests of debtors in the State.

Earnest money.—Before the decision of the Supreme Court in *Maula Bux's case*[39] the law relating to earnest money was stated thus:

Earnest money is not merely a part-payment but is also an earnest to bind the bargain.[40] Whether an amount paid is earnest money or advance deposit as part-payment is a question of fact. The rule of forfeiture has no application to the latter.[41] It is a part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason

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36 *Krishna Charan* v. *Sanat Kumar Das* (1917) 44 Cal. 162; 33 I.C. 609 (rate reduced from 75 per cent to 15 per cent); *Bonwang Raja Chellaphroo* v. *Banga Behari Sen* (1915) 20 C.W.N. 408; 31 I.C. 394 (rate reduced from 48 per cent to 12 per cent); *Abdul Majeed* v. *Khirode Chandra Pal* (1914) 42 Cal. 690; 29 I.C. 843 (rate reduced from 60 per cent compound interest to 30 per cent simple interest). See also *Gopeshwar* v. *Jadav Chandra* (1916) 43 Cal. 632, at p. 639; 32 I.C. 537. A recent authority has taken a different view. *Haripada Roy* v. *Jagai Shao* (1934) 38 C.W.N. 182; 151 I.C. 155; 1934 A.Cal. 511.

37 *Ponnusami* v. *Nadimuthu* (1917) 33 Mad. L.J. 302; 42 I.C. 231; *Kesavulu* v. *Arithulai* (1913) 36 Mad. 533; 22 I.C. 769; *Najaf Ali Khan* v. *Muhammad Fazal Ali Khan* (1927) 26 All L.J. 210; 107 I.C. 249 (rate reduced from 37 to 12 per cent). See in this connection *Debi Sahai* v. *Ganga Sahai* (1910) 32 All. 589, and *Gendan Lal* v. *Shahzadi* (1913) 11 All. L.J. 155; 18 I.C. 765, where s. 74 was not considered.

38 *Nathuni Sahu* v. *Baijnath Prasad* (1917) 2 Pat. L.J. 212, pp. 216-218; 39 I.C. 352.

39 *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.S.C. 1955; (1969) 2 S.C.C. 554.

40 *Howe* v. *Smith* (1884) 27 Ch.D. 89; *Jagdishpur Metal Industries* v. *Vijoy Oil Industries Ltd.* (1959) A.P. 176; *K.C.N. Gowda* v. *Molakram Tekchand & Sons* (1958) A.Mys. 10.

41 *K.C.N. Gowda Bros.* v. *Molakram* (1958) A.My. 10; (1957) Mys. 72; *Lowe* v. *Hope*, (1969) 3 W.L.R. 582. (purchasers failure to complete, vendor's right to deposit if contract rescinded. Difference between part paid and unpaid balance).

of the fault or failure of the vendee.[42] It is therefore excluded from the operation of provisions of sections 63 and 64, 65, 73 or 74. It has to be dealt with under the principles of law relating to such deposits and not principles applicable to restitution, penalty or liquidated damages.[43]

Under a contract the purchaser was to deposit 25% (a sum of Rs. 2,50,000/-) of the purchase price as earnest money which was liable to forfeiture in case of default in payment of price by the purchaser. It was held to be liable to forfeiture as earnest money as it was a guarantee that the contract will be fulfilled. It is part of the purchase price when the contract goes through. It is liable to be forfeited in case of default of the purchaser. Unless there is anything to the contrary in a contract, the seller is entitled to forfeit it. In the circumstances of the case the Supreme Court considered[44] it unnecessary to decide whether the question of forfeiture of the money deposited by the buyer was penal or whether such a plea could be taken. The Court also considered it unnecessary to consider the decisions of the Court in *Maula Bux* v. *Union of India* (1970) A.SC. 1955; (1970) 1 S.C.R. 428.

Where a sum of Rs. 3,000/- was paid as earnest money in a transaction of sale for Rs. 19,000/- and the purchasers default caused the falling through of the transaction, the amount of earnest money was held to be forfeitable as not being in the nature of a penalty.[45]

In the case of earnest money the Court has to decide whether the amount mentioned is a genuine pre-estimate of the damage to be suffered and for that purpose it has to see whether the amount is excessive or unconscionable and if it so finds the earnest money is not recoverable by the purchaser and proof of damages or quantum thereof is not necessary.[46]

In the case of immovable property if the conduct of the purchaser is such as to indicate that he had finally put an end to the contract or had abandoned it or repudiated it, the Court will not allow[47] him to get back the earnest money on the principle laid down by Bowen L.J. in *Howe* v. *Smith* (1884) 27 Ch.D. 89 at p.98 that "It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit."

In a suit for recovery of earnest money, the defendant who pleaded non-performance by the plaintiff failed to prove any stipulation for forfeiture nor time being of the essence of the contract nor did he prove any damage or loss. It was held that the defendant was not entitled to forfeit the earnest money.[48]

A sum of money paid under a contract was described as advance payment and was not earnest money and it bore a large proportion of consideration money. It was held to be advance in view of the above consideration. Generally earnest money bears a small proportion to the consideration to be paid.[49]

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42 *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554, *Kanwar Chiranjit Singh* v. *Har Swarup* (1926) A.P.C. 1 reld. on; *Mohammad Dalil Khan* v. *State of Andhra Pradesh* (1963) A.A.P. 216; *Howe* v. *Smith* (1884) 27 Ch.D. 89; *Hindustan Shipyard* v. *Appalaswami* (1963) A.A.P. 71; *Rabina Bibi* v. *Satyavathi* (1963) A.A.P. 304; *Harihara Iyer* v. *Mathew George* (1965) A. Ker. 187; *Kanpur Iron & Brass Works & Flour Mills* v. *Banarsidas* (1959) A.A. 755, 759; *Jaswant Rai* v. *Avnash Kaur* (1974) 1 Del. 689, 706.

43 *Jagdishpur Metal Industries* v. *Vijoy Oil Industries Ltd.* (1959) A.P. 176; *Habib Ali* v. *Rafik-ud-Din* (1968) A.Asm. 26; (1964) 16 Assam 513; *Surendranath* v. *Lolit Chandra* (1975) A. Gau. 58 (The earlier amount of earnest may not be forfeitable).

44 *Sree Hanuman Cotton Mills Ltd.* v. *Tata Aircraft Ltd.* (1970) A.SC. 1986, 1996; (1970) 3 S.C.R. 127; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.SC. 1955 quoted, expld. & disting; *Fatehchand* v. *Balkishandas* (1964) 1 S.C.R. 515; (1963) A.SC. 1405 Expl. and disting. *Charanjit Singh* v. *Harswarup* (1926) A.P.C. refd. to.

45 *Dharam Chand Soni* v. *Sushi Kumar Chakrabarty* (1981) A. Cal. 323; *Maula Bux* v. *Union of India* (1970) A.S.C. 1955 folld.; *Hukam Chand Mills* v. *Tata Air Craft* (1970) A.S.C. 1986, 1994.

46 *Baliram Dhote* v. *Bhupinder Nath Bannerji* (1978) A. Cal. 559, 565; *Subin Ghosh* v. *Indian Iron & Steel Co.* (81) Cal. W.N. 199 folld.

47 *Saidun Nissa* v. *Calcutta Vyapar Pratishtan* (1977) A. Cal. 285, 292. See *Sree Hanuman Cotton Mills* v. *Tata Aircraft Ltd.* (1970) A.SC. 1986.

48 *Surendranath Taluqdar* v. *Lohit Chandra* (1975) A. Gau. 58.

49 *Masimuthu Gounder* v. *Ramaswamy Gounder* (1979) A.M. 189; *Natesa Aiyar* v. *Appavu Padayachi* 38 Mad. 178 F.B. doubted.

Discharge by Frustration.—If a contract is discharged not by repudiation or by breach but on account of frustration the vendor is entitled to the return of his earnest money and no compensation is payable.[50] In a contract of sale of land the purchaser made a deposit but failed to pay the purchase price by the due date. The vendor rescinded the contract and purported to forfeit the deposit. The Court of Appeal held that inability to pay the purchase price on the due date did not make the contract impossible of performance. The question of return of deposit money was to be decided on the justice of the case and had to be decided along with the question of damages.[51]

Deposit on agreement for purchase.—Forfeiture of earnest money by a defaulting purchaser is not a penalty; but a term that a lump sum shall be paid in addition is penal, and only actual damage can be recovered under it.[52]

In *Shree Hanuman Cotton Mills case*[53] the Supreme Court laid down the following principles regarding earnest money:

"(1) It must be given at the moment at which the contract is concluded.
(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
(3) It is part of the purchase price when the transaction is carried out.
(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

In *Maula Bux* v. *Union of India*[54] and the Supreme Court observed:

"Forfeiture of earnest money under a contract for sale of property-movable or immovable—if the amount is reasonable, does not fall within s. 74 (of the Indian Contract Act). That has been decided in several cases. *Kunwar Chiranjit Singh* v. *Har Swarup* ((1926) A.PC. 1); *Roshan Lal* v. *The Delhi Cloth and General Mills Co. Ltd. Delhi* (I.L.R. 33 All. 166); *Muhammad Habibullah* v. *Muhammad Shafi* (I.L.R. 41 All. 324); *Bishan Chand* v. *Radha Kishan Das* (I.L.R. 19 All. 489). These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, s. 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

In *Maula Bux's case*[55] one *M* had entered into two supply contracts with the Government of India and one of the conditions of the contracts was that in default by *M* each of the contracts was liable to be "rescinded" and the amount of Rs. 10,000 in one contract and Rs. 8,500 in the other deposited as security could be forfeited and he was also liable to pay to Government the extra expense incurred by Government in obtaining the supplies from elsewhere. As there was default the Government forfeited the security.

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50 *Habib Ali* v. *Rafik-ud-Din* (1968) A.Asm. 26.

51 *Universal Corporation* v. *Five Ways Properties Ltd.* (1979) 1 All E.R. 552, 554 and 556 R; *Davis Contractors Ltd.* v. *Farahan Urban Distt.* (1956) 2 All E.R. at p. 160.

52 *Pana Singh* v. *Arjan Singh* (1929) 31 Bom. L.R. 909 (P.C.); 1929 A.P.C. 179. Where the earnest money constitutes a large part of the price, a stipulation for its forfeiture is in the nature of a penalty; *Kanhri Lal* v. *Lakshmichand* (1933) 143 I.C. 192, 1933 A.N. 223; *Stockloser* v. *Johnson* (1954) 1 All E.R. 630; *Natesa Aiyer* v. *Appavu* (1915) 38 Mad. 178, 19 I.C. 468, 1915 A.M. 896; *N.V. Jagannadhayya* v. *Ramanatha,* 1955 A. Or. 11; *Bhalchandra* v. *Mahadeo* (1947) Nag. 60, 1947 A.N. 193, a decision to the contrary, is, it is submitted, erroneous.

53 *Shree Hanuman Cotton Mills* v. *Tata Aircraft Ltd.* (1970) A.SC. 1986; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554: where *Kunwar Chiranjit Singh* v. *Har Swarup* (1926) A.P.C. 1 was reld. on; in *Sree Hanuman Cotton Mills* case; *Fatehchand* v. *Balkishandas* (1963) A.SC. 14054 was relied on.

54 (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554; *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515; (1963) A.SC. 1405 quoted.

55 *Maula Bux* v. *Union of India* (1970) A.SC. 1955; (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554; *Kunwar Chiranjit Singh* v. *Har Swarup* (1926) A.PC: 1 quoted.

The Allahabad High Court had held the "amount of Rs. 18,500 as damages not being unfair" and treated the amounts deposited as "earnest money". The Supreme Court held such payment not to be earnest money but as security guaranteeing due performance of the contracts. Thus the Supreme Court has decided that money deposited as guarantee for due performance of a contract (in that case for supply of commodities, e.g. eggs, poultry and potatoes) is not earnest money and that the term earnest money is applicable to cases of sale of property—movable and immovable.[56]

Security deposit—forfeiture of.—The following cases are illustrative of the circumstances where security deposit can or cannot be forfeited. The general principle is that such deposits are not *ipso facto* liable to forfeiture on a breach of contract but party complaining must prove the loss suffered, which he may be entitled to recover. But the circumstances may show that it was a genuine pre-estimate of loss.

A security deposit is intended to be kept for the due performance of the contract and it has to be refunded. The security of a part thereof can be forfeited in case of breach of contract when a legal injury results and damage results thereon. The burden is on the party claiming forfeiture that the necessary requirements exist for the forfeiture or a part thereof exists. Mere stipulation in an agreement is not enough. There is no presumption of legal injury in case of breach occurring. It has to be proved by the complaining party. The mere fact that the remaining part of the contract was to be performed departmentally or by another contractor is not enough to prove loss or the extent thereof.[57]

A term of contract gave to the defendant—the Union of India—the discretion to forfeit the security deposit in case of breach of contract by the plaintiff, the contractor—for supply of onions. On breach taking place the Union exercised its discretion of forfeiture though in the circumstances of the case it was a penalty.

As the Court in view of S. 74 (Exception) cannot directly relieve the party in breach, it gave relief as the goods supplied were diverted by the defendant to another purpose and the damages were scaled down by the return by security deposit.[58] This decision, it is submitted, was given on its own facts and must be so confined.

Forfeiture of security money.—Where the question is one of forfeiture of security deposit in case of breach of contract such sum does not *ipso facto* became reasonable compensation, if the actual loss can be proved. If the party complaining is in a position, to adduce evidence whereby the Court can assess reasonable compensation then without proof of actual loss, damages will not be awarded and amount mentioned by the contract will be penalty. But if the parties have mentioned a figure in contract which is their pre-estimate of damages and the party complaining cannot prove the damages because in the circumstances of the case the damages cannot be calculated in accordance with rules then the sum named will be evidence of reasonable compensation.[59]

In a case of urgency the contractor, who had to supply material for road building and repairs before a specified date defaulted. The contractor was aware of the urgency and that it was to be completed by a particular date otherwise the Government would suffer loss which it would not be in a position to prove and therefore the parties as their pre-estimates of the loss mentioned a sum of money an amount which was to be worked out on a percentage basis. The parties also knew that the contract could not be given by any other contractor because

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56 *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554.
57 *Variety Body Builders* v. *Union of India* (1973) A. Guj. 256, 259.
58 *Union of India* v. *K.H. Rao* (1976) A.SC. 626, 631.
59 *Anand Construction Works* v. *State of Bihar* (1973) A. Cal. 550, 558; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.SC. 1955 folld. *Mahadeo Prasad* v. *Siemens Ltd.* 60 Cal. 1379; (1934) A. Cal. 285 refd. *Bhai Panna Singh* v. *Bhai Arjan Singh* (1929) A.PC. 179 Expd.

Government would suffer loss thereby. Hence the amount mentioned was held to be reasonable compensation.[60]

Where the vendor did not fulfil two important conditions of the contract of sale within the specified time the Court ordered the return of earnest money paid and the payment of compensation and interest thereon. Although actual loss was not proved the Court awarded[61] reasonable compensation or damages because a sum of money was named in the contract as a pre-estimate of the loss. (S.74 of Act).

In the case of security deposit the amount is deposited by way of guarantee for the due performance of the contract but in case of breach of contract the amount cannot be forfeited if no loss is proved. In case of such a breach only reasonable compensation can be claimed provided loss is proved to have been caused.[62]

Where a sum of money is paid as advance and as a part of the consideration money, it cannot be forfeited in absence of a provision for forfeiture even if the defaulting party be liable for damages for breach.[63] The Court deposited was Rs. 1,000/- the price was Rs. 5,000/- the Court awarded Rs. 500/- as damage.

A party obtained a licence for the import of a foreign car and executed a bond undertaking to pay a sum of money for non-fulfilment of the conditions of the licence including re-exporting the car by a particular date which he failed to do. The amount mentioned was held to be liable to forfeiture under the Exception to s.74 of the Act—"an act in which the public are interested."[64]

If the advance paid is a reasonable amount then its forfeiture under the contract in case of default of the purchasers is not a penalty but if it is an unreasonable amount then it will be a penalty and only a reasonable compensation will be allowed.[65]

Forfeiture of deposit and specific performance.—Readiness and willingness is essential in specific performance and in relief from forfeiture of leases but not in relief from forfeiture of sums paid.[66] There is no general rule of equity which justifies the court in relieving a party to any bargain if in the event it operates harshly against him.[67]

Loan or advance freight.—Whether money advanced by a merchant is to be considered as a loan to be reimbursed by the owner or as part-payment of the freight not dependent upon the termination of the voyage must depend upon the terms of the written instrument, upon the construction of which the question arises.[68] If the terms of the charterparty show that the advance was a part of the freight it will not be treated as a loan and the charterer making it will not be allowed to recover it. One indication which has been held to be conclusive is where the owner takes the advance and agrees to allow a rebate for the cost of taking out an insurance in

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60 *Anand Construction Works* v. *State of Bihar* (1973) A.Cal, 550.
61 *Makkala Narasimlu* v. *Gurnala Raghunandan* (1977) A.AP. 374, 376; *Maula Bux* v. *Union of India* (1970) A.SC. 1955; & *Union of India* v. *Raman Iron Foundry* (1974) A.SC. 1265 reld.
62 *State of U.P.* v. *Chandra Gupta & Co.* (1977) A.A. 28, 34; *Maula Bux* v. *Union of India* (1970) A.SC. 1955; *Rampur Distillery Co.* v. *Union of India* (1973) A.SC. 1098.
63 *Mohamad Sultan Rowther* v. *Nur Mohammad* (1973) A.M. 233, 234; *Sree Hanuman Cotton Mills* v. *Tata Aircraft Ltd.* (1970) 3 S.C.R. 127; (1970) A.SC. 1986; *Fatehchand* v. *Balkishandas* (1965) A.SC. 1405; & *Maula Bux* v. *Union of India* (1970) A.SC. 1955 reld. on.
64 *B.N. Mathur* v. *Union of India* (1974) A.M. 233; *Special Officer Amravathi Co-operative Sugar Mills* v. *Thirumalaswamy* (1973) 2 Mad. L.J. 361 reld. on.
65 *Ambhunhi* v. *Sharda Amma* (1974) Ker. L.J. 431.
66 *Stockloser* v. *Johnson* (1954) 1 Q.B. 476, 491; (1954) 1 All E.R. 630; *Steedman* v. *Drinkle* (1916) 1 A.C. 275; (1914-15) All E.R. Rep. 298.
67 *Bridge* v. *Campbell Discount Co. Ltd.* (1962) A.C. 600; (1962) 1 All E.R. 385, 387.
68 *Allison* v. *Bristol Marine Insurance Co.* (1876) 1 App. Cas. 209; 34 L.T. 809.

respect of the prepaid freight, that provision is regarded as conclusive because while prepaid freight can be insured, a mere loan cannot be.[69]

Deposits other than earnest money.—Moneys are often deposited as security for the performance of a contract, without such moneys being earnest money. In such a case there may be a forfeiture clause or not. Where there is no forfeiture clause, the party committing a breach of the contract is liable only to pay damages and is entitled to the return of the remainder of the moneys deposited.[70] Where, however, there is a forfeiture clause, the question in England arises whether the deposit represented a genuine pre-estimate of liquidated damages or was in the nature of a penalty.[71] The question in India is whether such a case falls within the terms of sec. 74, so that only reasonable compensation has to be paid whether the amount deposited is by way of liquidated damages or by way of penalty. It is submitted that the words "any other stipulation by way of penalty" are sufficiently ample to cover the case of a deposit with regard to which there is a stipulation for forfeiture.

It was so decided in *Seth Fateh Chand's case*[72] Shah J. there observed:

> The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be done for rendering something after the contract is broken. There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited, but the court can enforce penalty of forfeiture by awarding such sums as are considered reasonable and not exceeding the amount specified in the contract.[73]

The facts in *Seth Fateh Chand's case*[73] were:

> Two sums of money were paid by the vendee to the vendor of land, a sum of Rs. 1,000 as earnest money and Rs. 24,000 "out of sale price" at the time the possession was given. There was a stipulation that the whole amount will be forfeited in case of default of the vendee to complete the contract. It was held that the sum could not bear the character of a deposit for the due performance of the contract.

As there was no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save the loss suffered by him by being kept out of possession of the property, he was only entitled to the forfeiture of Rs. 1,000 and the advantage that he derived from the use of the remaining Rs. 24,000. He was also held entitled to mense profits and therefore could not claim further damages for being kept out of possession and Rs. 11,250 awarded by the High Court on this count was set aside. In interpreting section 74 of the Contract Act the Supreme Court in *Fateh Chand* v. *Balkishan Dass*[73] observed that the section deals with damages in two classes of cases: (1) where the contract names a sum to be paid in case of breach, and (2) where the contract contains any other stipulation by way of penalty...The measure of damages in the case of breach of a stipulation by way of penalty is reasonable compensation not exceeding the penalty stipulated for.[74]

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69 *P.C. Ray & Co.* v. *Income-tax Officer,* 36 I.T.R. 365; (1959) A. Cal. 131.

70 *Mayson* v. *Clonet* (1924) App. Cas. 980; *Public Works Commissioner* v. *Hill* (1906) App. Cas. 368.

71 (1906) App. Cas. 368, *supra.*

72 *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515, 529; (1963) A.S.C. 1405, 1410-11; *Abba Gani & Co.* v. *Trustees of the Port of Bombay* (1952) Bom. 747; (1952) A.P. 310; (holding section not applicable to deposits already made); and *Natesa Aiyer* v. *Appaeri Padayschi,* 38 Mad. 178 (which concentrated on the words "to be paid in case of such breach" in the first condition of section 74 and ignored the wording of the second condition) not approved; *Contra McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457; (In Australia refund was not allowed); See *Madhava* v. *Kasargod Municipality* (1973) 1 Ker. 493, 496.

73 *Fateh Chand* v. *Balkishen Das* (1964) 1 S.C.R. 515, 525; (1963) A.SC. 1405. 1413; Explained in *Sree Hanuman Cotton Mills* v. *Tata Aircraft Ltd.* (1970) A.SC. 1986; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.SC. 1955; (1969) 2 S.C.C. 554.

74 *Fateh Chand* v. *Balkishen Das* (1964) 1 S.C.R. 515; (1963) A.SC. 1405; *Natesa Aiyar* v. *Appayu Padayachi* (1913) 38 Mad. 178; *Singer Manufacturing Company* v. *Raja Prosad* (1909) 36 Cal. 960;

There is, however, a large body of case law[75] which adopts the view that sec. 74 does not apply to deposits. If that is so, then the common law applies, and cases bearing on "liquidated damages or penalty" are applicable.

In *Abba Gani* v. *Port Trust*[76] however, cases relating to earnest money were relied upon, it is submitted, erroneously. On the other hand, in *Manian Patter* v. *The Madras Railway Company*[77] where the contract was similar to the one in *Abba Gani's* case, the Court relied upon *Wallis* v. *Smith,*[78] a case bearing on the question of liquidated damages or penalty. In *Younie* v. *Tulsiram*[79] Gentle J. mainly proceeded on the footing that sec. 74 did not cover a case of deposit. Though the reasoning may be open to criticism, the facts of the case bear a close resemblance to the facts of *Wallis* v. *Smith.*[80] This decision was based on the principle, enunciated by Jessel, M.R. that "where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all these cases the Judges have held that this rule (that is, the rule as to penalties) does not apply, and that the bargain of the parties is to be carried out." And upon the same principle where a deposit was made with a railway company by the purchaser of a season ticket for one month, and the ticket was issued on conditions, one of which was that the ticket was to be delivered up at the office of the company on the day after expiry, and another condition provided that the ticket and all benefit thereof, including the deposit, should be absolutely forfeited to the company if it should be lost, or in case of breach of any of the other conditions, it was held that the ticket-holder was not entitled to a return of the deposit where the ticket was delivered up some few days after the expiry of the month.[81]

In *Howe* v. *Smith*[82] the purchaser had paid £500 as deposit and in part-payment of the price £12,500. There was no provision as to what was to happen to the deposit on default of the purchaser. But on his default the deposit was held to be unrecoverable as it was treated as a guarantee.

In a case of sale of goods Rs. 3,000 was paid by way of advance and deposit as security for due performance of the contract. Even in the absence of a provision to that effect the amount was held liable for forfeiture. In this case the money variously described as "deposit", "advance" "earnest money i.e *biana*" and was paid for the manufacture of 20 kohlus out of which the purchaser accepted 8.[83]

In a Madras case a contractor agreed with a railway company to supply for a term of twelve months 2,400 tons of fuel at 200 tons per month and deposited with the company Rs. 350 for the fulfilment of the contract. The contract contained various stipulations as to its proper performance, and empowered the company to cancel the contract and forfeit the deposit if the contractor failed to make punctual delivery in accordance with the terms of the contract and the specification thereto annexed. The contractor having failed in performance of the contract, the company cancelled the contract and forfeited the deposit. The question arose whether in law the deposit was liable to be forfeited. The Court held that it was: "The rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount." The present section, it was said, did not apply to the case.[84]

Manian Patter v. *The Madras Railway Company* (1906) 29 Mad. 118; overruled.

75 *Yonie* v. *Tulsiram* (1942) 46 C.W.N. 522; *Abba Gani* v. *Port Trust* (1952) 54 Bom. L.R. 273, (1952) Bom. 747, (1952) A.B. 310; *Manian Patter* v. *The Madras Railway Company* (1906) 29 Mad. 118; *Singer Manufacturing Company* v. *Raja Prasad* (1909) 36 Cal. 960; disappd. in *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515; (1963) A.SC. 1405; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.S.C. 1955; (1969) 2 S.C.C. 554.

76 (1952) 54 Bom. L.R. 273, (1952) Bom. 747; (1952) A.B. 310; disappd. in *Maula Bux* v. *Union of India,* see note 17 *supra*. See *Venkataperumal* v. *Thiruppavanam*, 1955 A.M. 717.

77 (1906) 29 Mad. 118.

78 (1882) 21 Ch.D. 243.

79 (1942) 46 C.W.N. 522.

80 Note 20 *supra*.

81 *Cooper* v. *London and Brighton Railway Co.* (1879) 4 Ex.D. 88.

82 (1884) 27 Ch.D. 89; (1881-85) All E.R. Rep. 201, refd. to in *Bridge* v. *Campbell Discount Co. Ltd.* (1962) A.C. 600; (1962) 1 All E.R. 385, 396.

83 *Kanpur Iron and Brass Works and Flour Mills* v. *Banarsidas* (1959) A.A. 755.

84 *Maniam Patter* v. *The Madras Railway Co.* (1906) 29 Mad. 118; *Singer Manufacturing Co.* v. *Raja Prosad* (1909) 36 Cal. 960; see n. 17 *supra*.

Similarly where the plaintiff agreed to forfeit all arrears of wages if he left the service of the defendant without fifteen days's previous notice, it was held that the present section did not apply and that the plaintiff by leaving the service of the defendant without giving the required notice forfeited the arrears of wages.[85] A stipulation in a building contract for a fixed sum to be paid daily or weekly for delay in completing the work seems not to be stipulation by way of penalty.[86]

In view of the decision of the Supreme Court in *Fateh Chand* v. *Balkishan Das*[87] these Indian cases to the extent they are in conflict with that decision are, it is submitted, no longer good law.

To receive from the party who has broken the Contract.—"The jurisdiction of the court in cases under section 74 is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant to breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."[88] (per Shah J.).

Deposit, forfeiture of Frustration—inability to pay.—The purchase price on the due date does not frustrate a contract. In such cases return of deposit depends on the question of damages.[89]

Forfeiture of salary.—Where under the terms of a contract of employment it is agreed that the servant shall forfeit all arrears of wages that had not yet become payable though due, in default of giving his employer notice before leaving his service, the stipulation is not by way of penalty, nor is it illegal under s. 23. Thus, where a servant is engaged by the month, and the salary of each month is to be paid on the 22nd of the next month and fifteen days' notice is to be given before leaving service, the servant leaving on 20th April without giving notice is not entitled to his salary either for March which had become due (though not payable) or the broken period of April.[90] Similarly a clause in an artiste's service agreement suspending salary for non-appearance is not a penalty even though the suspension does not prevent the employer from recovering damages besides the suspension.[91] But a stipulation that an employee should work on holidays, including Sundays, if required by the employer to do so, and should be liable on refusal to forfeiture of fifteen days' wages has been held to be in the nature of a penalty and one which the Court should not enforce.[92]

Shares—forfeitures.—Subject to the provisions of the Companies Act the members of a company are bound by the Articles of the Company which govern the internal management of the Company and define the powers of the officers of the Company and define the rights and liabilites of the members. The power to forfeit a fully paid up share in case of default of carrying out his engagements and obligations by a member are also binding, as also that he will lose all rights of a shareholder. This was provided by the Articles of the Calcutta Stock Exchange Association.

Articles 22, 24,26,27 and 29 of the Calcutta Stock Exchange Association which deals with

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85 *Empress of India Cotton Mills Co.* v. *Naffer Chunder Roy* (1898) 2 C.W.N. 687.

86 See *Law* v. *Redditch Local Board* (1892) 1 Q.B. 127; cp. *Jones* v. *St. John's College* (1870) L.R. 6 Q.B. 115; these cases are on the Common Law distinction between penalty and liquidated damages (pp. 678-679 above).

87 (1964) 1 S.C.R. 515; (1963) A.SC. 1405; see *Maula Bux case* (1970) 1 S.C.R. 928.

88 *Fateh Chand* v. *Balkishan Das* (1964) 1 S.C.R. 515, 530; (1963) A.S.C. 1405 (per Shah J.). See also *Stockloser* v. *Johnson* (1954) 1 Q.B. 476, 492; (1954) 1 All E.R. 630; but see *Bridge* v. *Campbell Discount Co.* (1962) AC. 600; (1962) 1 All E.R. 385 (see Lord Denning).

89 *Universal Corporation* v. *Five Ways Properties Ltd.* (1979) 1 All E.R. 552, 554, 556.

90 *Empress of India Cotton Mills Co.* v. *Naffer Chunder Roy* (1898) 2 C.W.N. 687; *Aryodaya Spg. & Co. Ltd.* v. *Siva Virchand* (1911) 13 Bom. L.R. 19.

91 *Gaumount British Picture Corporation* v. *Alexander* (1936) 2 All E.R. 1686; 1693.

92 *Amar Singh* v. *Karam Singh* (1914) Punj. Rec. No. 50, 167; 25 I.C. 441.

the power of forfeiture and the conditions for the same are valid. Therefore a fully paid up share can be forfeited under the provisions of those Articles.[93]

Art. 33 of the Articles of the Calcutta Stock Exchange Association deals with cases where lien alone is enforced and Art. 29 with forfeiture of a share. But under s. 74 of the Contract Act, the Calcutta Stock Exchange had no power to withhold the balance of the sale proceeds and a share so forfeited after paying the amounts due to itself or its members.[94]

Breach of promise of marriage.—It has been held by the High Court of Rangoon that if the parents of the girl have agreed that on the girl committing a breach of the promise of marriage double the amount of the gifts given to the girl at betrothal should be returned, such a stipulation is penal, notwithstanding some archaic texts in *Dhammathats.*[95]

Pledge.—In a Rangoon case it has been held that an agreement that a pledge should become irredeemable if not redeemed after a certain period is not *per se* penal but would be penal if the value of the thing pledged is very much larger than the amount of the loan.[96] It is submitted, however, that the agreement that the pledge should in the above circumstances be irredeemable is invalid: see notes on ss. 176 and 177 below.

Restitution of part-payment.—As to an amount paid as part-payment there is, in a proper case, an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract.[97]

"Reasonable compensation."—The words of the section give a wide discretion to the Court in the assessment of damages. "The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation, though, of course, the expression 'reasonable compensation' used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles".[98] In the exercise of this discretion the Privy Council has affirmed a judgment giving as reasonable in the particular case compensation at the same rate as the increased interest stipulated for.[99] And generally it is open to the Court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the Court to exceed what is reasonable.[1]

In case of illegal occupation of the premises after the expiry of lease for 15 years at Rs. 1150/- per mensem, the amount of Rs.50/- per diem agreed to be payable by the lessee is not unreasonable compensation, there being no fraud or misrepresentation.[2]

Under Forest Rules of Orissa a security deposit is not earnest money for a pre-estimate of damages but it is a deposit to meet the damages which may be the result of a forest contractor's defaults or breaches of the term of a contract. The provision for forfeiture of secuirty is therefore in the nature of a penalty and the State can only recover reasonable compensation

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93 *Naresh Chandra Sanyal* v. *The Calcutta Stock Exchange Association Ltd.* (1971) A.SC. 422, 426; *Calcutta Stock Exchange Association* v. *S.N. Nundy & Co.* (1950) 1 Cal. 235 applied; *Sri Gopal Jalan and Co.* v. *Calcutta Stock Exchange Association Ltd.* (1964) 3 S.C.R. 698.

94 *Naresh Chandra Sanyal* v. *Calcutta Stock Exchange Association* (1971) A.SC. 422, 428.

95 *Maung Law Phyu* v. *Ma Baw* (1933) 11 Rang. 143; 146 I.C. 724; 1933 A.R. 198.

96 *Dwarika* v. *Bagawati,* 1939 A.R. 413.

97 *Stockloser* v. *Johnson* (1954) 1 Q.B. 476, 492; (1954) 1 All E.R. 630; *Mussen* v. *Van Dierman's Land Co.* (1938) Ch. 253 expl. Cf. *Fateh Chand* v. *Balkishen Das* (1964) 1 S.C.R. 515, 530; (1963) A.S.C. 1405.

98 *Nait Ram* v. *Shib Dat* (1882) 5 All. 238, 242. Distinguished in *Dilbar Sarkar* v. *Joysri Kurmi* (1898) 3 C.W.N. 43, where it was held, having regard to the *object* of the agreement, that the measure of compensation was not merely the actual loss sustained by the plaintiff as in *Nait Ram's case.*

99 *Sundar Koer* v. *Sham Krishen* (1906) 34 I.A. 9; 34 Cal. 150.

1 *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1906) 29 Mad. 491, 496; *Mir Hazar Khan* v. *Sawan Ali* (1910) Punj. Rec. No. 81; *Subbarayulu* v. *Annamalai,* 1944 A.M. 526.

2 *Syed Ali Kaiser* v. *Ayasha Begum;* (1977) A. Cal. 226.

and cannot forfeit the deposit entirely irrespective of any loss or damage. If no damage or loss is proved to have resulted from the default of the contractor, the security deposit has to be refunded.[3]

It has to be decided on the facts of each case whether the stipulated amount is a genuine pre-estimate of damages for breach of contract or the amount is so excessive and unreasonable as to amount to penalty. It is thus a matter of construction in each case. If it is the former, the Government in the case of liquor licences will be entitled to the stipulated amount and in the latter case the Government will be entitled to a reasonable compensation. The burden of proving that the stipulated sum is a penalty is upon the defaulting party in the case of liquor licence.[4]

Whether or not actual damage or loss is proved to have been caused thereby.—The words "whether or not actual damage or loss is proved to have been caused thereby" are sufficiently ample to cover the different kinds of contract which come before the Courts.

In every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered before claiming a decree and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.[5] When the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not it merely dispenses with the proof of "actual loss or damage". It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach or not, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.[6]

There are some contracts in which it would be impossible for the Courts to assess damages,[7] while in other contracts damages can be calculated in accordance with well established rules.[8] Where the Court is unable to assess damages the sum named by the parties if it is a genuine pre-estimate of damages may be taken into consideration as the measure of reasonable compensation,[9] but not if the sum named is in the nature of a penalty.[10] That sum is not conclusive in all circumstances and in all cases.[11] But where damages can be calculated, it is incumbent upon the party claiming damages to prove it.[12] Compensation for the delay

3 *Goverdhan Raj Anand* v. *State of Orissa* (1971) Cut. 938, 952-3; *Chittori Subbanna* v. *Kudappa Subbanna* (1965) A.SC. 1325 disting; *Jagannadhayya* v. *Ramanatha* (1954) A.Or. 11 disting; *Hindustan Shipyard (P) Ltd.* v. *Appaswami* (1963) A.AP. 71 disting; *State of Orissa* v. *Jilludmudi Venkataraj* (1965) Cut. 867; Refd. to.

4 *V. Narasimha Rao* v. *Supdt. of Excise* (1974) A.AP. 157, 167 (F.B.).

5 *Bhai Pamna Singh* v. *Bhai Arjan Singh* (1929) A.PC. 179; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.SC. 1955; (1969) 2 S.C.C. 554. Expl. & folld. in *Anand Construction Works* v. *State of Bihar* (1973) A. Cal. 550, 558; *State of Rajasthan* v. *Chandra Mohan Chopra* (1971) A. Raj. 229, 231.

6 *Fateh Chand* v. *Balkishen Das* (1964) 1 S.C.R. 515, 526-27; (1963) A.S.C. 1405, 1410-11; *Satyanarayan* v. *Vithal Jamadar* (1959) A.B. 452, (1957) Bom. 840; *State of Rajasthan* v. *Chandra Mohan Chopra* (1971) A.Raj. 229, 231; *Union of India* v. *Ranpal Distillery & Chemicals Ltd.* (1973) A.SC. 1098. See *Maula Bux* v. *Union of India* (1970) A.SC. 1955; (1970) 1 S.C.R. 928; *Bhai Panna Singh* v. *Bhai Arjan Singh* (1929) A.PL. 1.

7 *Clydebank Engineering & Shipbuilding Co.* v. *Yzquierdo y Castaneda* (1905) A.C. 6; *Maula Bux* v. *Union of India,* see not 5 above.

8 See observations of Cotton L.J. in *Wallis* v. *Smith* (1882) 21 Ch.D. at p. 270; *Pampa* v. *Arjan Singh* (1929) 31 Bom. L.R. 909 (P.C.); *Maula Bux* v. *Union of India,* see note 38, *supra* p. 601.

9 *Mahadeoprasad* v. *Siemens (India) Ltd.* (1933) 60 Cal. 1379; *Preston* v. *Humphreys,* 1955 A. Cal. 315; *Maula Bux* v. *Union of India,* see note 38, *supra* p. 601.

10 *Public Works Commissioner* v. *Hill* (1906) A.C. 368; *Maula Bux* v. *Union of India,* see note 38, *supra* p. 601.

11 *Mahadeo Prasad* v. *Siemens Ltd.* 60 Cal. 1379; (1934) A. Cal. 285; *Bhai Panna Singh* v. *Bhai Arjan Singh* (1929) A.P.C. 179; construed; *Brahmaputra Tea Co. Ltd.* v. *Scarth,* 11 Cal. 545, 550-1 folld.; *Moolchand Beharilal* v. *S.D. Chand & Co.* (1947) A.L. 112, 115, criticised.

12 *Mool Chand* v. *Chand & Co.* 1947 A.L. 112, 115, 116; *Pravadayal Agarwala* v. *Ramkumar Agarwala* (1956) A.Cal. 41, 44; If damages are not capable of mathematical exactitude, Court will grant reasonable damages; *Bhai Panna Singh* v. *Bhai Arjan Singh* (1929) A.P.C. 179 reld. on; *Moolchand Beharilal* v. *S.D. Chand & Co.* (1947) A.L. 112, 115; *Brahmayya* v. *Ganagaraju* (1963) A.AP. 310; *Union of India* v. *Vasudeo Agarwal* (1960) A.P. 87; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1969) 2 S.C.C. 554.

caused in the completion of the work under a work contract will not be awarded in the absence of evidence to show that any loss was suffered consequent upon the delay.[13] If a primary obligation under a contract is secured by a secondary covenant to pay a penalty or liquidated damages, the obligor obtains no option of breaking his primary obligation. If the obligee sues for damages, he cannot recover damages in excess of the amount of the penalty or liquidated damages. But he is not bound to sue for damages. He may sue for specific performance if positive and for injunction if it is negative. But he cannot sue for damages as well as injunction.[14]

Thus where the suppliers of an oil plant had entered into guarantees in respect of the capacity, economy and efficiency of the plant, and subsequent tests proved it was not according to the terms of the guarantee the court held that it could be inferred from evidence of a general nature that the sum named in the contract as payable on breach of guarantee was to be awarded as reasonable compensation.[15] In *Preston* v. *Humphreys*[16] rupees fifty was named as the sum payable per day for late delivery of a soda water plant. The Court awarded rupees twenty-five per day as reasonable compensation after considering general evidence on damages. Where a sum of rupees five-thousand was deposited and the deposit was to be forfeited on a breach of a contract for loading and unloading wagons, it was held that one-thousand rupees was reasonable compensation and the defendant was directed to repay the remainder.[17] Where the defendants agreed to deliver a certain quantity of indigo plant to the plaintiff on a certain day, and in default to pay a certain sum as damages, it was held that the plaintiff was not entitled to anything more than "reasonable compensation." "The method of assessing damages," it was said "would be to ascertain the quanity of indigo which would have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question".[18] Similarly it has been held by the High Court of Bombay that the measure of damages for breach of a contract to borrow money at interest for a certain period is not the difference between the agreed rate of interest and that realised by the lender from his bankers *for the full period of the loan*, but only for such period as might be reasonably required to find another borrower of a similar amount at the agreed rate.[19] In a Calcutta case in 1895[20] the defendant executed a *kabuliat* by which he agreed to pay rent at rates of eight annas, four annas, and two annas per *bigha* for a period of seven years, and if he cultivated the land on the expiry of the term without executing a fresh *kabuliat,* to pay rent at a uniform rate of Rs. 4 per *bigha*. The defendant continued to hold the land after expiry of the said period without executing a fresh *kabuliat,* and the plaintiff sued for arrears of rent at the rate of Rs. 4. It was held that the stipulation for the higher rate of rent was in the nature of a penalty, and the Court allowed rent at the former rates. Rampini J. gave a dissenting judgment holding that s. 74 did not apply, as the suit was not brought on the allegation that a contract had been broken, but was one to recover arrears of rent at rate at which the defendant agreed to pay on his failure to execute a fresh *kabuliat*. The learned Judge further held that the rate of rent mentioned in the *kabuliat* was not named as the amount to be paid in case of a breach of the contract.[21] But a stipulation by a tenant that if he failed to deliver at a specified time forty *mudis* of rice by way of rent,[22] and to pay Government revenue and interest due on a mortgage, he would

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13 *Namayya* v. *Union of India* (1958) A.A.P. 533.
14 Halsbury's Laws of England, Vol. 12, p. 681, para 1564; *Mulluk Chand* v. *Surendra Nath* (1957) A.Cal. 217 at p. 219.
15 *Mahadeoprasad* v. *Siemens (India) Ltd.* (1933) 60 Cal. 1379.
16 1955 A. Cal. 315.
17 *Mool Chand* v. *Chand & Co.,* 1947 A.L. 112.
18 See *supra,* note 35; *Mulchand Beharilal* v. *S.D. Chand & Co.,* 1947 A.L. 112, 229 I.C. 145.
19 *Datubhai* v. *Abubakar* (1887) 12 Bom. 242.
20 *Tejendro Narain* v. *Bakai Singh,* 22 Cal. 658.
21 22 Cal. 658, at p. 667.
22 See illustration (e) to s. 74 above. Where half as much again of the paddy rent was to be delivered in case of default, the stipulation was held to be a penalty. *Shyam Lal* v. *Kalim Shaikh* (1931) 58 Cal. 84; 130 I.C. 274; 1931 A. Cal. 111.

deliver five *mudis* more of rice, has been held to be not in the nature of a penalty, but liquidated damages.[23]

Not less than.—In a Managing Agency agreement it was provided that in case of the firms deprivation of the agency for any reason or cause other than that specified in the agreement the Managing Agents shall receive as compensation or liquidated amount as damages for the loss of the appointment, a sum equal to the aggregate amount of salary which was not to be less than Rs. 6,000 p.m. for the unexpired portion of the agency.

The Supreme Court held that the parties having specified the amount of liquidated damages there could be no question of ascertaining damages and it excluded the right to claim an unascertained sum as damages. The words "not less than" only emphasise in such a case that the compensation would not be computable at a sum less than the amount mentioned. The sum was regarded by parties as reasonable and intended that it should not be reduced by the court in its discretion.[24]

A contract with a Railway providing for a penalty of one half per cent per day on the value of the goods not supplied with a proviso entitling the Railway to refuse to accept goods after stipulated day is a penalty and not liquidated damages.[25]

An elder brother after the death of the father expended money on the education of his young brother who later agreed to give his elder brother half his income. This was held not to apply to the salary earned by the younger brother and was not void nor did section 74 apply to it.[26]

Where the breach of contract is by the vendee but the vendor suffers no loss as a result thereof but makes profit as a result of increase in the price of land he is not entitled to forfeit the earnest money.[27]

Promissory Note.—S. 74 Contract Act has no application to negotiable instruments. S. 74 applies to all contracts being a provision of general applicability. To a promissory note S. 17(a) Negotiable Instrument is applicable in cases of dishonour.[28]

Illustration (a).—The case put in this illustration is that of a penalty to a common bond to secure the payment of money. It may, however, be noted that where certain sum of money is due, and the creditor agrees to take a lesser sum if that sum is paid on a certain day, and the debtor in default agrees to pay the larger amount actually due, it is not a case of a penalty.[29]

Illustration (b).—This illustration shows that the penalty contemplated by this section may not only be to secure the payment of *money*, as in illustration (a), but to secure the performance of some *collateral act*.[30] It must be presumed that the agreement mentioned, being in partial restraint of trade, is made in circumstances bringing it within one of the exceptions to s. 27 of the Act.

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23 *Balkuraya* v. *Sankamma* (1890) 22 Mad. 453.
24 *Sir Chunilal V. Mehta* v. *Century Spinning & Manufacturing Co.* (1962) A.S.C. 1314, 1319; (1962) Supp. 3 S.C.R. 549.
25 *Union of India* v. *Vasudeo Aggarwal* (1960) A.P. 87.
26 *Ananthayya* v. *Subbarao* (1960) A.M. 188; (1960) Mad. 87.
27 *Mohanlal* v. *Dyaldas* (1976) A. Raj. 68, 70; *Fatehchand* v. *Balkishandas* (1964) 1 S.C.R. 515; (1963) A.SC. 1405; *Maula Bux* v. *Union of India* (1970) 1 S.C.R. 928; (1970) A.SC. 1955; Reld on.
28 *Tayaramma* v. *Ramanjaneya Merchantile Co.* (1977) A.AP. 205, 207.
29 *Thompson* v. *Hudson* (1869) L.R. 4 H.L. 1. A proviso for acceptance of interest at a reduced rate on punctual payment is familiar in English mortgage deeds. Where under a deed Rs. 175 per annum were to be paid to the plaintiff for maintenance, a stipulation that if the amount was not paid in any year the plaintiff was to take possession of a certain field, yielding an annual rental of Rs. 500, and appropriate the profits, was held to be a penalty: *Mst. Bana Bai* v. *Mst. Chandrabhaga,* 1931 A.N. 60: 132 I.C. 450. Also where a lessee has to pay an enhanced rent on default, it is a penalty: *Krishna Bhatta* v. *Narayana Achary,* 1949 A.M. 618. It is, however, stated that had the proper rent been the enhanced amount, with a concession to the tenant if he paid punctually, there would have been no question of penalty. The same distinction is drawn in *Burjorji Shapurji* v. *Madhavlal Jesingbhai* (1934) 58 Bom. L.R. 610, 617. See also *supra* at p. 594, n. 95.
30 See *Sloman* v. *Walter* (1784) 2 W. & T.L.C., 9th ed. 221.

Illustrations (f) and (g).—A stipulation in a bond by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, is in the nature of a penalty, not because payment is accelerated, but because the amount is enhanced.[31] See illustration (g). That a stipulation for merely accelerating payment of the debt is not by way of penalty is shown by illustration (f).[32]

Exception.—In *Secretary of State for India* v. *Dilsizian Freres*[33] the words "shall be liable" in the exception were construed as giving the Court a discretion not to levy the whole sum, but this seems contrary to the plain intention of the exception. The same phrase occurs in ss. 156 and 157 of the Companies Act, 1913, defining the liability of a contributory and of a director of a company, and it there certainly imports no discretion. An administration bond executed by an administrator in accordance with s. 256 of the Indian Succession Act, 1865 (now s. 291 of the Indian Succession Act, 1925) does not come within the exception so as to make the obligor liable, upon each of the conditions thereof, to pay the whole amount mentioned therein.[34] Similarly a bond given by a person to whom the right of collecting fees from vendors of goods in a market is farmed by a Local Board under the Madras Local Boards Act, 1884 (now the Madras Local Boards Act, 1920) stipulating that if he exacted fees in excess of the prescribed rates he should be liable to pay any fine not exceeding Rs. 50 imposed by the president of the Board, is a bond "for the performance of a public duty or an act in which the public are interested," but it cannot be said to have been "given under the provisions of any law," for there is no section in the Act which authorises or requires the giving of such a bond. Such a bond, therefore, does not fall within the exception so as to render the contractor liable to pay the full amount of the penalty on breach of the condition of the bond. The Board is only entitled to reasonable compensation not exceeding the amount of the penalty.[35] It has been held by the Madras High Court that a contract with a municipality for the lighting of a town whereby it was stipulated that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract does not fall within this exception. "No doubt the public are, in a sense, interested in the proper lighting of the municipal town, but the contract is not one for which any special provision is made in the Municipal Act (District Municipalties Act, 1884, Madras), and cannot be placed in a different category from a contract made with any private individual".[36] The amount deposited in the last-mentioned case was Rs. 500, and it was held that it was in the nature of a penalty, and that it could not be enforced, since the contract rendered the penalty "altogether irrespective of the importance of the breach." The principle of this decision was dissented from by the same Court in *Manian Patter* v. *The Madras Railway Co.*[37] on the ground that, the case being one relating to a forfeiture of deposit for non-performance, the rule by which it was governed was not the rule as to penalties, but the rule that the Court should not interfere with the forfeiture, if the amount was reasonable.

A provision of a security bond given to a civil court that in default of production of the article given into the custody of the surety he will pay three times its value is in the nature of a penalty and inserted *in terrorem* and therefore the court will award reasonable compensation,[38] which it is submitted must depend on the circumstances of each case and not on the value of the article alone, e.g. an heirloom; a charm, a family painting and the like.

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31 *Joshi Kalidas* v. *Koli Dada* (1888) 12 Bom. 555; *Velchand* v. *Flagg* (1911) 36 Bom. 164.

32 See *Ex parte Burden* (1881) 16 Ch.D. 675. See also *Sterne* v. *Beek,* 1 De G.J. & S. 595, and *Wallingford* v. *Mutual Society* (1880) 5 App. Ca. 685. The provision in a chit-fund that a subscriber on default of paying an instalment is liable to pay all future instalments in a lump is also not penal: *Subbiah Pillai* v. *Mutthiah Pillai,* 1933 A.M. 657; 65 Mad. L.J. 302; 146 I.C. 1026; *Kunju* v. *Narayanan,* 1933 A.M. 252; 65 Mad. L.J. 29; 140 I.C. 838.

33 (1921) 45 Bom. 1213; 62 I.C. 675.

34 *Lachman Das* v. *Chater* (1887) 10 A.A. 29.

35 *President of Taluk Board, Kundapur* v. *Burde Lakshminarayana Kampthi* (1908) 31 Mad. 54.

36 *Srinivasa* v. *Rathnasabapathi* (1892) 16 Mad. 474. See now the Madras District Municipalities Act, 1920.

37 (1906) 29 Mad. 118; disappd, by S.C. p. 599, n. 17.

38 *K.P. Ambady* v. *K.M. Balan* (1959) A. Ker. 273.

Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.[39]

Illustration

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.[40]

This section is to be read as supplementary to ss. 39, 53 (which, however, already contains a similar provision), 55, 64, and 65. The facts of the illustration resemble those of illustration (a) to s. 39, above. In such a case English usage is to describe the promisee's right not as an option to rescind the contract, but as an option to treat it as finally broken and have the damages assessed once for all (see note on s. 39). The difference, however, seems rather verbal than substantial. A party who rescinds on the ground of fraud or the like is in a different position: he rescinds the contract not because fulfilment has been refused or prevented, but because the contract, by reason of the fraud, or as the case may be, is altogether to his disadvantage. It is sometimes said that a party who rescinds for fraud cannot also recover damages.[41] This limitation on the available remedies must be confined to wholly executory contracts. In the case of a partially executed contract the two remedies should be cumulative.[42] The need for both remedies may be illustrated by a hypothetical case based upon *Redgrave* v. *Hurd*.[43] If *P* agrees to enter into partnership with *D* in the latter's business of solicitor, and also to buy his suburban house, and the contract is induced by the fraud of *D*, *P* should be entitled not only to rescind the contract, but also to recover as damages his removal expenses and damages for the loss involved in giving up his own practice.[44]

Where in a contract, the Government fixed the date of commencement arbitrarily and then rescinded the contract, it was held that the rescission was illegal.[45]

CHAPTER VII

This chapter of the Act, comprising ss. 76 to 123, is wholly repealed by the Indian Sale of Goods Act, 1930, s. 65, but the numbering of the later chapters and sections is not altered.

A commentary on the Sale of Goods Act, incorporating so much of the former comment of the authors as is still applicable, has now been published as a separate volume.[46]

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39 This section appears fairly to cover the right of a buyer who has paid a deposit on sale to recover it back if the seller makes default, if any more specific authority is wanted than his remedy for breach of contract under the general provisions of s. 73. But, as rightly observed in *Piari Lal* v. *Mina Mal* (1927) 50 All. 82; 102 I.C. 766; 1927 A.A. 621, the right to recover money paid on a consideration which has failed is not exhausted by statutory specifications. In *Bhagwandas* v. *Secy. of State* (1924) 49 Bom., 194; 86 I.C. 87; 1925 A.B. 227, the reportable point is not that this section was applicable, but that a certain section of the Indian Forest Act was not.

40 *Gaumont British Picture Corporation* v. *Alexander* (1936) 2 All E.R. 1686, 1693.

41 See Halsbury's Laws of England, 4th Edn., Vol. 31, p. 657, para 1082.

42 Per Bowen L.J. in *Newbigging* v. *Adam* (1886) 34 Ch.D. 582, 592. See also Salmond & Williams on Contract, 2nd edn., p. 269. Followed by the Saskatchewan Court of Appeal in *Hill* v. *Stephen Motor Co.* (1929) 3 D.L.R. 676.

43 (1881) 20 Ch.D. 1.

44 These are the facts of *Redgrave* v. *Hurd*, except that as *P* did not plead fraud he could not recover damages for a misrepresentation that had to be treated as an innocent one.

45 *Shiv Dayal* v. *Union of India* (1963) A. Punj. 538.

46 The Indian Sale of Goods Act, published in 1933. See Pollock and Mulla's Indian Sale of Goods Act.

CHAPTER VIII

OF INDEMNITY AND GUARANTEE

"Contract of indemnity" defined.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Indemnity.—English usage of the word "indemnity" is much wider than this definition. It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor; in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction.[1] "Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another...and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty".[2] So Lord Davey stated one important application of the principle in the House of Lords. Bankers had innocently presented to a corporation a transfer of its own stock for registration, and transferees for value from them were registered as owners. The transfer to the bank turned out to be a forgery, and the true owner, in an action against the corporation, enforced restitution. The House of Lords, disagreeing with the Court of Appeal, held that the bankers must indemnify the corporation. Some good company lawyers regret the decision, thinking that the corporation's duty was not merely ministerial, since it was the guardian of its own register, having a discretion to make inquiries if thought fit, and "in theory a company is bound to exercise an active supervision to keep its register correct".[3] Again we say that a contract of insurance is a kind of contract of indemnity. But this language would, since the Contract Act, be improper in India.[4]

The Calcutta High Court, however, has, in *Chand Mull's case,*[5] held that a contract of fire insurance is a contract of indemnity and the insured has to prove the loss incurred, the sum mentioned being the utmost limit of insurer's liability. A condition in a fire insurance policy gave the right to the insured as well as the insurer to terminate the insurance.[6] The insurers were held to have the option of terminating the policy at will.[7]

The present chapter applies in terms only to express promises; but it should be noted that a duty to indemnify may be annexed by operation of law to various particular kinds of contract (*cp.* s. 69, above). On the sale of shares in company the transferee is bound to indemnify the transferor "against future calls, whether made by the company or by a liquidator. The

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1 *Dugdale* v. *Levering* (1875) L.R. 10 C.P. 196; *Kuppan Chettiar* v. *Ramaswami Chettiar* (1947) Mad. 58, 227 I.C. 110, 1946 A.M. 472.

2 *Sheffield Corporation* v. *Barclay* (1905) A.C. 392, 399.

3 L.Q.R. xxii. 4, 5.

4 See the Transfer Property Act, 1882, s. 49, as to the rights of a transferee of immovable property under a fire policy.

5 *Chandmull Jain* v. *General Assurance Society Ltd.* (1959) A. Cal. 558; 63 C.W.N. 367. Welford & Otter-Barry: Law of Fire Insurance (4th Ed.) 296 refd. to.

6 *Chandmull Jain* v. *General Assurance Society Ltd.* (1959) A.Cal. 568; 63 C.W.N. 367.

7 Ibid, *Sunfire Office* v. *Hart* (1889) 14 A.C. 98 (P.C.) reld. on.

liability of the transferor in the event of a winding up is exactly analogous to the case of lessee and assignee, the former of whom is liable for breaches of covenant committed by the latter, but, being only secondarily liable, has his remedy over against the person primarily liable, the assignee. That is the case of *Moule* v. *Garrett*".[8] The same Judge had said in the case cited by him.[9] "Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation."

Commencement and Extent of Indemnifier's Liability.—The text of the Act leaves these matters undefined, and in fact the leading English authorities are comparatively recent. Accordingly the Calcutta High Court has reviewed and followed them without citing the Contract Act at all.[10] It might be supposed than an indemnifier could not be called on till the indemnified had incurred actual loss and this was at one time said to be the rule of English Common Law. But, according to the equitable principles which now prevail, "to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given...if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance".[11] Accordingly the existence of a clear enforceable claim—as under a judgment recovered—suffices to call the indemnifier's obligation into action, and in general for the whole amount, without regard to circumstances which may affect the amount ultimately paid by the indemnified or those who stand in his place. But "the case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays".[12] The High Courts of Calcutta,[13] Madras[14] and Allahabad[15] and Patna,[16] have taken the view that when a person contract to indemnify another, the latter may compel the indemnifier to place him in a position to meet the liability that may be cast upon him, without waiting until he (the indemnity-holder) has actually discharged it. The High Courts of Bombay[17] and Lahore[18] and the Nagpur Judicial Commissioner's Court as it then was[19] however have taken the view that the indemnifier does not become liable until the indemnified has incurred an actual loss. There is thus a distinct cleavage of opinion between the different High Courts. It is submitted however that the view taken in Calcutta, Madras and Allahabad is the more correct. In a judgment of the High Court of Bombay where the whole subject is reviewed, the earlier decision of that Court just cited was not followed by Chagla J.[20] It has been argued that under s. 125 all that the promisee is entitled to recover from the promisor is damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; but the

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8 *Roberts* v. *Crowe* (1872) L.R. 7 C.P. 629, 637, per Willes J. See also *Kellock* v. *Enthoven* (1874) L.R. 9 Q.B. 241, Ex.Ch. Authorities of this class, however, are too much implicated with the special provisions of the English Companies Acts to be generally instructive for the present purpose.

9 *Moule* v. *Garrett*, Ex.Ch. (1872) L.R. 7 Ex. 101, 104.

10 *Osman Jamal & Sons Ltd.* v. *Gopal Purshattam* (1928) 56 Cal. 262; 118 I.C. 882; 1929 A. Cal. 208. It follows from that decision that s. 125 must not be read as exhaustive; the English rules, however, and therefore the possible Indian applications of them, go beyond the bounds of the Contract Act. In *Chand Bibi* v. *Santoshkumar Pal* (1932) 60 Cal. 761; 146 I.C. 863; 1933 A.Cal. 641, the learned Judge who decided the case just cited appears to have forgotten his previous judgment.

11 Kennedy L.J. in *Liverpool Mortgage Insurance Co.'s Case* (1914) 2 Ch. 617, at p. 638: fuller quotation of English authorities in Lort Williams J.'s judgment in (1928) 56 Cal. 262, note 10, *supra*.

12 Buckley L.J. in *Liverpool Mortgage Insurance Co.'s Case* (1914) 2 Ch. 617, at p. 633; and see *Osman Jamal & Sons Ltd.* v. *Gopal Purshottam, supra*, note 10.

13 *Kumar Nath Bhuttacharjee* v. *Nobo Kumar* (1899) 26 Cal. 241; *Profulla Kumar* v. *Gopee Bullabh* (1944) 2 Cal. 318, 1946 A. Cal. 159, 225 I.C. 110.

14 *Ramalingathudayar* v. *Unnamalai Achi* (1915) 38 Mad. 791; 24 I.C. 853.

15 *Shiam Lal* v. *Abdul Salal*, 1931 A.A. 754; (1931) All.L.J. 687; 133 I.C. 604; *Abdul Majeed* v. *Abdul Rashid*, 1936 A.A. 598; (1936) All L.J. 940; 164 I.C. 665.

16 *Chunibhai Patel* v. *Natha Bhai* (1944) 22 Pat. 655, 213 I.C. 385, 1944 A.P. 185.

17 *Shankar Nimbaji* v. *Laxman Supdu*, 1940 A.B. 161; 42 Bom.L.R. 175; 188 I.C. 663.

18 *Sham Sundar* v. *Chandu Lal*, 1935 A.L. 974.

19 *Ranganath* v. *Pachusao*, 1935 A.N. 147; 156 I.C. 94.

20 *Gajanan Moreshwar* v. *Moreshwar Madan*, 1942 A.B. 302; 44 Bom. L.R. 703.

learned judge rejected the argument based on the language of s.125, though he conceded that it would have considerable force if the whole law of indemnity were embodied in ss. 124 and 125; but, he observed, that was obviously not so, the Contract Act being both an amending and a consolidating Act and not exhaustive of the law of contract to be applied by the Courts in India:

"It is true that under the English Common Law no action could be maintained until actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him, he had actually to wait till a judgment was pronounced and it was only after he had satisfied the judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. Therefore, the Court of Equity stepped in and mitigated the rigour of the Common Law. The Court of Equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into Court sufficient money which would constitute a fund for paying off the claim whenever it was made... I have already held that ss. 124 and 125, Contract Act, are not exhaustive of the law of indemnity and that the Courts here would apply the same equitable principles that the Courts in England do. Therefore, if the indemnified had incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and pay it off."[21]

For a general statement of the equitable principles applied in such circumstances by the English Courts reference should be made to *In re Richardson, Ex parte The Governors of St. Thomas Hospital*[22] and especially to the judgments of Cozens-Hardy M.R. and Fletcher Moulton L.J.

A right to be indemnified against a monetary liability is assignable.[23]

A contract for indemnity in a hire-purchase agreement arising from a contract becoming enforceable does not become operative if an implied condition of providing a log book is not fulfilled. The loss in such a case arises because of the plaintiff allowing dealers to hand over the car without the log book.[24]

In a sale by a father for self and as guardian for his minor son, the father guaranteed to indemnify the purchaser if sale of son's share was set aside. The guarantee is enforceable if the vendee is dispossessed because it is only then that there is a failure of consideration. It can also be enforced on the basis of indemnity.[25] But the vendee will be entitled to recover loss sustained for protecting his possession.[26] In *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*.[27]

one R.E.B. was insured against third party risks. The indemnity was also available to any person operating with the permission of R.E.B. the motor-car for private or pleasure purposes. The plaintiff was injured in an accident involving a car wherein she was a passenger and which collided with the car driven by J.B. the daughter of R.E.B. with the permission of her father. The decree against J.B. not being satisfied an action was brought against the insurance company. It was held that R.E.B. insured only himself and not J.B. R.E.B. had not constituted himself a trustee for J.B. and had not conferred on her a right to indemnity under the policy which was enforceable under the policy and the policy did not confer enforceable rights to anyone. "It constituted merely a promissory representation or statement of intention on the part of the insurers not binding in law of equity".

An agreement between K.P. Ltd. and *T* whereby royalty was to be paid to one *S* was taken over by third parties and they were to indemnify K.P. Ltd. against all claims which might be made against them under the agreement.

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21 Ibid, 1942 A.B. 302, at p. 304.
22 (1911) 2 K.B. 705.
23 *British Union & National Insurance Co.* v. *Rawson* (1916) 2 Ch. 476.
24 *Bentworth Finance Ltd.* v. *Lubert* (1967) 3 W.L.R. 378 (C.A.).
25 *Ramaswami* v. *Muthukrishna* (1967) A.S.C. 359; (1966) 3 S.C.R. 608; *Subbaraya* v. *Rajagopala*, 38 Mad. 887 appd.
26 *Ramaswami* v. *Muthukrishna* (1967) A.S.C. 359; (1966) 3 S.C.R. 608.
27 (1932) A.C. 70; (1932) All E.R. Rep. 527 (P.C.).

This agreement was held unenforceable by *S* but was held to entitle the company to indemnity against the third parties.[28]

In an agreement for hire of a crane the hirer accepted responsibility for all damage "arising directly or indirectly out of or in connection with... use of the...crane." Injury was caused to a docker while unloading timber due to negligence of the capstan driver employed by owners and the crane driver's attempt to move timber away from the docker. This was held to fall within the clause of indemnity and the hirer was held liable to indemnify the owners in a third party proceedings.[29]

Rights of indemnity-holder when sued.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Sub-s. (1).—This section represents the English law, which is best summarised in the notes to *Lampleigh* v. *Braithwait* in Smith's Leading Cases, As to sub-s 1, "it is obvious that when a person has...altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive," although the promisor was not party to it.[30] This rule has been followed by the Indian Courts.[31]

An act at another's request.—The principal of law that a person doing an act at the request of another was entitled to an indemnity if there was nothing in the act which was apparently illegal and was done without default, but it injured a third party nevertheless, was a broad principle not limited to a request not made by a party for his own benefit. Default on the part of the person doing the act negativing the application of the principle only arose in the event of dishonesty, lack of good faith or failure to comply with the request and did not extend to oversight as the bank may have committed. Accordingly the principle applied to the

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28 *Kempong Prospecting Limited* v. *Schmidt* (1968) 2 W.L.R. 55 (P.C.); *Wright* v. *Tyne Improvement Commissioners* (1968) 1 W.L.R. 336; (1967) 2 L.L. Rep. 411 revd. (a case arising out of hiring of a crane and the hirer accepted responsibility for all damages arising directly or indirectly in connection with the use thereof); *Hadley* v. *Droitwich Construction Co. Ltd.* (1968) 1 W.L.R. 37 (hiring of a crane; implied term).

29 *Wright* v. *Tyne Improvement Commissioners* (1968) 1 W.L.R. 336; (1967) 2 Ll. Rep. 411 revd.

30 *Parker* v. *Lewis* (1873) L.R. 8 Ch. 1035, 1059, per Mellish L.J.

31 *Nallappa* v. *Vridhachala* (1914) 37 Mad. 270; 25 I.C. 888. And the promisee had a cause of action as soon as a decree is passed against him; *Chiranji Lal* v. *Naraini* (1919) 41 All. 395; 51 I.C. 158.

bank if in acting on the request of the stockbroker who in the circumstances had promised to indemnify the bank by acting on the request had accepted that promise which therefore became contractual indemnity.[32]

Indemnity by forwarding agents.—A forwarding agent entered into an agreement with carriers for the hire of their vans. According to the rules of Carriers Association they had to keep the carrier indemnified against the negligence of the drivers. By arrangement between the forwarding agent and the owner of watches a consignment of watches was taken for carriage from the London Airport Bonded Warehouse. On the route the consignment was lost due to the negligence of the driver and the owners recovered damages from the carriers. The carriers then brought an action for enforcement of the indemnity. It was held that the provision in the agreement that the forwarding agent should keep the carriers indemnified against all claims whatsoever constituted an agreement of indemnification of the carrier against all claims and included therefore those claims arising from the negligence of the carrier or their drivers.[33]

Sub-s. (2).—As to sub-s. (2), "in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract. and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered.[34] But the costs must be such as would have been incurred by a prudent man.[35]

The rule in England is settled to this effect; it is applied, indeed, to the case of a man who has failed to perform his contract through breach of a sub-contract, if he sues the sub-contractor, although there is no agreement to indemnify the contractor, and the question is regarded as being of the measure of damages only.[36] The costs recoverable, in a proper case, are not confined to the taxed costs.[37]

Sub-s. (3).—As to sub-s. (3),

"if a person has (expressly) agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he (the defendant) may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity."[38]

Even if the promisee has not given notice to the promisor, the compromise is conclusive against the promisor if it is effected *bona fide,* and without collusion, and is not impeached as an imprudent bargain.[39]

Rights of promisor.—This section deals with the rights of a *promisee* in a contract of indemnity. There is no provision in the Act for the rights of a promisor in such a contract. The absence, however, of such a provision does not take away the rights which such a promisor has according to English law, and which are analogous to the rights of a surety declared in s. 141. Those rights constitute an essential part of the law of indemnity, and they are of general application, as they are based on natural equity.[40] The promisor is not liable, if the promisee

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32 *Yeung* v. *Hongkong & Shanghai Banking Corpn.* (1980) 2 All E.R. 599, 606 & 607 (P.C.); *Sheffield* v. *Barclay* (1904-07) All E.R. Rep. 747 appld. dictum of Lord Davey at p. 751 explnd.

33 *Gillespie Brothers & Co. Ltd.* v. *Roy Bowles Transport Ltd.* (1973) 1 All E.R. pp. 193-202.

34 *Pepin* v. *Chunder Seekur Mookerjee* (1880) 5 Cal. 811.

35 *Gopal Singh* v. *Bhawani Prasad* (1888) 10 All. 531.

36 *Hammond & Co.* v. *Bussey* (1887) 20 Q.B.D. 79; *Agius & Co.* v. *Great Western Colliery Co.* (1899) 1 Q.B. 413, both in C.A.; and see notes on s. 73, above.

37 *Howard* v. *Lovegrove* (1870) L.R. 6 Ex. 43; *Venkatarangayya Appa Rao* v. *Varaprasada Rao* (1920) 43 Mad. 898; 60 I.C. 164.

38 Per Mellish L.J., L.R. 8 Ch. 1035 at p. 1059.

39 *Venkataramanna* v. *Mangamma* (1944) Mad. 867, 1944 A.M. 457.

40 See *Maharana Shri Jasvatsingji Fatesingji* v. *The Secretary of State for India* (1889) 14 Bom. 299, at p. 303.

suffers damage owing to circumstances which do not come within the scope of the contract of indemnity.[41]

Indemnity—Interpretation.—By incorporation of contract of indemnity was introduced in a contract between the parties. The principle applicable to a clause conferring exemption from liability on one party to a contract applied to a clause of indemnity. Accordingly the party is whose favour the indemnity clause was made (the *preferens*) is entitled to indemnity against the consequences of his own negligence or of that of his employees only if the indemnity clause contains an express provision to that effect or the words used are wide enough to cover in their ordinary meanings, the negligence on the part of the *preferens*. A clause does not give this indemnity where there is no express reference to negligence or a word synonymous with it. The use of the word 'whatsoever' could not be read as such synonym or having express reference to negligence; since it is no more than a word of emphasis. Read as a whole the indemnity did not apply to cover the negligence of the *preferens*. The indemnity applied only where the suppliers were carrying out the work of the order.[42]

Sections 124 and 125 do not embody the whole law on the subject of contracts of indemnity.[43]

"Contract of guarantee," "surety," "principal debtor," and "creditor."

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety": the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

Difference between Guarantee and Indemnity.—There can be no contract of guarantee unless there be a principal debtor,[44] the surety's obligation must be substantially dependent on a third person's default.[45] A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity.[46]

In a contract of guarantee there have to be three parties; a principal debtor whose liability may be actual or prospective, a creditor, and a third party who in consideration of some act or promise on the part of the creditor promises to discharge the debtor's liability if the debtor should fail to do so. His liability is collateral.[47] In the case of indemnity, the promisor makes himself primarily liable and undertakes to discharge the liability in any event.[48] Said Davey L.J. in *Guild & Co's case:*

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41 *Krishna Yachendra* v. *Apparao* (1949) 76 I.A. 120, 1949 A.P.C. 234, reversing *Raja of Venkatagiri* v. *Sobhandri* (1944) Mad. 663. 216 I.C. 120, 1944 A.M. 211; *Ramamurthi* v. *Kuppuswami,* 1950 A.M. 621.

42 *Smith* v. *South Wales Switchgear Ltd.* (1978) 1 All ER 18 (H.L.).

43 See notes on s. 124, above, and *Gajanan Moreshwar & Moreshwar Madan,* there cited, footnote 20 at p. 609; *Khatrapal* v. *Madhukar Pictures* (1956) A.B. 106.

44 *Mountstephen* v. *Lakeman* (1871) L.R. 7 Q.B. 196, 202, Ex. Ch., affirmed in House of Lords, L.R. 7 H.L. 17.

45 *Harburg India Rubber Comb Co.* v. *Martin* (1902) 1 K.B. 778, C.A.

46 *Guild & Co.* v. *Conrad* (1894) 2 Q.B. 885; *Mahalinga* v. *Union Bank,* 1943 A.M. 216.

47 *Guild & Co.* v. *Conrad* (1894) 2 Q.B. 885, 896 (C.A.); *Kelappan Nambiar* v. *Kunhi Raman* (1957) A.M. 164; (1957) Mad. 176; *Ramachandra* v. *Shapurji* (1940) Bom. 552, 556-7; (1940) A.B. 315; *Mahabir Shamsher* v. *Lloyds Bank* (1968) A.Cal. 371; 72 C.W.N. 94; *Official Assignee* v. *Ramalingappa,* 49 Mad. 539; (1926) A.M. 554; *Nagpur Nagrik Sahakari Bank Ltd.* v. *Union of India* (1981) A.AP. 153, 162.

48 *Guild & Co.* v. *Conrad* (1894) 2 Q.B. 885, 896 (C.A.); *Kelappan Nambiar* v. *Kunhi Raman* (1957) A.M. 164; (1957) Mad. 176; see also *Lakeman* v. *Mountstephen* (1874) 7 H.L.Cas. 17; *Radha Govinda Rai* v. *Khas Dharmaband Colliery Co.* (1963) A.P. 160; *Nagpur Nagrik Sahakari Bank Ltd.* v. *Union of India* (1981) A.AP. 153, 162.

"There is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment and a promise to keep a person who has entered or about to enter, into a contract of liability indemnified against that liability independently of the queston whether a third person makes default or not."[49]

In England, however, this last distinction is material chiefly because a guarantee is within the Statute of Frauds, and therefore not actionable without such a "memorandum or note" as is required by s.4 of that Act; whereas the present section expressly declares that an oral guarantee is not less valid than a written one. As to the difference in principle between indemnity and suretyship, the Indian Act does not depart from English law. "Contracts of suretyship...require the concurrence of three persons, namely, the principal debtor, the creditor and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor," on the true construction of s. 141 as well as s. 126. Accordingly, if *A* enters into a contract with *B*, and *C*, without any communication with *B*, undertakes for a consideration moving from *A* to indemnify *A* against any damage that may arise from a breach of *B*'s obligation, this will not make *C* a surety for *B*, or give him a right of action in his own name against *B* in the event of *B*'s default.[50]

In order to constitute a contract of guarantee there must be a third contract by which the principal debtor expressly or impliedly requests the surety to act as such. Without this contract it is not possible to work out the liabilities of the surety.[51] It is not necessary that a principal debtor should as a matter of law be an express party to a contract of guarantee. It is sufficient that the principal debtor is a party to the contract by implication.[52]

The mere transfer by a debtor of his property to a trustee for the benefit of his creditors, the trustee not undertaking any personal liability to the creditors, does not constitute the relation of principal and surety as between the debtor and the trustee.[53]

The definition of the word "surety" in the section is not however exhaustive and the High Court of Bombay have held that it would include a person who, without undertaking a personal liability on behalf of the principal debtor, merely deposits documents of his property by way of security.[54]

A person may become a surety without the knowledge and consent of the principal debtor, but the only rights which he acquires in that case are those given by ss. 140 and 141, and not those given by s. 145.[55]

Simultaneous tripartite agreement.—Simultaneous tripartite contract between the principal debtor and creditor and the surety is not necessary. Where there is a contract between the creditor and the principal debtor a contract between the creditor and the surety can also be formed. It is not necessary that the surety should get any advantage himself.

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49 *Guild & Co.* v. *Conrad* (1984) 2 Q.B. 885, 896. See also *Lakeman* v. *Mountstephen* (1874) 7 H.L. Cas. 17.

50 *Periamanna Marakkayar* v. *Banians & Co.* (1925) 49 Mad. 156, 172, 185; 95 I.C. 154; 1926 A.M. 544. See also *Ramachandra* v. *Shapoorji* (1940) Bom. 552, per Beaumont C.J. at pp. 556-557; 192 I.C. 375; 1940 A.B. 315; *Buldana Municipality* v. *Vishnu Damodhar* (1948) Nag. 350, 1949 A.N. 48; *Radha Kunwar* v. *Ram Narain*, 1952 A.A. 587; *Madiraj* v. *Venkateshwarrao*, 1955 A. Hvd. 261.

51 *Periamianna Murrakkayar* v. *Banians & Co.*, 49 Mad. 156; (1926) A.M. 544; *Suresh Narain* v. *Akhauri* (1957) A.P. 256; *Ram Chandra* v. *Shapurji* (1940) A.B. 317; (1940) Bom. 552; *Janwatraj* v. *Jethmal* (1958) A. Raj. 343; (1958) 8 Raj. 975.

52 *Suresh Narain Sinha* v. *Akhauri* (1957) A.P. 256.

53 *Arunachellam Chetti* v. *Subramanian Chetti* (1907) 30 Mad. 235.

54 *Jagjivandas* v. *King Hamilton & Co.* (1931) 55 Bom. 677; 134 I.C. 545; 1931 A.B. 337.

55 *Muthu Raman* v. *Chinna Vallayan* (1916) 39 Mad. 965; 33 I.C. 508. As to execution of a decree against a surety for the judgment debtor under C.P.C. s. 145, and the contract of the surety not being invalidated by an insufficient stamp, see *Joyma Bewa* v. *Easin Sarkar* (1926) 53 Cal. 515; 95 I.C. 483; 1926 A. Cal. 877.

The consideration may move from the creditor or the principal debtor or both.[56]

Conditional guarantee—Bengal Money Lenders Act.—Where the guarantee is conditional on the default of the principal debtor, it does not fall under the expression "promise to pay" and a gurantee does not fall within s.40(1) of the Bengal Money Lenders Act.[57]

A transaction of guarantee may be contained in more than one document but they must be read and interpreted together.[58]

"Liability".—By the word "liability" in this section is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation.[59]

Performance Guarantee—Irrevocable letter of credit.—The principles applicable to international trade and the safeguards established for price payable to the foreign sellers for goods sold to buyers of other foreign countries have received approval by Indian Courts as shown by the following cases of which the latest Supreme Court decision to *United Commercial Bank* v. *Bank of India* (1981) A.S.C. 1426. The decisions of English Courts given herein are illustrative.

An irrevocable or confirmed letter of credit, or performance guarantee by a bank is a guarantee by the bank to a seller for payment of price. The bank is not concerned with the contract by its customer or any difference between the buyer and the seller. The terms of guarantee and the bank's obligation are contained in the letter of credit itself. The customer cannot instruct the bank not to pay.[60]

A performance bond.—A "performance bond or guarantee" is given at the instance of a seller for fulfilment of seller's obligation under the contract of sale, the guarantee being that the guarantor would pay on first demand without any condition or proof. The contract between the buyer and the seller fell through as no letter of credit was provided by the buyer. The seller sought an injunction against the guaranteeing Bank not to pay the guarantee but the injunction was refused because a "performance bond" is similar to a "confirmed letter of credit" requiring the bank to honour the guarantee without proof of conditions. It was not concerned whether either party to the contract which underlay the guarantee was in default except where the seller established fraud on the part of the buyer. The 'performance bond' loan was like a promissory note payable on demand.[61]

Bank guarantee.—An irrevocable performance Bank guarantee is a distinct separate transaction. If disputes arise between company on whose behalf the guarantee is given and a corporation in whose favour it is given and the disputes are referred to arbitration the payment of the guarantee cannot be stayed pending the arbitration. Hence no injunction can be granted.[62]

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56 *Prasanjit Mehta* v. *United Commercial Bank Ltd.* (1979) A.P. 151; *Duncan Fox & Co.* v. *North & South Wales Bank Ltd.* (1880) 6 A.C. 1, 11-12 reld. on; *K. Audilaxmana Rao* v. *Raghusami Reddy* (1970) A.AP. 158 reld. on; *Ramchand B. Loyalka* v. *Shapurji & Bhownagree* (1940) A.B. 315 appl.

57 *Satyanaran Kamal Kumar* v. *Birendra Pal Singh* (1979) A. Cal. 197.

58 *Chattanatha* v. *Central Bank of India* (1965) 3 S.C.R. 318; (1965) A.S.C. 1856; *Manks* v. *Whiteley* (1912) 1 Ch. 735.

59 *Manju Mahadev* v. *Shivappa* (1918) 42 Bom. 444; 46 I.C. 122.

60 *United Commercial Bank* v. *Bank of India* (1981) A.S.C. 1426, 1438. See also (1976) 52 ALJ 709 (by R. Baxt).

61 *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.* (1978) 1 All ER 976, 983-4, 986-7; *R.D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank* (1977) 2 All E.R. 862 approved; *Malas (trading as Hamzeh Malas & Sons)* v. *British Imex Industries Ltd.* (1958) 1 All ER 262; and *Discounts Record Ltd.* v. *Barclay Bank Ltd.* (1975) 1 All ER 1071 applied.

62 *Damodar Paints (P) Ltd.* v. *Indian Oil Corporation* (1982) A.D. 57; *Premier Tyres Ltd.* v. *State Trading Corporation* (1981) Rajdhani L.R. 138 folld.; *Pesticides, India* v. *State Chemicals and Pharmaceuticals Corporation of India* (1982) A.D. 78, 82.

In an irrevocable letter of credit an advantage is that the relation between the banker and the seller is distinct from that between the buyer and the seller. The bank on which the credit is drawn cannot refuse to honor the credit relying upon a breach of contract between the parties which would have entitled the buyer to refuse payment to the seller. The bank's obligation is absolute.

But the question whether the buyer can get the assistance of the Court to prevent the payment was answered in the negative by the English Courts because the bank's obligation is "absolute".[63]

The facts in the *Records Case*[64] were that an English Company entered into a contract for the purchase of records and cassettes from a French Company and instructed an English Bank to open a letter of credit required which the English Bank complied with. The English Bank had authorised the French Bank to accept the bills drawn on the credit. The goods supplied to the English buyers were not in accordance with the goods contracted for the purchase so much so that it led to allegations of fraud. It was argued that the seller was guilty of fraud and the Court could intervene and reliance was placed on *Sztejn* v. *J. Henry Schroder Banking Corporation* (1941) N. Y. Supp. 2d 631, 644, where it was held that the principle underlying such bills of credit could not be used to protect an unscrupulous seller. A similar rule could be deduced from *Hamzeh Malas and Sons* v. *British Imex Industries Ltd.* (1958) 2 K.B. 127, 130, where Sellers L.J. observed "There may well be a case where the court would exercise jurisdiction as in a case where there is fraudulent transaction. See also *Elian* v. *Matsa* (1966) 2 Lloyds Rep. 495,497. Mr. Justice Megarry distinguished this case on two grounds, firstly, the form in which the issue arose had required the Court to assume that fraud had been established, whereas in the case of *Discount Records Ltd.* charge of fraud had not been established and it was only an allegation. The second ground on which *Sztejn's case* was distinguished was broader in nature being in effect the inappropriateness of the relief sought in the light of commercial realities. Thirdly, the defendant was out of jurisdiction of the Court, and therefore, the suit was dismissed. It is also to be emphasised that in the *Discount Record Case* the court found that the allegations of fraud had not been sufficiently made out.

The significance of *Discount Records case* is that it opens possibility that a buyer relying on a serious breach of contract may be able to successfully restrain a bank from paying on a documentary credit.[65]

Confirmed letter of Credit.—An irrevocable confirmed letter of credit is a mechanism of great importance in international trade. The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor which imposes on the banker an absolute obligation to pay irrespective of any dispute between the parties as to the quality of the goods. An elaborate system has been built upon the footing that bankers confirmed letter of credit is of that order. The autonomy of the confirmed letter of credit is indicative of and unqualified by the contract of sale and underlying transaction and it is therefore entitled to protection. As a rule Courts refrain from interfering with that autonomy and that established practice as the vendor is selling on the assurance that nothing will prevent his receiving price.[66]

Irrevocable letter of Credit.—At the instance of the appellant company the respondent Bank opened an irrevocable letter of credit at a bank in Taiwan for purchasing a fishing trawler. The payment was to be made at the presentation of a sight draft drawn on the company accompanied *inter alia* with a certificate signed by the company's Managing Director with his passport number certifying that the vessel had been built and was in a fit condition to

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63 *Stein* v. *Hambros Bank* (1921) 2 Ll L.R. at p. 517; *Discount Records Ltd.* v. *Barclay's Bank Ltd.* (1975) 1 W.L.R. 315.

64 *Discounts Records Ltd.* v. *Barclays Bank Ltd.* (1975) 1 W.L.R. 315.

65 51f. 49 A.L.J. 632.

66 *Tarapore & Co.* v. *V.O. Tractoro Export* (1970) A.SC. 891, 896, 897, (1969) 2 SCR 920; *Hamzeh Walis & Son* v. *British Imex Industries Ltd.* (1958) 2 Q.B. 127; *Urguhart Lindsey & Co. Ltd.* v. *Eastern Bank Ltd.* (1922) 1 K.B. 318; *Dulien Steel Products Inc.* v. *Bankers Trust Co.* 298 Fed. Rep. (2nd Ser. P. 836 reld. on; See Supra Bankers Commercial Credit.

sail. Subsequently it handed over to the beneficiary a certificate purporting to be signed by the Managing Director along with the particulars and documents requisite. They were presented at the bank in Taipeh—the agent of the issuing bank—and after a comparison of the signatures paid the money to the beneficiary. The company brought an action against the issuing bank alleging forgery of signature and of the passport. The Privy Council held that the mere fact that the signature was a forgery did not prevent the Taipeh bank from paying after taking all precautions of verification.[67]

Bank guarantee and irrevocable letter of Credit.—The difference between a "bank guarantee" and "an irrevocable letter of credit" is this. A bank guarantee has a dual aspect. It is not merely a contract between a bank and a beneficiary of the guarantee, it is also a security given to the beneficiary by a third party. In seeking to enforce the guarantee the beneficiary in effect seeks to realise the security furnished by the third party. The third party, has, therefore locus standi to challenge the guarantee enforcement. The courts are slow to interfere with the operation of the letter of credit not merely on the ground of its importance in international trade but the seller is assured of payment irrespective of the compliance or non-compliance of the terms of the contract between the seller and the buyer. The important point of distinction is the autonomy of the irrevocable letter of credit and the dependence of the guarantee by a bank on the contract between the buyer and the seller. In the case of an irrevocable letter of credit payment does not depend on the performance of the terms, in the case of and the letter of credit the obligation is of the bank to the beneficiary and no third party comes in. In the case of a bank guarantee the third party is always on the scene and without some default of the third party payment does not become due. Thus a bank guarantee is not autonomous which a letter of credit is.[68]

Where a bank gives a guarantee to pay on 'first demand' and 'without contestation' and 'without reference to such party' and 'without questioning the legal relationship' the legal relationship in whose favour the guarantee was given and the party on whose behalf it was given out 'notwithstanding any disputes between the parties'.... the guarantor bank is obliged to pay according to the contractual obligation and the Court will not give an injunction restraining bank to pay.[69]

Bank guarantee.—A bank gave a gurantee to the selling Company for payment of excise duty on behalf of the purchaser. The selling Company was entitled to recover from the purchaser the excise duty levied and therefore the Court refused to issue an injunction to the Bank to restrain it from honouring the guarantee.[70]

Where under an indemnity the purchaser agreed to indemnify the seller for the payment of Sales Tax levied and in case of the failure of the purchaser to pay, the seller paid the tax the cause of action arose on the payment of the tax and not on the date of the making of the order to pay.[71]

Pre-existing liability not a bond.—An instrument reciting a pre-existing liability and not creating one is not a bond therefore where by an instrument by which a person undertakes to

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67 *Gian Singh & Co.* v. *Banque de l' Indo-China* (1974) 1 All ER 754 (P.C.).

68 *State Bank of India* v. *Economic Trading Co. S.A.* (1975) A. Cal. 145-149; *Tarapore & Co.* v. *Tractoro Export* (1969) 2 SCR 920; (1970) A.S.C. 89; *Metals & Minerals Cos. of India* v. *Surajbaram Sethi* (1970) 74 Cal. W.N. 91 reld. on.

69 *Texmaco Ltd.* v. *State Bank of India* (1979) A. Cal. 44; *State Bank of India* v. *Economic Trading Co.* (1975) A. Cal. 145; *Tarapore & Co.* v. *V.O. Tractors* (1970) A.SC. 891; (1969) 2 SCR 960; *Metals & Minerals Corporation of India* v. *Suryaballabh Seth* (1970) 74 Cal. W.N. 991 (distinction between Bank guarantee and irrevocable letter of credit) refd. to; *R.D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank Ltd.*(1977) 3 WLR 752; *Edward Owen Engineering Ltd.* v. *Barclay Bank International* (1977) 3 WLR 764, 773 reld. on (Bank must pay on demand).

70 *Indian Cable Co. Ltd.* v. *Plastic Products Engineering Co.* (1979) A. Cal. 37; *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.SC. 1634; *State Bank of India* v. *Economic Trading Co.* (1975) A. Cal. 145 refd. to.

71 *Abdulhussain Sheikh* v. *Bombay Metal Syndicate* (1972) A.B. 252.

pay the sales tax under the Act is not a bond if it only recites the liability and undertakes to save the Government from loss.[72]

A surety is not liable for any liability of the principal debtor incurred previous to the document of suretyship.[73]

Where a person signed in the sale list of Toddy shops in a column headed 'Certificate of Solvency' against the name of the auction purchaser of Toddy shops, he cannot be held to have stood surety for the auction purchaser undertaking to pay his liability in the case of his failure to discharge it. He only certified that the auction purchaser was a solvent person.[74]

Guarantee in favour of non-banking Company.—Mortgage and a guarantee given in favour of a corporate body which is not under the statute allowed to do banking business is nevertheless valid and enforceable.[75]

Effect of Partition of India on guarantees.—A surety bond given to guarantee payment of a deposit in a bank with its head office at Dacca was not discharged due to partition of the country and the bank suspending payment and its Indian branch consequent thereon.[76]

Consideration for guarantee.

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

Consideration for a contract of guarantee.—This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor's request and it is immaterial whether there is or is not any apparent benefit to the promisor[77] (see notes on s. 25, "Explanation 2", above).

Like any other contract, a contract of suretyship may be invalidated by total failure of the consideration, as where the consideration for an intended guarantee was postponing the sale of the debtor's goods, but the creditor was unable to stop the sale for want of the consent of other necessary parties,[78] or where the consideration was withdrawal of a criminal prosecu-

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72 *Hindustan Sugar Mills Ltd.* v. *State of U.P.* (1972) A.A.S.; *Mai Dhan Gupta* v. *Board of Revenue* (1969) All L.J. 333; *Hiralal Sircar* v. *Queen Empress* 22 Cal. 757 reld.

73 *Chattaranjan Banerjee* v. *Deputy Commissioner* (1980) A.Gau. 62; *State of Bihar* v. *M. Homi* (1957) A.S.C. 587; *Aniradhan* v. *Thomcos Bank* (1963) A.S.C. 746; *Pratap Singh Moholalbhai* v. *Keshava Lal Niralal* (1935) A.PC. 21; *Bleat* v. *Brown* (1862) 4 De GF & J 367, 376 reld. on.

74 *Joseph Abraham* v. *Tehsildar Meenachil* (1971) 1 Ker. 618; (1971) A. Ker. 334; *Union of India* v. *Bhimsen Walaitiram* (1971) 1 S.C.W.R. 111 refd. to.

75 *Yango Pastoral Co. (Pty) Ltd.* v. *First Chicago Australia Ltd.* (1979) 53 A.L.J. 1.

76 *Suresh Narain* v. *Akhauri* (1957) A.P. 256. See also *United Commercial Bank Ltd.* v. *Okara Grain Syndicate Ltd.* (1968) A.SC. 1115. (Money deposited with a bank as guarantee for performance of contract with District Magistrate no trust created in his favour. Bank liable after partition of India.)

77 *Sonarlinga* v. *Pachai Naickan* (1913) 38 Mad. 680; 22 I.C. 1. Some benefit to the principal debtor is indispensable: *Pestonji* v. *Bai Meherbai,* 1928 A.B. 539; 30 Bom. L.R. 1407; 112 I.C. 740.

78 *Cooper* v. *Joel* (1859) 1 D.F. & J. 240.

tion against the debtor, but the Court would not sanction the withdrawal, the offence being non-compoundable.[79]

Where *A* advanced money to *B* on a bond hypothecating *B*'s property, and mentioning *C* as surety for any balance that might remain due after realisation of *B*'s property, and *C* was no party to the bond, but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration.[80] In this case it was said that illustration (c) could be good law only on the assumption that there was no privity between *C* and *B* and that *C* acted merely as a volunteer;[81] but this appears to be exactly what the illustration says. Again, the mere fact that *A* lends money to *B* on the recommendation of *C* is no consideration for a subsequent promise by *C* to pay the money in default of *B*.[82]

In *Ghulam Husain* v. *Faiyaz Ali*[83] it was held that where after a lease had been executed a person became surety for the payment of rent due by the lessee, the contract of suretyship was for consideration, on the ground that the word "done" in s. 127 showed that past benefit to the principal debtor could be good consideration for a bond of guarantee. This seems to attribute an unnatural meaning to the word, which, it is submitted and as the rest of the section shows, refers to an executed as distinguished from an executory consideration. The facts in the Privy Council case on which the Court relied[84] are not very clearly set out in the judgment of their Lordships, but apparently the surety bond, though executed at a date subsequent to the principal agreement (a compromise approved by the Court) was executed in pursuance of one of the terms of that agreement. A contract of guarantee executed after the contract between the creditor and the principal debtor and without consideration is void. It must be contemporaneous with the contract of the creditor and the principal debtor. Past benefit to the principal debtor is not a good consideration.[85]

This section does not, of course, exclude the possibility of other kinds of consideration. However, lending money or supplying goods to the principal debtor and forbearing to sue him,[86] are by far the commonest forms of consideration for a surety's contract. In India forbearance to execute a decree against the debtor is also a common form.[87]

Distinction between insurance and indemnity.—In an insurance contract the insurer is not a surety and does not undertake to pay the original debt but undertakes to pay a new debt arising out of the contract of indemnity which may be quantitatively and qualitatively different from the original debt. The fact that the contract is framed in the form of a policy is only a *prima facie* evidence of the intention of the parties, but the form of the contract is not conclusive. A contract expressed in the form of a policy may nevertheless be a guarantee. In a contract of guarantee there must be three parties; a principal debtor whose liability may be actual or prospective, a creditor and a third party who in consideration of an act or promise on the part of the creditor promises to discharge the debtor's liability on the debtor's default.

In a contract of indemnity the indemnifier makes himself primarily liable to and undertakes to discharge the liability in any event. The liability may arise out of contract or tort. It may be prospective at the time of making the promise or it may be past provided some new

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79 *Het Ram* v. *Devi Prasad* (1881) 1 All.W.N. 2.
80 *Nanak Ram* v. *Mehin Lal* (1877) 1 All. 487.
81 Ibid, at p. 496. The remark occurs in the course of somewhat captious depreciation of the utility of illustrations in general, which even suggests that the illustrations are not authoritative.
82 *Muthukaruppa* v. *Kathappudayan* (1914) 27 Mad.L.J. 249; 25 I.C. 726; *Varghese* v. *Abraham*, 1952 A.T.C. 202 (facts not clearly stated).
83 (1940) 15 Luck. 656; 188 I.C. 175; 1940 A.O. 346; contra *Ram Narain* v. *Lt. Col. Hari Singh* (1964) A.Raj. 76.
84 *Kali Charan* v. *Abdul Rahman* (1918) 23 C.W.N. 545; 50 I.C. 651; 1918 A.P.C. 226.
85 *Ram Narain* v. *Lt. Col. Hari Singh* (1964) A.Raj. 76; (1963) 13 Raj. 793; *Ghulam Hussain Khan* v *Faiyaz Ali Khan*, 15 Luck. 656; (1940) A.O. 346, diss. from.
86 As to this see *Coles* v. *Pack* (1869) L.R. 5 C.P. 65.
87 *Narain Singh* v. *Mata Prasad Singh* (1887) All.W.N. 52.

consideration is given. The risk of default of the debtor can be as effectively insured as the debt can be guaranteed.[88]

Insurance policy.—It is a matter of construction whether an insurance policy is a mere insurance against loss or is a contingency policy. The first principle of an insurance policy saying "the company shall indemnify against..." is that the Company will pay if the insured has been found liable or has sustained loss which is proved. But when the policy is a mere contingency policy, the insurer has to pay on the happening of specified contingency and the payment represents either loss or a possibility of loss which that event entails.[89]

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable not only for the amount of the bill, but also for any interest and charges which may have become due on it. *(Ackermann* v. *Ehrensperger* (1846) 16 M. & W. 99: "I entertain no doubt that a party who guarantees the payment of a bill is liable for all that the principal would be liable for," per Pollock, C.B., at p. 103).

Additional Illustrations

(A guarantees to *B* the payment of rent becoming due from *B* to *C*, *B* fails to pay the rent. *A* is liable for the rent, but not for interest on the rent, unless the bond contained some such words as "with interest thereon": *Maharaja of Benares* v. *Har Narain Singh* (1906) 28 All. 25.

Z writes to *A*, who holds *B*'s promissory note, that *B* will pay the principal and interest within three months: "if he does not so pay, I shall have the note assigned to my name and pay you the principal and interest." This is not a special contract of guarantee, but an ordinary contract of suretyship in which terms implied by law (see s. 141, below) are expressed: accordingly both *Z* and *B* are liable to *A*: *Chokalinga Chettiar* v. *Dandayuthapani Chettiar*, 113 I.C. 337; 1928 A.M. 1262.)

Proof of surety's liability.—The liability must be proved against the surety in the same way as against the principal debtor. A judgment or award against the principal is not admissible as against the surety without a special agreement to that effect: "In an action against the surety the amount of the damage cannot be proved by any admisions of the principal".[90] The present section is merely a re-enactment of the Common Law.[91]

It is not open to a creditor to call upon the surety to pay under the contract of suretyship unless the creditor has performed his part of the contract.[92]

Liability for whole or part of debt.—There is an important distinction to be observed as to guarantees limited in amount. A man may make himself a surety, "with a limit on the amount of his liability, for the whole of a debt exceeding that limit", and a guarantee of limited amount for an ascertained debt is presumed to be a guarantee for the whole.

But "where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt co-extensive with the amount of his guarantee, and

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88 *Hukamchand Insurance Co. Ltd.* v. *Bank of Baroda* (1977) A. Knt. 204, 207.

89 In the matter of *British General Insurance Co. Ltd.* (1971) A.B. 102, 105.

90 *Ex parte Young* (1881) 17 Ch.D. 668, at p. 671; *Shree Meenakshi Mills* v. *Ratilal Tribhovandas* (1941) Bom. 273; 43 Bom. L.R. 53; 196 I.C. 732; 1941 A.B. 108.

91 *Hajarimal* v. *Krishnarav* (1881) 5 Bom. 647, at p. 650.

92 *Probodh Kumar* v. *Gillanders & Co.*, 1934 A.Cal. 699; 59 Cal.L.J. 503; 152 I.C. 571; *Pratapsing* v. *Keshavlal* (1934) 62 I.A. 23; 59 Bom. 180; 153 I.C. 700; 1935 A.P.C. 21. A surety bond is to be strictly construed: *Veeresalingam* v. *Subbarayudu*, 1939 A.M. 932; (1939) 2 Mad. L.J. 282; *Paramasivam* v. *Ramasami* (1939) Mad. 290; 180 I.C. 406; 1939 A.M. 152; *Pannaji Devichand* v. *Basappa* (1943) Bom. 636, 45 Bom. L.R. 510, 209 I.C. 161, (1943) A.B. 243.

this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety".[93] Evidence of contrary intention is of course admissible in either case. But, in the absence of such evidence, the surety who has guaranteed the whole debt with a limit of his liability does not acquire any rights of subrogation or contribution (see ss. 140, 141, 146, below) until he has paid up to that limit, whereas the guarantor of a floating balance up to a limited amount is deemed to be surety only for that part of the debt, and is entitled to the benefit, in rateable proportion, of any dividends paid by the estate of the principal debtor.[94]

Thus where *A* guaranteed *Z* against trade debts to be contracted by *M* "as a running balance of account to any amount not exceeding £400," and *M* became indebted to *Z* for £625 and made a composition with his creditors for 8*s*. 7*d*. in the pound, leaving a balance of £365 due to *Z*, it was held that, as between *A* and *Z*, *A* was entitled to deduct from that balance the amount of the dividend paid upon £400, the maximum of *A*'s guarantee, and was liable to *Z* only for the difference. For the guarantee was on its true construction only a guarantee for £400, part of *M*'s entire debt to *Z*, not a guarantee for an unknown amount with liability limited to £400; and that being so, the dividend paid by *M* was to be applied rateably in reduction of every part of the debt, and the liability of *A* on the part for which he had undertaken was diminished accordingly.[95]

In a later case, held to be indistinguishable from this, it was said:

"If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion he has in respect of it all the rights of a creditor. The question is whether the guarantor means 'I will be liable for £250 of the amount which *A*, *B* shall owe you,' or 'I will be liable for the amount which *A*, *B* shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250...' It is true that a surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all moneys obtainable from other sources have been applied in reduction of the debt."

But such an intention ought to be clearly expressed.[96]

In a guarantee, a surety agreed to be liable for the *Sankhyaikal* paid to the debtor. This was construed to mean all advances whether given in cash or by transfer to deposits.[97] Where a commission agent contracts to supply "pure mustard oil", he is a guarantor for the quality of the oil.[98]

Where the directors of a company became guarantors on their becoming directors of the company, their liability will extend to borrowings or outstandings after they became guarantors and not for earlier liabilities.[99]

Co-extensive.—Surety's liability is co-extensive with that of the principal debtor.[1]

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.[2] But where the liability arises only upon the happening of a contingency,

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93 *Ellis* v. *Emanuel* (1876) 1 Ex. Div. 157, at p. 163, Cur. per Blackburn J.
94 Applied in *Bhushayya* v. *Suryanarayana* (1944) Mad. 340, 1944 A.M. 195.
95 *Bardwell* v. *Lydall* (1831) 7 Bing. 489; 33 R.R. 540.
96 *Hobson* v. *Bass* (1871) L.R. 6 Ch. 792, at p. 794 (Lord Hatherley); cp. 1 Ex. Div. 168. There is no qualification in the words "if the aforesaid persons fail to pay the amount thereof I will pay it in accordance with the bond." *Nandlal* v. *Surajmal*, 1932 A.N. 62; 138 I.C. 879.
97 *Chandukutty* v. *Raman Nair* (1959) A.Ker. 176.
98 *Purshottam Das Ganpati Rai* v. *Gulab Khan* (1963) A.P. 407.
99 *Hargopal Aggarwal* v. *State Bank of India* (1976) A.M. 211, 212.
1 *Narayan Singh* v. *Chattar Singh* (1973) A. Raj. 347.
2 *Sankana* v. *Virupakshapa* (1883) 7 Bom. 146; *Lachhman* v. *Bapu* (1869) 6 Bom. H.C.A. 241; *Totakot* v. *Kurusingal* (1869) 4 M.H.C. 190; *Karim Bakhsh* v. *Bithul Das* (1882) All.W.N. 132; *Inayutullah* v. *Rani* (1886) All.W.N. 306; *Surdet Singh* v. *Gujjar Sing* (1919) P.R. 93; *Depak Datt Chaudhari* v. *Secy. of State*, 118 I.C. 443; 1929 A.L. 393; *Badri Batan Lal* v. *Vindhya Pradesh Government*, 1952 A.V.P. 18. A suit may also be maintained against the surety for the full amount of the debt where the

the surety is not liable until that contingency has taken place.[3]

The defendants had a cash credit account with the plaintiff Bank and they hypothecated their movable assets as security. They also deposited by way of mortgage the title deeds of their immovable properties. Another defendant the insurer issued a Bank loan/cash indemnity policy against losses suffered by the Bank in consequence of default of the principal debtors in making repayments on due dates. Default having taken place the plaintiff Bank brought a suit on the mortgage and for enforcement of the Indemnity policy. It was held that (1) the plaintiff bank could enforce the Indemnity policy without first exhausting its remedies against the principal debtor, (2) It was not necessary for the plaintiff to await the obtaining of the mortgage decree and getting a personal decree under Order 34, Civil Procedure Code, and it could enforce its rights under the policy.[4]

Surety and Principal Debtor: Res judicata.—A creditor can bring a suit for recovery of his debt against the principal debtor and surety and there is no conflict of interest between them. A subsequent suit by the surety against the principal debtor is not barred by constructive *res judicata*[5]

Mortgage—Surety for shortfall.—A mortgage suit against the principal debtor and a surety for shortfall on sale of mortgaged property is maintainable even though no cause of action has arisen against the surety.[6]

Surety's liability where original contract is void or voidable.—This section only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former.

Unless it can be inferred that contract is one of indemnity, the liability of a surety is ancillary and rests on the validity of the principal's debt or liability which he guarantees.[7] And where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so-called surety is not a collateral, but a principal, contract.[8] In *Kashiba* v. *Shripat,* Farren J. based himself upon English text-books and the decision in *Harris* v. *Huntbach,*[9] and Pickford J., as Lord Sterndale M.R. then was, gave a similar decision on the English law in *Wauthier* v. *Wilson,*[10] but Oliver J. refused to follow it in *Coutts* v. *Browne-Lecky.*[11] The latter decision has been criticised on the

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principal debtor has been adjudged insolvent or gone into liquidation under the Companies' Act: - *Jagannath* v. *Shivnarayan* (1940) Bom. 387; 42 Bom. L.R. 451; 190 I.C. 73; 1940 A.B. 247; *Madho Sah* v. *Sitaram Sah* (1962) A.P. 405; *Hazarilal* v. *Chhajju Ram* (1960) A.Raj. 319; *Suresh Narain* v. *Akhauri* (1957) A.P. 256; *Mahanth Singh* v. *U. Bayi,* 66 I.A. 198; (1939) A.P.C. 110; *Budha Singh* v. *Mukand Bihari* (1975) A.A. 201; *Bank of Bihar* v. *Damodar Parshad* (1969) A.SC. 297; (1969) 1 SCR 620; *Radha Krishan Das* v. *Ajodhya Das* (1937) All. L.J. 1265 disting; *Arumugham Chettiar* v.*Sadasivan Pillai* (1971) A.M. 321; *Sriniwasan* v. *Subramaniam* (1965) 2 Mad.L.J. 502 not folld.; *Nagpur Nagrik Sahakari Bank* v. *Union of India* (1981) A.B. 153, 159.

3 *Subankhan* v. *Lalkhan* (1947) Nag. 643, 1948 A.N. 123.

4 *Hukam Chand Insurance Co.Ltd.* v. *Bank of Baroda* (1977) A.Knt. 204, 207, 20 Halsbury's Laws of England 3rd Vol. 22 para 819 quoted; *Subhankhan Ramzarkhan* v. *Lalkhan* (1948) A.N. 123 disting.

5 *Ram Sagar Singh* v. *Yogendra* (1975) A.P. 329.

6 *Ram Kumar* v. *Bastar Singh* (1971) A.Raj. 124.

7 *Kellapan Nambiar* v. *Kunhi Raman* (1957) A.M. 164. (1957) Mad. 176; *Subramania Chettiar* v. *Narayanswami Gounder* (1951) Mad. 305; (1951) A.M. 48 (F.B.) refd. to; *Vardarajulu Naidu* v. *Thavasi Nadar* (1963) A.M. 413 (a case of illegal partnership). See also *Blest* v. *Brown* (1862) 4 De G.F. & J. 367, 376; *Pratapsingh Moholabhai* v. *Keshavlal Setalvad,* 62 I.A. 23; & *M.S. Anirudhan* v. *Thomco's Bank Ltd.* (1963) 1 Supp. S.C.R. 63, 77; (1963) A.SC. 748.

8 *Kashiba* v. *Shripat* (1894) 19 Bom. 697; *Sohan Lal* v. *Puran Singh* (1916) Punj. Rec. No. 54, p. 165; 35 I.C. 537; *Tikki Lal* v. *Komalchand* (1940) Nag. 632; 1940 A.N. 327. But see n. 83, *infra.*

9 (1757) 1 Burr. 373.

10 (1911) 27 T.L.R. 582.

11 (1947) 1 K.B. 104.

ground that *Harris* v. *Huntbach* was not cited, and that it is based upon a misconception of Scots law and Roman law.[12] In a later case the High Court of Madras has held that if a surety guarantees a debt by a minor, he incurs no liability as his liability is co-extensive with that of the principal debtor, whose contract is void.[13] The guarantors of an infant's overdraft at a bank where all parties know the facts are not liable to the bank,[14] because the contract was to guarantee a debt which was no debt at all and the contract was no contract.[15] *Coutts' case* has been criticised on the ground that this rule is not necessary for the protection of an infant and allows the guarantor to escape a liability which he deliberately undertakes.[16] If on account of a contract of partnership being illegal, the principal's liability is unenforceable, the surety will also not be liable.[17] A bargain securing to a Barrister a share in the proceeds of litigation in which he is engaged is void for champerty and any security given in respect of such a bargain is liable to be set aside.[18] According to English law, a company director who guarantees a contract by the company which is *ultra vires* that company, remains liable to the creditor.[19] A discharge of the principal debtor by operation of law does not discharge the surety.[20]

But these case must be confined to their own facts, i.e. to cases of bankruptcy. The liability of a surety being co-extensive with that of the principal debtor, the surety is entitled to any modification or the variation of the latter's liability under a statute, e.g. under Agriculturist Debtors Relief Act.[21] For the same reason, the liability of the surety is immediate and before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance, nor can such can injunction be imposed in a decree by a court.[22] It is the duty of the surety to pay the decretal amount upon which he will be subrogated to the rights of the creditor under s. 142.[23] The solvency of the principal debtor is no ground for restraining the creditor from executing his decree.[24]

In a Lahore case[25] a dispute was referred to arbitration and a person stood surety for any amount that might be awarded against one of the parties to the reference. The surety paid and sued the debtor for the money paid by him on the debtor's behalf. The reference to arbitration was illegal and void in law, but the surety was held entitled to recover. This decision is difficult to understand, since the supposed debtor was not, as it turned out, a debtor at all or liable to pay the sum which the supposed surety had paid for him. In English and Scots law, a surety is not liable if the original agreement is illegal.[26]

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12 See Cohn in 10 Mod.L.R. 40. The view of Oliver J. is contrary to Roman law, the law of the United States, South African law and Scots law (see *Stevenson* v. *Adair* (1872) 10 M. 919).

13 *Kelappan Nambiar* v. *Kunhi Raman* (1957) A.M. 164; (1957) Mad. 176; *Coutts & Co.* v. *Browne-Lecky* (1947) 1 K.B. 104; (1946) 2 All E.R. 206; *Wauthier* v. *Wilson* (1911) 27 T.L.R. 582; on app. (1912) 28 T.L.R. 239 dist. & explained; *Kashiba* v. *Sripat*, 19 Bom. 697 dist.; *Swan* v. *Bank of Scotland* (1836) 10 Bli (N.S.) 627 (H.L.).

14 *Coutts & Co.* v. *Browne-Lecky* (1947) K.B. 104; (1946) 2 All E.R. 207; *Wauthier* v. *Wilson* (1912) 28 T.L.R. 239 (C.A.) dist. and explained; *Swan* v. *Bank of Scotland* (1836) 10 Bli (N.S.) 627 (H.L.).

15 Warrington J. in *Wauthier* v. *Wilson*, 27 T.L.R. 582; app. 28. T.L.R. 239 (was a case of indemnity and not a guarantee) see *Coutts & Co.* v. *Browne-Lecky*, (1946) 2 All E.R. 207, 210. Pothier: *On Contracts* quoted in de Colyars Law of Guarantee (3rd Ed.), p.210 quoted by Oliver J. in *Coutts case*.

16 2 Cohn. 10 M.L.R. 40.

17 *Varadarajulu* v. *Thavasi Nadar* (1963) Mad. 942; (1963) A.M. 413.

18 *Skapholme* v. *Hart* (1680) Cas. temp. Finch 477; Halsbury's: *Laws of England*, Vol. 3, p.44 (3rd Ed.).

19 *Garrard* v. *James* (1925) Ch. 616; *Yorkshire Railway Wagon Co* v. *Maclure* (1882) 21 Ch.D. 309; *Garrard* v. *James* (1925) Ch. 616; quoted by Oliver J. in *Coutts & Co.* v. *Browne-Lecky* (1946) 2 All E.R. 208, 209; (1947) K.B. 104.

20 E.g. bankruptcy: *Jagannath* v. *Shivnarayan* (1940) Bom. 387; liquidation: *Bank of India* v. *R.F. Cowasjee*, 1955 A.B. 419, 428; *Aypunni Mani* v. *Kochouseph* (1966) A.Ker. 203. But as to the effect of Debt Relief Acts, see *infra*.

21 *Aypunni Mani* v. *Kochouseph* (1966) A.Ker. 203 (F.B.): *Subbaramania Chettiar* v. *Narayanswami* (1951) Mad. 305; (1951) A.M. 48 (Madras Agriculturists Debt Relief Act) (F.B.): *Subramania* v. *Batcha Rowther* (1942) A.M. 145 overd. See footnotes 64 and 68 at p. 629.

22 *The Bank of Bihar Ltd.* v. *Damodar Prasad* (1969) A.SC. 297; *Wright* v. *Simpson*, 31 E.R. 1272, 1282 reld. on; *Lachhman* v. *Bapu Khandu* (1869) 4 B.H.C.R. 241.

23 *The Bank of Bihar Ltd.* v. *Damodar Prasad* (1969) A.SC. 297. (Judgment of Patna High Court revd.); *Lachhman* v. *Bapu*, 6 Bom. H.C.R. 241 appd.

24 *Ibid.*

25 *Mohammad* v. *Abdul*, 1939 A.L. 187.

26 *Swan* v. *Bank of Scotland* (1836) 10 Bligh (N.S.) 627, H.L.

In the case of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, the loss to be recoverable in a suit against the guarantor must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement.[27]

Administration and surety bonds.—The liability of sureties under an administration bonds does not depend on the validity or invalidity of the grant. Nor is the bond void merely because administration was obtained by misrepresentations of which neither the Court nor the sureties were aware.[28] The same principle applies to surety bonds passed under the Guardian and Wards Act.[29] See notes to s.20, above.

Limitation.—This section must be read together with the Limitation Act, and not so as to nullify its provision limiting the time within which a suit must be brought after the accrual of a cause of action. The payment of interest, therefore, by debtor before the expiration of the period of limitation does not give a fresh starting point for limitation against the surety under s.19 of the 1963 Limitation Act even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account. Payment of interest by the debtor could not be regarded as made by a person liable to pay the surety's debt, nor can the surety be, for the purpose of that section, considered the agent of the principal duly authorised to pay the interest.[30] "The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference unless the circumstances could be said to render the payment one on behalf of the surety".[31]

Debtors acknowledgement does not exonerate surety.—A debtors acknowledging a debt within a period of limitation does not exonerate the surety nor can the surety plead discharge under s. 133 nor does s. 137 apply because mere forbearance to sue till beyond the period of original limitation. S. 139 has no application for there is no impairment of the rights of the surety.[32]

See also the commentary on s. 134, below.

"Continuing guarantee."

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations

(a) *A*, in consideration that *B* will employ *C* in collecting the rent of *B*'s *zamindari*, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee. (See *Durga Priya Chowdhury* v. *Durga Pada Roy* (1927) 55 Cal. 154; 109 I.C. 752; 1928 Cal. 204, where this illustration is relied on.)

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £100, and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100. (Facts simplified from *Wood* v. *Priestner* (1867) L.R. 2 Ex. 66, 282.)

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27 *Sri Kishen* v. *The Secretary of State for India in Council* (1885) 12 Cal. 143. This was a case on the construction of an undertaking in the nature of a "fidelity guarantee" on very peculiar facts; the Contract Act is not referred to at all.

28 *Debendra Nath Dutt* v. *Administrator-General of Bengal* (1906) 33 Cal. 713; (1908) 85 Cal. 955; L.R. 35 I.A. 109 (P.C.).

29 *Sarat Chandra Roy* v. *Rajoni Mohan Roy* (1908) 12 C.W.N. 481.

30 *Gopal Daji* v. *Gopal Bin Sonu* (1903) 28 Bom. 248.

31 *Brajendra Kishore* v. *Hindustan Co-operative Insurance Society* (1917) 44 Cal. 978, at p. 993; 39 I.C. 705.

32 *Vendom Jupitor Chits (P) Ltd.* v. *K.P. Mathew* (1980) A. Ker. 190; *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) A.SC. 328; *Mahanthisingh* v. *U. Bayi* (1939) A.PC. 110; *Subramania Aiyer* v. *Gopala Aiyer* (1910) 33 Mad. 308 folld.; *Federal Bank of India* v. *Som Nath* (1956) A. Punj. 21; *Hazara Singh Gujjar Singh* v. *Bakhshish Singh Mulla Singh* (1962) A. Punj. 495 diss. from.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks. *(Kay* v. *Groves* (1829) 6 Bing. 276.)

Continuing guarantee.—Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, "as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written".[33] Surrounding circumstances must be looked to "to see what was the subject-matter which the parties had in their contemplation when the guarantee was given".[34] A guarantee in this form: "I, *M*, will be answerable for £50 sterling that *Y*, butcher, may buy of *H*," was held to be a continuing guarantee to the extent of £50 when it appeared from the circumstances that the parties contemplated a continuing supply of stock to *Y* in the way of his trade. The Court has power "not to alter the language but to fill up the instrument where it is silent, and to apply it to the subject-matter to whch the parties intended it to be applied".[35] In construing the language of the parties the whole of their expressions must be looked to, not merely the operative words. Thus the following words were held to show that a guarantee, which otherwise might have been confined to a single transaction, was intended to be continuing:

"Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you".[36]

B became surety under bond to Government for the treasurer of a collectorate. The collector yearly examined the accounts and struck a balance which he certified to be correct. *B* on each occasion executed a new bond, but the old bonds were not cancelled or given up. On subsequent inquiry, the treasurer was discovered to have embezzled moneys during each year. It was held that on such discoveries being made, *B* was still liable under the old bonds, there having been no novation.[37]

A guarantee of the fidelity of a person appointed to a place of trust in a bank is not a continuing guarantee.[38] Nor is a guarantee for the payment by instalments of a sum certain within a definite time.[39]

Instalment Contract.—Under the terms of a letter of guarantee, the guarantors guaranteed the payment of instalments due or to become due from the purchasers of the ship which was being built for them, if the buyers defaulted. Under the contract if the buyers defaulted in paying the second instalment, the ship-builder had in addition to other rights, the right to recover damages, cancel or rescind the contract and sell the ship by public auction. The buyers defaulted in paying the second instalment and the ship-builders cancelled the contract and sued the guarantor for the second instalment and interest. On appeal to the House of Lords against the judgment in favour of the ship-builders the guarantors contended that by the notice of cancellation the contract had terminated and the right to recover the second instalment had been destroyed and there was only the remedy in damages which had replaced the other claims and therefore the guarantors were not liable. The House of Lords held that the buyers were liable for the second instalment which liability arose before the notice of cancellation and accordingly the guarantors remained liable. Secondly the guarantors were liable even if the right was replaced by claim for damages because the object of the guarantee was to enable the ship-builders to recover from the guarantors irrespective of the position between the ship-builders and the buyers.[40]

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33 Bovill C.J., *Coles* v. *Pack* (1869) L.R. 5 C.P. 65, at p. 70.
34 Willes J., *Heffield* v. *Meadows* (1869) L.R. 4 C.P. 595, at p. 599.
35 Ib., and per Montague Smith J., at p. 601.
36 *Nottingham Hide Co.* v. *Bottrill* (1873) L.R. 8, C.P. 694; *Cf. Wali Muhammad* v. *Ganpat* (1930) 52 All. 1014; 132 I.C. 813; 1931 A.A. 243.
37 *Lala Banshidhar* v. *Government of Bengal* (1872) 9 B.L.R. 364; 14 M.I.A. 86.
38 *Sen* v. *Bank of Bengal* (1920) 47 I.A. 164; 58 I.C. 1; *quaere,* whether in the particular case there was any guarantee at all, see 47 I.A. 164, at p. 170.
39 *Bhagvandas* v. *Secy. of State,* 1926 A.B. 465; 28 B.L.R. 662; 96 I.C. 248.
40 *Hyundai Heavy Industries Co. Ltd.* v. *Papadopoulos* (1980) 2 All ER 29, 38, 40, 42; *Dictum in Moschi* v. *Lep Air Service Ltd.* (1972) 2 All E.R. at pp. 308, 403. 407; appld; *Palmer* v. *Temple* (1839) 9 Ad. &

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations.

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months *A* revokes the guarantee. This revocation discharges *A* to *B* for the 2,000 rupees on default of *C*.

(b) *A* guarantees to *B* to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

Future transactions.—The words "future transactions" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transactions is contemplated. It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee... the guarantee cannot be annulled during the continuance of that relationship"; and as the surety could not determine it himself by notice, so his death does not relieve his estate from liability; the nature of the transaction implies a contract to the contrary under s. 131. The father of a person admitted as an underwriting member of Lloyd's (a position from which he could not be removed except for certain causes specified in the rules of the association) gave a guarantee to Lloyd's "for all his engagements in that capacity"; it was held that the guarantee was not confined to transactions within the society, that it was not recoverable while the son continued to be an underwriting member, and that the guarantor's death did not revoke it.[41]

But a material change in what we may call the guaranteed situation may justify a revocation. Thus, in the common case of a continuing guarantee for a servant's honesty, proved dishonesty on the servant's part entitles the surety to say: "After this you must employ such a man, if you will, at your own peril".[42]

Illustration(a) was evidently founded on the case, fairly recent at the time, of *Offord* v. *Davis*[43] The truth is, as the judgment of the Court explains, that *A*'s guarantee is in such circumstances nothing but an offer until *B* has acted upon it by discounting a bill; for, if *B* does not promise to discount *C*'s bills, there is no immediate legal detriment to *B*. When *B* does discount a bill, *A*'s offer becomes a promise to that extent, and so from time to time. The standing offer is, therefore, revocable by *A* at any time.

> "This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendant, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it... We consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more."

Accordingly we have here to do not with any peculiar feature in the relations of principal and surety, but with an application of the general Common Law doctrine of consideration.

Notice.—The mere denial of liability by the surety in a previous suit instituted by the creditor against him and the principal does not operate as a notice under this section.[44]

E (at p. 520); *Dies* v. *British & International Mining & Finance Corporation Ltd.* (1939) 1 K.B. 743 disting. See also: *Halsbury* Vol. 20 (4th Ed.) Paras 158 f-f.

41 *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290 (Fry J.) (see his statement on the principle at p. 306, quoted above), and C.A.

42 *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666, 677, 681, following on this point a dictum in *Burgess* v. *Eve* (1872) L.R. 13 Eq. 450, at p. 458; but this is not the only ground for the decision. See s. 139, below. The last-mentioned case, turning as it does partly on the peculiar rules as to instruments under seal, is not in itself of much value for Indian purposes.

43 (1862) 12 C.B.N.S. 748; 133 R.R. 491; Finch, Sel. Ca. 87; and see the judgment of Baggallay L.J. in *Morrell* v. *Cowan* (1877) 7 Ch.D. 151, at p. 154.

44 *Bhikabhai* v. *Bai Bhuri* (1903) 27 Bom. 418.

When the contract of suretyship prescribes a particular mode of giving notice of termination of a continuing guarantee by a surety, notice must be given in that mode and no other mode will be effective. Therefore where the surety set up an oral intimation of the factum of partition of the surety's family, the guarantee is not discharged and the section of the Act cannot be interpreted by reference to other sections of the Act.[45]

Sureties for guardians and administrators.—The High Court of Bombay[46] holds that this section does not apply to a surety bond required by the Court on the appointment of a guardian of the property of a minor. The surety in that case applied to the Court to be released from his obligation as such on account of the guardian's maladministration of the minor's estate, but the Court refused the application, stating that "the very object of requiring such security was to guarantee the minor against such misconduct or mismanagement on the part of the guardian." The Calcutta High Court, however, has held that this section applies to a surety bond passed under the Probate and Administration Act, 1881 (see now the Indian Succession Act, 1925) and that a surety for the administrator of an estate can as to future transactions, by giving notice, be released from his obligation as surety on account of maladministration of the estate by the administrator.[47] As to the Bombay case it was said that, though it was similar in principle, the surety there had a remedy inasmuch as he might have applied to the Court as the next friend of the minor for the discharge of the guardian, while in the Calcutta case the surety was absolutely without remedy, for, being neither a legatee nor a creditor, he could not take any steps to protect either the estate or himself by instituting administration proceedings. On the other hand the Madras High Court has held, following the principle of the Bombay decision, that this section does not apply to surety bonds passed under the Probate and Administration Act. (See now the Indian Succession Act, 1924.)

"If the section applies; the 'creditor' would presumably be the obligee under the bond, *i.e.*, the Judge or Registrar, and the surety could, without any action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to established practice and might lead to great inconvenience".[48]

However this may be, a surety accepted by the Court for a receiver appointed under a mortgage decree cannot discharge himself by notice to the decree-holder given without the consent of the Court.[49]

Guarantee: Revocation by notice.—The plaintiff, a director of a football club gave a guarantee to a bank for the club's overdraft. The liability was to arise on a demand by the creditor for all liabilities certain or contingent. The guarantee provided that the liability was continuing until the receipt of a notice in writing by the plaintiff of discontinuance. The plaintiff resigned as a director and on his informing the bank, the account was closed. The plaintiff called upon the club to discharge his guarantee by paying the creditor. He sought a declaration that in equity he was entitled to the declaration. On the account being closed and the liability becoming fixed, the plaintiff was entitled to be discharged by the debtor paying off and it was immaterial that the creditor had to give notice to the surety before proceeding against him.[50]

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

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45 *Dhanomal Parsram* v. *P. Kuppuraj* (1977) A.M. 274, 279; *Union of India* v. *Pearl Hosiery Mills* (1961) A. Punj. 281 disting.

46 *Bai Somi* v. *Chokshi Ishvardas* (1894) 19 Bom. 245.

47 *Raj Narain* v. *Ful Kumari Devi* (1901) 29 Cal. 68.

48 *Subroya Chetty* v. *Ragammall* (1905) 28 Mad. 161, relying principally on *Re Stark* (1866) L.R. 1 P. & M. 76, to which it was observed the attention of the Calcutta Court was not drawn. In the Calcutta case the surety proceeded by the *application* in the probate proceedings, and in the Madras case a regular *suit*. The Madras Court said that the surety was not entitled to relief in either case.

49 *Mahomed Ali Manoojee* v. *Howeson Bros.* (1925) 30 C.W.N. 266; 98 I.C. 506; 1926 A.P.C. 32. *Cf. Narayanan* v. *Kunhathayi Amma,* 1940 A.M. 730; (1940) 1 Mad.L.J. 939; 191 I.C. 896.

50 *Thomas* v. *Notts Incorporated Football Club* (1972) 1 All. ER 1176, 1182.

"Contract to the contrary."—The English rule appears to be that where there is a guarantee subject to revocation by notice, and the surety dies without having revoked it, notice of his death to the creditor (or at all events of his death leaving a will) operates as a revocation.[51] But this does not govern the construction of the present section.[52] An express provision that a guarantor *on his representatives* may determine the guarantee by notice is an example of such a contract to the contrary as this section contemplates; in such a case mere notice of the death will not be enough.[53]

It is by no means clear that the present section states the rule rather than an exception; at any rate, the "contract to the contrary" need not be in express terms.

Where *A* guaranteed payment of rent to a lessor, and *B* in turn promised *A* to be responsible for all rent that might not be paid by the lessee, and which he might under his guarantee become liable to pay, it was held that, assuming that the latter transaction was a continuing guarantee, it was not revoked by *B*'s death, and that *B*'s representative was liable to *A* for rent paid by *A* to the lessor after *B*'s death on failure of the lessee to pay the same.[54]

Compare s. 208, below, as to the determination of an agent's authority.

Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons on the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration.

A and *B* make a joint and several promissory note to *C*. *A* makes it in fact, as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

Joint debtors and suretyship.—This rule is elementary so far as it goes; but it is material to observe that it does not extend beyond its literal terms. Where one of two joint debtors is, to the knowledge of the creditor, in fact a surety for the other as between themselves, his immediate liability to the creditor is not qualified, but he is entitled to the rights of a surety under the following sections: 133, 134, 135.

"When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley* v. *Pasheller*[55] and *Overend, Gurney & Co.*v. *Oriental Financial Corporation*".[56]

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51 *Coulthart* v. *Clementson* (1879) 5 Q.B.D. 42, judgment on further consideration by Bowen J. See, however, (1895) 1 Ch. 573, at p. 577, and *per* Cotton, L.J. *Beckett* v. *Addyman* (1882) 9 Q.B.D. 783, at p. 792.

52 *Durga Priya Choudhury* v. *Durga Pada Roy* (1927) 55 Cal. 154, at p. 159; 109 I.C. 752; 1928 A. Cal. 204.

53 *Re Silvester* (1895) 1 Ch. 573. For earlier and more or less conflicting authorities in courts of law and equity see *Bradbury* v. *Morgan* (1862) 1 H. & C. 249; *Harriss* v. *Fawcett* (1873) L.R. 8 Ch. 866; *Muhammad Ubed-Ullah* v. *Muhammad Insha Allah Khan* (1920) 43 All. 132; 61 I.C. 138.

54 *Gopal Singh* v. *Bhawani Prasad* (1888) 10 All. 531.

55 (1836) 4 Cl. & F. 207; 42 R.R. 1.

56 (1874) L.R. 7 H.L. 348; *per* Lord Watson, *Rouse* v. *Bradford Banking Co.* (1894) A.C. 586, at p. 598. In *Swire* v. *Redman* (1876) 1 Q.B.D. 536, *Oakeley* v. *Pasheller* was not rightly understood. See *per* Lord Herschell, (1894) A.C. 586, at p. 591.

This includes the case where one member of a firm retires and another continues the business and agrees to indemnify the outgoing partner: there the retired partner has the rights of a surety (as to discharge by giving time and the like) as against a creditor having notice of the dissolution and its terms.[57]

There need not be any assent by the creditor, much less a new agreement to accept the secondary debtor in the relation of surety.[58]

In two Indian cases, both decided under the English law, the opinion was expressed that if the creditor, with knowledge of the contract between the co-debtors, does any of the acts specified in ss. 133, 134 or 135, in the legal consequence of which is the discharge of the surety, the debtor, who is in fact a surety, will thereby be discharged from liability.[59]

The provisions of this section do not apply where the liability undertaken is not the same. A party who accepts bills of exchange for the accommodation of another is not precluded by this section from pleading that he was an accommodation acceptor only. The liability undertaken by the acceptor and drawer of a bill is in no sense a joint liability, and though they each contract to pay the same sum of money, they contract severally in different ways, and subject to different conditions.[60] See Negotiable Instruments Act, 1881, ss. 37, 38.

Discharge of surety by variance in terms of contract.

133. Any variance, made without the surety's consent in the terms of the contract between the principal (debtor)[61] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations.

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss. (*Bonar* v. *Macdonald* (1850) 3 H.L.C. 226; 88 R.R. 60.)

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act. (*Oswald* v. *Mayor of Berwick* (1856) 5 H.L.C. 856 (the rule of law was undisputed, and the only question considered was whether there had been a material alteration in the office); *Pybus* v. *Gibb* (1856) 6 E. & B. 902, 911, also treating the rule as settled).

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for money received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payment shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st March. (*Bonser* v. *Cox* (1841-44) 4 Beav. 379; 6 Beav. 110; 55 R.R. 113).

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57 *Goldfarb* v. *Bartlett* (1920) 1 K.B. 639.

58 *Wythes* v. *Labouchere* (1858) 3 De G. & J. 593, 599; 121 R.R. 238, 242.

59 See *Punchanun Ghose* v. *Dally* (1875) 15 B.L.R. 331 (the judgment refers at its very end to s. 132 of the Act); *Harjiban Das* v. *Bhagwan Das* (1871) 7 B.L.R. 535.

60 *Pugose* v. *Bank of Bengal* (1877) 3 Cal. 174, at p. 184. *Cp. Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1874) L.R. 7 H.L. 348.

61 The word "debtor" was inserted by the Repealing and Amending Act, 1917, s. 2 and Schedule I.

Variation of contract between creditor and principal.—This is a rule of long standing, thus expressed by Lord Cottenham:

"Any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety.[62]

Again, it was laid down a generation later by the Privy Council:

"A long series of cases has decided that a surety is dicharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract the performance of which the surety has guaranteed".[63]

Moreover, as the case now cited shows, the more special provisions of the two following sections are deductions from the same principle.

"The party who is surety for another for the performance of an engagement can only be called upon to guarantee the performance of that engagement when the engagement is carried into complete, literal, and strict effect.... He enters into a particular and specific contract, and that contract alone he is bound to perform.[64]

Surety's liability—Strict Interpretation when discharged.—The surety, it is often said, is a favoured debtor, for in the expressive phrase of Lord Westbury L.C. in *Blest* v. *Brown*.[65]

"You bind him to letter of his engagement. Beyond the proper interpretation of that engagement, you have no hold upon him. He receives no benefit and no consideration..."

To this, there are exceptions. In the case of ambiguity when all other rules of construction fail, the courts interpret the guarantee *contra preferentem,* i.e. against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement.[66]

In *Dr. M. N. Kaul's* case:

A guarantee was given by a bank which was to remain in force.

(i) for one calendar month after the pronouncement of the judgment and/or

(ii) (a) a period of 12 months from the date of the execution of the guarantee whichever be later and/or

(b) the drawing and sealing of the order (as the case may be) of the Supreme Court finally disposing of the petition of Dr. Kaul.

No order was drawn up but the writ petition in which the stay order was passed abated due to the death of the principal and the court made no order of the nature mentioned in clause (ii)(b).

The Supreme Court held that none of the above conditions applied to the facts of the case and the guarantee was discharged.[67]

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62 3 H.L.C. 226, at pp. 238, 239. The law is the same in Scotland; *ibid.*

63 *Ward* v. *National Bank of New Zealand* (1883) 8 App. Ca. 755, at p. 763.

64 Lord Lyndhurst L.C. *Bonser* v. *Cox* (1844) 13 L.J. Ch. 260; 55 R.R. 120; See ill. (e).

65 (1862) 4 De G.F. & J. 367, 376; *Pratapsingh Moholabhai* v. *Keshavlal Harilal Setalvad,* 62 I.A. 23, 33; *M.S. Anirudhan* v. *Thomco's Bank Ltd.* (1963) 1 Supp. S.C.R. 63, 77; (1963) A.S.C. 746, applied in *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.S.C. 1634.

66 *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.S.C. 1634, 1936 (*per* Hidayatullah J.); *Anirudhan* v. *Thomco's Bank Ltd.* (1963) 1 Supp. 1 SCR 63; (1963) A.SC. 746, 752; *Pratap Singh Moholabhai* v. *Keshavlal Harilal Setalwad* 62 I.A. 23; (1935) A.PC. 21 reld. on; see *Manibhushan* v. *Pioneer Bank Ltd.* (1959) A.Cal. 746.

67 *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.S.C. 1634; *Calicut Fibre Industries* v. *Secretary, Government of India* (1973) 1 Ker. 418.

The only qualification (for it is not an exception) to the generality of the rule is that, where a guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the surety's liability as to the rest.[68] The intention of a "settlement" contract, for repurchase of goods by the seller from the buyer, is not that the original contract shall be discharged but that the two contracts shall stand together;[69] accordingly, a contract of resale to the vendor does not discharge a surety from his original contract.[70] A stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive him of his right to discharge under this section.[71]

A guarantor is bound strictly according to the terms of the letter and the guarantee. The guarantor cannot be held liable after the date of expiry of the bond as mentioned in it. Extension of the period by the Bank by correspondence cannot affect the terms of the bond itself, because the liability had not accrued before the expiry of the term of the bond. Further, the extension must be under Art. 299 of the Constitution.[72]

Material alteration.—An unauthorised material alteration in a deed of guarantee—alteration in amount guaranteed, rate of interest and date of contract—will discharge the deed of guarantee if without the knowledge of the surety.[73]

A somewhat peculiar case is the following:—

N owed £3,400 to *P*, and was about to dispose of his business to a company to be formed. It was agreed between *N* and *P* that *N* should pay off the debt within a time named, and in the meantime transfer to *P* shares in the company of the nominal value of £6,000, and redeem them at par within twelve months; and (among other terms) *N*'s book debts should be collected by one *V* and divided equally between *P* and a certain other creditor, *P*'s share to be applied towards redemption of the shares above mentioned. *E* guaranteed the redemption of the shares. Some months later *P* released his interest in the book debts to *N*. Later *N* failed to deliver the shares, as promised. This was a variance from the original contract which discharged *E*, the surety. "The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book debts... The surety is entitled to remain in the position in which he was at the time when the contract was entered into."[74]

Where a company was entitled under its articles to forfeit shares for default in paying up unpaid instalments, and by another article the owners of forfeited shares were made immediately liable for the amount of the calls due and incidental expenses with interest until payment, the company's election to forfeit shares was held to discharge sureties who had guaranteed payment of the calls; for a new and more onerous obligation was imposed on the debtor, and the sureties were deprived of their right on lien on the shaes.[75] A creditor cannot be forced to continue his contract when principal debtor indicates inability to perform.[76]

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68 *Skillett* v. *Fletcher* (1866-67) L.R. 1 C.P. 217; 2 C.P. 469; *Croydon Gas Co.* v. *Dickinson* (1876) 2 C.P.D. 46.

69 *Uttam Chand Saligram* v. *Jewa Mamooji* (1919) 46 Cal. 534, at 542; 54 I.C. 285; *Karuppaswami* v. *Chottabhai,* 1945 A. Mad. 59.

70 *Uderam* v. *Shivbhajan* (1920) 22 Bom. L.R. 711; 58 I.C. 272.

71 *Chitguppi & Co.* v. *Vinayak Kashinath* (1921) 45 Bom. 157; 58 I.C. 184. *Quaere,* as to the suggestion there made that nothing short of a specific consent to the particular variation will suffice.'

72 *Calicut Fibre Industries* v. *Secretary Government of India* (1973) 1 Ker. 418; *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.SC. 1634 reld. on.

73 *S. Perumal Reddiar* v. *Bank of Baroda* (1981) A.M. 180, 192.

74 *Polak* v. *Everett* (1876) 1 Q.B.D. 669, *per* Blackburn J., at p. 674 (where the words "to the person collecting them" seem to be a slip), *per* Mellor J., at p. 677. Lord Blackburn disliked the rule and doubted its wisdom (p. 674), but admitted that it was beyond discussion. The C.A. affirmed the decision of the Q.B.D. for the same reasons without delivering any formal judgment (p. 678).

75 *Re Darwen and Pearce* (1927) 1 Ch. 176.

76 *LEP Airways Ltd.* v. *Rolloswin* (1971) 3 All. E.R. 45, 54

Surety—discharge: Want of notice.—Goods were dispatched by the consignor to self at the Railway station of delivery and the RR was transferred to one *B* who endorsed it to a Bank. The consignor then gave a guarantee bond at the starting station stating that the RR was lost and one *D* stood as surety. The consignor then authorised *C* at the destination station to take delivery. The station staff in spite of notice by the Bank of its being endorsee of the original RR delivered the goods to *C*. *B* brought a suit for recovery of the price of goods against the Railway who claimed the amount from the surety. It was held that as the goods were delivered contrary to rules without notice to the surety, he was discharged.[77]

Unsubstantial alterations and not disadvantageous to debtor.—Attempts have been made to confine the rule to the cases where the variance materially affects the surety's interest, and to treat it as a question in each case whether the change is material for this purpose. Only one reported case appears to countenance this view.[78] and it is clearly inconsistent with later and higher authority. There may be "cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety," and in such cases "the surety may not be discharged", but

"if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself mut be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged".[79]

The principle has been applied by the Court of Appeal, though with some reluctance in the circumstances, where several persons, being in fact the individual members of a private company, deposited the title-deeds of properties belonging to them respectively with a person who was practically financing the Company, as security for the company's debts to him: this person allowed one of the depositors to have back her title-deeds in order to raise money for a purpose of her own; this was held to discharge the other depositors.[80] Accordingly we can see no ground for the suggestion that the present section goes beyond English Law.

An unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract, avoids the contract against the person other wise liable upon it. The alteration even if made by a stranger without the knowledge of the promisee or his agent, while the contract document is in possession of the promisee or his agent, also discharges the contract but if it is altered by a stranger while the document was not in the custody of the promisee or his agent, the promisor is not discharged.[81] If a guarantor entrusts a letter of guarantee to the principal debtor and the latter makes an alteration without the assent of the guarantor, then the guarantor is liable because it is due to the act of the principal debtor and what the principal debtor does will estop the guarantor from pleading want of authority.[82]

A guarantor stood surety for an overdraft by a bank. The bank gave a blank guarantee form to the principal debtor who filled it up by stating the maximum debt guaranteed to be Rs. 25,000. The bank was not prepared to accept the guarantee or give accommodation for more than Rs. 20,000. The principal debtor made an alteration reducing the sum to Rs. 20,000 and gave the document to the bank. In a suit against the principal and the surety, the surety pleaded discharge of liability on the basis of the alteration.

The Supreme Court by a majority held that the surety was not discharged.[83]

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77 *Union of India* v. *Narayana Setti Jagdeswara* (1981) A.A.P. 215.

78 *Sanderson* v. *Aston* (1873) L.R. 8 Ex. 73, judgment on second plea.

79 *Holme* v. *Brunskill* (1878) 3 Q.B.D. 495, at p. 505, *per* Cotton and Thesiger L.JJ., followed *Bolton* v. *Salmon* (1891) 2 Ch. 48, at p. 54; *Noor Mahomed Lallam* v. *Dhaniram,* 96 I.C. 234; 1926 A.S. 105.

80 *Smith* v. *Wood* (1929) 1 Ch. 14. The substantial question was whether the depositors were co-sureties at all.

81 *M.S. Amirudhan* v. *Thomco's Bank Ltd.* (1963) Supp. 1 S.C.R. 63, 65 (Sarkar J. *contra*); (1963) A.S.C. 746. Halsbury's Laws of England, Vol. 8 (3rd Edn.), p. 301.

82 *M.S. Anirudhan* v. *Thomco's Bank Ltd.* (1963) Supp. 1 S.C.R. 63, 66, 80-82; (Sarkar J. *contra);* (1963) A.S.C. 746. Williston on Contract, Vol. VI, para, 1914, p. 5354.

83 *M.S. Anirudhan* v. *Thomco's Bank Ltd.* (1963) A.SC. 746 (1963) Supp. 1 S.C.R. 63 (Sarkar J. *contra*).

The law now accepts that unsubstantial alteration which are to the benefit of the surety do not discharge the surety from liability. If the alteration is to the disadvantage of the surety or its unsubstantial nature is not self-evident, the surety can claim to be discharged and the court will not enquire whether it in fact harmed the surety.[84]

Where by the terms of a consent decree for the payment by instalments of a sum of money with interest passed against certain defendants as principal debtors, and against other defendants, as sureties, it was stipulated that on default of payment of any one instalment the decree-holder should sell the properties of the principal debtors for the whole amount remaining due under the decree, and the liability of the sureties was limited to the deficiency, it was held by the Privy Council that the omission of the decree-holder to sell the properties until several years after the first order for sale for the purpose of increasing the interest payable to him under the decree discharged the sureties to the extent of the interest that had accrued due after the date of that order.[85]

The judgment proceeded on the ground that the conduct of the decree-holder in delaying the sale has the result of "laying an additional burden upon the sureties."

A becomes surety to *C* for payment of rent by *B* under a lease. Afterwards *B* and *C* contract, without *A*'s consent, that *B* will pay rent at a higher rate. *A* is discharged from his suretyship in respect of arrears of rent accruing subsequent to such variance.[86]

A owes Rs. 1,300 to *B*. *C* afterwards requests *B* to forbear to sue *A* for a week, and deposits Rs. 1,300 with *B* as security. *B* agrees to forbear as requested. *A* fails to pay within a week. *B* afterwards obtains from *A* a promissory note payable on demand for Rs. 1,800. *C* is discharged from the suretyship, and is entitled to recover back his deposit from *B*.[87] Where a tax collector's son was allowed to collect the tax and misappropriated the moneys, the collector's surety was discharged.[88]

A surety for a partner was held to be discharged where the partners had extended the business and increased its capital thus making the partner for whom the surety stood guarantee liable for losses than was contemplated at the date of the bond.[89]

An attempted variance which is inoperative, as being against the local law applicable as between the creditor and the principal debtor, will not discharge the surety.

A Canadian banker's loan and interest were guaranteed; the bank increased the rate of interest from 7 to 8 per cent, 7 per cent being the highest the bank could legally charge in Canada; the guarantors remained bound for principal and lawful interest.[90]

In a case on appeal from the Supreme Court of New Zealand the judgment of the Privy Council[91] summed up the doctrine in connection with its principal applications. It is thought useful to quote this statement as a whole, although it involves the repetition of one or two references already given:

"In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. The reason of this

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84 *M.S. Anirudhan* v. *Thomco's Bank Ltd.* (1963) Supp. 1 S.C.R. 63, 79; (1963) A.S.C. 746; *Ward* v. *The National Bank of New Zealand Ltd.* (1883) 8 App. Ca. 755; *Bishop of Crediton* v. *Bishop of Exeter* (1905) 2 Ch. 485; *Pigot's case,* 77 E.R. 1177; 11 Co. Rep. 266 not accepted; *Suffel* v. *Bank of England* (1882) 9 Q.B.D. 555 explained; *Amin Abdul Kadar* v. *Jivraj Otmal* (1972) A.B. 88, (Mere fact of consent decree does not discharge surety.).

85 *Ramanund* v. *Choudhry Soonder Narain* (1878) 4 Cal. 331.

86 *Khatun Bibi* v. *Abdullah* (1880) 3 All. 9. Where the thing guaranteed is not the payment of rent, but something collateral to be due by the tenant, *e.g.*, redelivery of farm stock in good condition at the end of the term, a variation of the terms of the tenancy may discharge the surety even though it actually diminishes the rent payable: *Holme* v. *Brunskill* (1877) 3 Q.B.D. 495.

87 *Creet* v. *Seth and Seth* (1887) All. W.N. 136.

88 *H. Pin Sein* v. *Paungde Municipality,* 1938 A.R. 126; 177 I.C. 75.

89 *Jowand Singh* v. *Tirath Ram,* 1939 A.L. 193; 183 I.C. 740.

90 *Egbert* v. *National Crown Bank* (1918) A.C. 903. But it is for the promisee to show performance of the contract before he can hold the promisor to his promise, and therefore even though an attempted variance is invalid in law, the guarantor will not be held liable if the promisee has failed to perform the original contract: *Pratapsingh* v. *Keshavlal* (1934) 62 I.A. 23; 59 Bom. 180; 153 I.C. 700; 1935 A.P.C. 21.

91 Delivered by Sir R. Collier, afterwards Lord Monkswell.

rule is thus given by Lord Eldon in the case of *Samuell* v. *Howarth*.[92] The surety discharged for this reason, because the creditor in so giving time to the surety has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not.... It has been truly stated that the renewal of bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that... The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.'

"A recent decision of the Court of Appeal, in *Holme* v. *Brunskill*,[93] is based on the same principle. The defendant gave the plaintiff a bond that the tenant of his farm should on the expiration of his tenancy redeliver a flock of sheep on the farm in good order and condition. By an agreement between the plaintiff and the tenant, the tenant gave up a field on the farm, and held the remainder at a reduced rental. The jury, at the trial, having found that the surety was not prejudiced by this agreement, it was held by Lord Justices Cotton and Thesiger (Lord Justice Brett dissenting) that, notwithstanding the finding of the jury, the surety was released.

"Lord Justice Cotton observes: 'The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evidence that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged, yet that if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry into the effect of the alteration.' The *ratio decidendi* is thus stated: 'The plaintiff attempts to substitute for the contract that the flock shall be given up in good condition with the farm as then demised a contract that it should be delivered up in like condition with a farm of different extent... The surety ought to have been asked to decide whether he would assent to the variation. He never did assent, and in my opinion was discharged from liability.' To the same effect is *Polak* v. *Everett*,[94] where, there being a stipulation that half the book debts of the debtor should, under certain circumstances, be made over to the creditor, he released the book debts, and accepted in lieu thereof a supposed equivalent. The ground of the decisions is thus stated by Quain J.: 'The contract of the surety should not be altered without his consent, and the creditor should not undertake to alter the contract and then say, "Although the contract has been altered, and I have put it out of my power to carry it out by a voluntary act, I now offer you an equivalent."'[95]

Discharge of surety by release or discharge of principal debtor.

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations.

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) A contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land, and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

Creditor's discharge of principal debtor:

"The law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged".[96]

But it is to be observed, with regard both to this and to the following section, that if the creditor expressly reserves his remedies against the surety, or generally his securities and

92 (1817) 3 Mer. 272; 17 R.R. 81.
93 (1877) 3 Q.B.D. 495.
94 (1877) 1 Q.B.D. 669
95 *Ward* v. *National Bank of New Zealand* (1883) 8 App. Ca. 755, at p. 763.
96 Kelly C.B., in *Cragoe* v. *Jones* (1873) L.R. 8 Ex. 81, at p. 82.

remedies against persons other than the principal debtor, the surety is not discharged. In England this is well settled as the main rule; and it is really quite consistent with the terms of the present section. For the reason of the doctrine is that a nominal release of the debtor, subject to a reservation of securities, is not a release destroying the debt, but operates only as a covenant not to sue the principal debtor, who remains, however, liable to indemnify the surety.[97] The surety's right to indemnity against the principal debtor is a necessary result of such a reservation.[98]

Like effects may be produced without an express reservation. "Where the whole debt has not been discharged, but the debt as to part remains undischarged, but the principal debtor cannot be pursued by the creditor for the balance, the surety may by apt words be left liable although the principal debtor has as regards such balance been released as between himself and the creditor." In the case referred to the surety had executed mortgages to a bank to secure the overdraft of a firm composed of his own two sons, and each deed contained a declaration that the bank might "without affecting their rights herein" compound or make arrangements with the debtors. Under a scheme of arrangement made by the debtors with their creditors, including the bank, the Court of Appeal held that the mortgage security was released only for a certain portion of the debt as to which there was an express and complete substitution of a new security.[99]

A creditor, without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt: this, still more obviously, does not discharge the other surety.[1]

But where there is a final and full release of the principal debtor by a complete novation or otherwise, "the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone." Acceptance of a new debtor instead of the old one puts an end to the liability of a surety for the old debt.[2]

A was employed at the Agra branch of a bank. *C* was a surety for *A*. His employment was terminated and he was employed afresh by his employer at another place where another person stood surety. *C* was thereby discharged.[3]

The importance of the English doctrine as to reservation of rights is, however, considerably diminished by the operation of s. 138 (*infra*).

Discharge by operation of law.—A discharge of the principal debtor in bankruptcy does not operate as a discharge of the sureties.[4]

Effect of Debt Relief Acts.—Where a decree has been obtained against the principal debtor and a surety, and thereafter the principal debtor applies to a Debt Conciliation Board, which discharges him from the debt on the failure of the decree-holder to prove his debt, the surety is not discharged: the surety has now become liable as a judgment-debtor and provisions such as s. 134 have ceased to apply.[5] Provisions such as s. 145 still operate however, as

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97 *Bateson* v. *Gosling* (1871) L.R. 7 C.P. 9, where former authorities are critically reviewed by Willes J., *Green* v. *Wynn* (1869) L.R. 4 Ch. 204; following *Webb* v. *Hewitt* (1857) 3 K. & J. 438, 442, *Murugappa Mudaliar* v. *Munuswami Mudali* (1919) 38 M.L.J. 131; 54 I.C. 758.

98 *Close* v. *Close* (1853) 4 D.M.G. 176, at p. 185, affirmed by the C.A. in *Cole* v. *Lyon* (1942) 1 K.B. 142.

99 *Perry* v. *Nat. Pro. Bank of England* (1910) 1 Ch. 464, *per* Buckley L.J., at p. 478, distinguishing the *Commercial Bank of Tasmania's* case (*infra*, note (62)).

1 *Bhagvandas* v. *Secy. of State* (1926) 28 Bom. L.R. 662; 96 I.C. 248; 1926 A.B. 465.

2 *Commercial Bank of Tasmania* v. *Jones* (1893) A.C. 313, at p. 316.

3 *Bishal Chand* v. *Chattur Sen* (1967) A.A. 506.

4 *Morice* v. *Simla Bank Corporation* (1878) Punj. Rec. No. 2; *Jagannath* v. *Shivnarayan* (1940) Bom. 387; 42 Bom. L.R. 451; 190 I.C. 73; 1940 A.B. 247, where the English authorities are cited. See also *Anand Singh* v. *Collector of Bijnor*, 1932 A.A. 610; (1932) All.L.J. 868; *Bombay Co. Ltd.* v. *Official Assignee* (1921) 44 Mad. 381, 390; *Aypunnimani* v. *Kochouseph* (1966) A.Ker. 203 (F.B.) See f.n. 89, p.617.

5 *Nellore Co-operative Urban Bank Ltd.* v. *Mallikarjunayya* (1948) Mad. 707, 1948 A.M. 252; following an English decision in *Re A Debtor* (1913) 3 K.B. 11.

they do not govern the creditor's rights: thus the surety has a right to be reimbursed by the principal debtor.[6]

When it is said that the liability of a guarantor is co-extensive with that of the debtor it only extends to the quantum of the debt. A contract of guarantee is a separate contract and the fact that the debtor is discharged under s.4(b) of the Tamil Nadu Relief Undertaking Act would not also discharge the liability of the guarantor when it gives relief to the principal debtor.[7]

In a case of true suretyship, where no decree has yet been passed, or the surety has been provided after the decree, the surety is discharged under s. 134 if the principal debtor applies to a Debt Conciliation Board, and the creditor fails to prove his debt, or declares that he will recover the debt from the surety and not from the principal debtor.[8]

Where the creditor proves his debt, but the debt is scaled down by the Board, the Madras High Court holds that the surety is liable only for the reduced amount,[9] whereas the Nagpur High Court holds that the surety remains liable for the whole of the original debt.[10] The opinion of the Madras Full Bench is to be preferred, in view of the plain words of s. 128, whereby the liability of the surety is co-extensive with that of the principal debtor. The judgment of the Court is, however, remarkable for the curious interpretation placed upon s. 140, and the complete failure to mention s. 145. The Court considers that to hold the surety liable *in solidum* would be unjust, as he has no recourse against the principal debtor, inasmuch as s. 140 confines his rights against him to those the creditor has. With respect, this is to misread s. 140, which is an enabling section, and does not purport to confine the rights of the surety to those possessed by the creditor. The talk of its imposing a burden is a misconception: the right of recourse against the principal debtor is provided by s. 145.[11] But the existence of this right of indemnity provides a good reason for scaling down the liability of surety as well as of principal debtor. This may be illustrated by reference to the difficulties involved in the contrary Nagpur view. On that view, the surety is liable in full. S. 145 enables him, however, to recover what he has paid from the principal debtor. The object of the Debt Relief Act is therefore defeated, unless the principal debtor makes a fresh application to the Board. The difficulty was envisaged, but was not faced in *Nellore Co-operative Urban Bank* v. *Mallikarjunayya,*[12] before the Full Bench had in *Subramania* v. *Narayanaswami*[13] overruled *Subramaniam* v. *Batcha Rowther.*[14] In Madras, in view of the Full Bench decision, the problem remains only in the case in which the creditor has obtained a decree against principal debtor and surety, before any application is made to a Conciliation Board. In Nagpur, it is an abiding difficulty, involving the possibility of multiplicity both of applications to the Board, and of lawsuits, before liability can be determined. On the Madras view, the law is at least clear: the loss caused by scaling down falls upon the creditor. On the Nagpur view, it is uncertain whether the surety or the principal debtor bears the loss, apparently the latter in the absence of any fresh proceedings under the Debt Relief Act, so that the wheel has come full circle, and the intention of the legislature seems in danger of being defeated.

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6 (1948) Mad. 707, 717. The position is the same in the case of judgment-debtors, who were originally all principal debtors, the relevant provision then being s. 43, paragraph 2: *Jankibai* v. *Rama* (1947) Nag. 881.

7 *Gopilal Nichani* v. *Trac Industries* (1978) A.M. 134 *Ram Chandra* v. *Shapurji* (1940) A.B. 315 reld. on. *Subramania* v. *Narayanswami* (1951) A.M. 48 F.B. disting.

8 *Babu Rao* v. *Babu Manakhad* (1939) Nag. 175, 1938 A.N. 413.

9 *Subramania* v. *Narayanaswami,* 1951 A.M. 48 (F.B.) overruling *Subramaniam* v. *Batcha Rowther,* 1942 A.M. 145, (1941) 2 M.L.J. 751; *Aypunnimani* v. *Kochouseph* (1966) A.Ker. 203 (F.B.); see f.n. 90 of p. 617.

10 *Balkrishna* v. *Atma Ram,* 1944 A.N. 277; *Shivji Ram* v. *Kisan* 1952 A.N. 201. Apparently it would not help the surety to invoke s. 56; so held in *Janakumara* v. *Samanthabadra* (1945) Mad. 491, a decision by the same bench as decided 1942 A.M. 145 *(supra).*

11 See note 66, *(supra).*

12 (1948) Mad. 707, 717 *(supra).*

13 1951 A.M. 48 *(supra).*

14 1942 A.M. 145 *(supra).*

"Act or omission of the creditor."—The acts or omissions contemplated by this section may be those referred to in ss. 39, 53, 54, 55, 63 and 67 *(ante)*. The facts of illustration (c) to this section are similar to those of illustration (b) to s. 54. If the principal debtor is discharged from his obligation by reason of any acts or omissions specified in those sections, the liability of the surety will determine. But the act or omission must be one of which the legal consequence is the discharge of the principal debtor. The mere omission, therefore, of a creditor, in a suit by him against a principal debtor and a surety, to effect service of summons on the principal debtor, does not discharge the surety, for the principal debtor is not thereby discharged from liability to the creditor. The only consequence of such an omission is to enable the Court to dismiss the suit as against the principal debtor after the expiration of one year under s. 99A of the Code of Civil Procedure, 1882 (now Code of 1908, O. 9, r. 5); but the plaintiff would still be at liberty to bring a fresh suit against the principal debtor under the provisions of that section.[15] The same principle applies where the suit against the principal debtor has abated on his death during the pendency of the suit.[16]

By accepting wrongful repudiation of liability of principal debtor, a guarantee is not discharged from existing liability even though what was a debt becomes liability for damages and acceptance of repudiation could not be treated as a variation of terms of conduct.[17]

Creditor's omission to sue principal within limitation period.—The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there have been two opposite views taken by the Indian High Courts; the majority however holding that the surety is not in such circumstances discharged.[18] The conflict arises in great part from the provisions of s. 137 *(infra)*, and especially the words "mere forbearance" occurring in that section. It was conceded by the Bombay and Calcutta High Courts, that if s. 134 stood alone, the omission of a creditor to sue the principal debtor within the period of limitation would discharge the surety under that section, as having the legal consequence of discharging the principal debtor; but the Madras High Court relied on the well-known distinction betwen the barring of the remedy by action (which is consistent with the debtor not being discharged for other purposes) and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason, that "the surety can himself set the law in operation against the debtor".[19] In a recent Privy Council case[20] the reasoning of the majority of the High Courts has been preferred by their Lordships and the point, therefore, may now be regarded as settled. The Supreme Court has held that a creditor is entitled to recover the debt from the surety even though the suit against the principal debtor is barred.[21]

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15 *Mahant Singh* v. *U Ba Yi* (1939) 66 I.A. 41 Bom.L.R. 742; 181 I.C. 1; 1939 A.P.C. 110; *Shaik Alli* v. *Mahomed* (1889) 14 Bom. 267; *Nathabhai* v. *Ranchodlal* (1915) 39 Bom. 52; 27 I.C. 165; *Kanahai Missir* v. *Sukananan* (1937) 14 Rang. 594; 168 I.C. 815; 1937 A.R. 72; *Mallappa Sanna* v. *Sidramappa*, 1937 A.M. 501; (1937) 1 Mad.L.J. 469; 169 I.C. 679.

16 *Nur Din* v. *Allah Ditta* (1932) 13 Lah. 817; 138 I.C. 305; 1932 A.L. 419.

17 *LEP Air Services Ltd.* v. *Rolloswin*, (1971) 3 All E.R. 45, 50, 52, 54.

18 *Hajarimal* v. *Krishnarav* (1881) 5 Bom. 647; *Sankana* v. *Virupakshapa* (1883) 7 Bom. 146; *Krishto Kishori Chowdhrain* v. *Radha Romun* (1885) 12 Cal. 330; *Subramania* v. *Gopala* (1909) 33 Mad. 308; 7 I.C. 898; *Dil Mahammed* v. *Sain Das*, 100 I.C. 922; 1927 A.L. 396; *U Ba Pe* v. *May Lay* (1932) 10 Rang. 398; 139 I.C. 138; 1932 A.R. 88. The Allahabad High Court has taken a different view: *Radha* v. *Kinlock* (1889) 11 All. 310; *Ranjit Singh* v. *Naubat* (1902) 24 All.504. See also *Hazari* v. *Chunni Lal* (1886) 8 All. 259; *Salig Ram Misir* v. *Lachhman Das* (1927) 50 All. 211; 107 I.C. 42; 1928 A.A. 46; *Narain Das* v. *Nenu*, 116 I.C. 421; 1929 A.N. 145, agreeing with the learned authors of this work.

19 *Per* Lindley L.J., *Carter* v. *White* (1883) 25, Ch.D. 666; at p. 672. There seems to be no direct decision.

20 *Mahant Singh* v. *U Ba Yi* (1939) 66 I.A. 198; 41 Bom.L.R. 742; 181 I.C. 1; 1939 A.P.C. 110.

21 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1135; (1958) A.SC. 328; *Mahant* v. *U. Ba Yi*, 66 I.A. 198; (1939) A.P.C. 256; *Dil Mohammad* v. *Sain Das* (1927) A.L. 396; *Subramunya Aiyer* v. *Gopala Aiyar*, 33 Mad. 308; *Suresh Narain* v. *Akhauri* (1957) A.P. 256; *Mohammad Sultanud Din* v. *Mohammad Dastgir* (1960) A.AP. 210; *Das Bank Ltd.* v. *Kali Kumari Debi* (1958) A.Cal. 530; 62 C.W.N. 493; *Aziz Ahmad* v. *Sher Ali* (1956) A.A. 8; (1956) 1 All 173.

In the case of parties to a negotiable instrument their rights and liabilities are governed by the Negotiable Instruments Act. Accordingly the omission on the part of an indorsee of a *hundi* to sue the acceptor within the period of limitation does not discharge the drawer where the suit has been instituted as against him in time.[22]

In the case of an agreement being void because of the disability of one of the parties thereto enter into it, the surety would be held liable as a principle.[23] But see *Contra,* the discussion of this question at pp. 616-617.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

Contract to give time to principal debtor.—The leading English cases have already been cited under the preceding section. The earliest decision, one commonly referred to in modern books, dates from 1795.[24] The general principle was thus stated: "It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

A nominal giving of time may have the effect, in substance, of accelerating the creditor's remedy, as where, having commenced an action against the principal debtor, the creditor took a recorded acknowledgement of the debt, and undertook not to enforce it before a certain day, which, however, was earlier than the time at which he could have obtained judgment in the action in the ordinary course. In such a case the surety, being manifestly not prejudiced, is not discharged.[25]

A contract whereby the creditor promises to give time to the principal debtor must be distinguished from an unconditional contract not to sue him. In the former case, the remedy of the creditor is merely suspended until the determination of the fixed period; in the latter case the principal debtor is completely released from his obligation so as to entitle the surety to a discharge under s. 134, apart from the specific provisions of this section. In either case, the mere formation of the contract is sufficient to operate as a discharge of the surety irrespective of any forbearance that may be exercised under it. The reason of this rule appears to be that a surety has a right, immediately on the debt becoming due, to insist upon proceedings being at once taken by the creditor against the principal debtor, and any contract that would prevent the creditor from suing him would be inconsistent with that right (s. 139).[26] But the contract must be a binding one supported by consideration; forbearance to sue, therefore, exercised in pursuance of an agreement without consideration, would not discharge the surety, as it does not amount to anything more than "mere forbearance" within the meaning of s. 137.[27] A consent decree, made without the surety's consent, for payment by instalments of the sum due

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22 *Jambu Ramaswamy* v. *Sundararaja* (1902) 26 Mad. 239; *Shambumal Gangaram* v. *State Bank of Mysore* (1971) A.My. 156. (Omission to enforce claim against drawer of hundies does not discharge customer in whose favour the hundies were drawn).

23 See *Kashiba* v. *Shripat* (1894) 19 Bom. 697, and the English cases cited there, notably *Harris* v. *Huntbach* (1757) 1 Burr. 373. But see pp. 616-617.

24 *Rees* v. *Berrington,* 2 Ves. Jr, 540; 3 RR. 3 (Lord Loughborough). See *Bharat Nidhi* v. *Bhagwandas Mehra* (S.C.) C.A. 939 of 1964 decided 3-1-67.

25 *Hulme* v. *Coles* (1827) 2 Sim. 12; 29 R.R. 52. Similarly the surety is not discharged by the creditor's innocent acceptance from the principal debtor of a payment which is in fact a fraudulent preference; *Petty* v. *Cooke* (1871) L.R. 6 Q.B. 790. The mere fact of striking a balance between the creditor and the principal debtor so as to decide what is due was held not to discharge the surety: *Devi Das* v. *Sant Singh Mohan,* 1931 A.L. 627; 133 I.C. 652.

26 See *Protab Chunder* v. *Gour Chunder* (1878) 4 Cal. 132, at p. 134.

27 *Damodar Das* v. *Muhammad Husain* (1900) 22 All. 351; *Maharaj Bahadur Singh* v. *Basunta Kumar* (1913) 17 C.W.N. 695, at pp. 697-8; *T.N.S. Firm* v. *Mohammad Hussain,* 1933 A.M. 756; 65 Mad.

from the principal debtor discharges the surety.[28] It is not necessary that the contract should be express: a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. Thus the acceptance of interest in advance by a creditor operates as a general rule as an agreement to give time to the principal debtor and consequently as a discharge to the surety; for the creditor is in that event precluded from suing the principal until the time covered by the payment in advance has expired.[29] But the surety will not be discharged if he consents to the contract. Such consent may be a general one, and it has been held by the Privy Council that a stipulation between a creditor, principal debtor, and a surety that the surety should not be released by any dealings between the creditor and the principal debtor, followed by a contract to give time to the principal debtor, does not discharge the surety.[30]

Where the deed of guarantee stipulated that the hundies endorsed by the guarantor could be renewed within one year or within a reasonable time thereafter and the hundies were renewed within two and a half months after the period of one year the Court held that the renewal was within a reasonable time and the guarantor was not discharged.[31]

S. 135—Art. 299.—Where a bank gave a guarantee by a bond which required an importer to carry out the terms of the bond, and the period of the bond was 4 years, which was extended by correspondence but not in conformity with the provisions of Art. 299 of the Constitution, the guarantor was thereby discharged.[32]

It has been said that in an ordinary surety bond under s. 55(4), Civil Procedure Code, the principal creditor is not the decree-holder, but the Court, and it is really in the discretion of the Court to enforce the bond or not.[33] Sections 133, 135 and 139 cannot in terms apply to transactions where the bond is given to the Court in view of the fact that there is no creditor as required by s. 126,[34] but the equitable principles underlying these sections can be applied, and if the Court to which the security has been given has itself been responsible for varying the terms, the surety is justified in applying to the Court to be relieved, and the Court will exonerate him if his position has been materially affected.[35]

Although sections dealing with contract of guarantee and discharge of that contract do not apply to surety bonds in favour of courts the equitable principle underlying these sections apply[36]. Therefore any substantial variation of the original contract would discharge the

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L.J. 458; 146 I.C. 608; *Sonepat Co-operative Society* v. *Kapuri Lal* (1935) 16 Lah. 583; 157 I.C. 124; 1936 A. Lah. 305; *Sankaranarayana* v. *Kottayam Bank* (1950) A.T.C. 66 (F.B.).

28 *National Coal Co.* v. *Kshitish Bose & Co.* (1926) 30 C.W.N. 540; 95 I.C. 409; 1926 A.Cal. 818 (the head note in this report is misleading; it is clear that the judgment was based on the fact that payment by instalments gave time to the debtor). *Annadana* v. *Konammal* (1933) 56 Mad. 625, 141 I.C. 852, 1933 A.M. 309. (In this case the surety bond had been executed in favour of the Court; the same principles apply). If extension of time is granted by the Court, the surety is not released: *Balkrishna* v. *Atmaram,* 1944 A.N. 277; *Bharat Nidhi* v. *Bhagwandas Mehra* C.A.S.C. 939-64 decided 3-1-67; n. 99 *infra.*

29 *Kali Prasanna* v. *Ambica Charan* (1872) 9 B.L.R. 261; *Protab Chunder* v. *Gour Chunder, supra: Gourchandra* v. *Protabchandra* (1880) 6 Cal. 241, where it was found that the surety consented to advance interest being taken. See also *Punchanun Ghose* v. *Daly* (1875) 15 B.L.R. 331, and the observations of Phear J., at p. 338.

30 *Hodges* v. *Delhi and London Bank, Ltd.* (1900) 27 I.A. 168, at p. 177; 23 All. 137.

31 *Prem Devi* v. *Priya Devi* (1971) All.L.J. 17.

32 *Calicut Fibre Industries* v. *Secretary Government of India* (1973) 1 Ker. 418, 427; *State of Maharashtra* v. *Dr. M.N. Kaul* (1967) A.SC. 1634 folld.

33 *Dhari Mal* v. *Kanshi Ram,* 100 I.C. 762; 1927 A.L. 336.

34 *Parvati Bai* v. *Vinayak Balwant* (1938) Bom. 794, 800, 40 Bom.L.R. 989, 179 I.C. 258, 1939 A.B. 23; *Narayana Rao* v. *Francis,* 1953 A.Mys. 68.

35 *Parvati Bai* v. *Vinayak Balwant* (1938) Bom. 794, 801; *Hiralal* v. *Manilal,* A.I.R. 1926 Bom.565; *Sistla Sitaramaswamy Sastri* v. *Bonthu Basavayya* (1921) 60 I.C. 114; *Darshan Ram* v. *Khair Din,* 1924 A.Lah. 194; *Narsing Mahton* v. *Nirpat Singh* (1932) 11 Pat. 590, 140 I.C. 564, 1932 A.P. 313.

36 *Raja Dhanraj Girji* v. *Raja P. Parthasarthy Rayanimuaru* (1963) 3 S.C.R. 921, 926; *Official Liquidator Travancore & Quillon Bank* v. *Official Assignee* (1944) Mas. 108; *Parvatibai* v. *Vinayak* 1939 Bom. 794; *Mohamedali Ibrahim* v. *Laxmibai* (1929) 44 Bom. 118; *Narsingh Manton* v. *Nirpat Singh* (1932) 11 Pat. 590; *Muhammad Yusaf* v. *Ram Gobinda Oja* (1927) 55 Cal. 91; quoted.

surety.[37] Where a bus which was attached is released on a surety bond being given and subsequently there is a compromise decree between the creditor and the principal debtor giving the latter instalments and the bus also is not sold till much later, the surety will be discharged.[38] But a bail bond is not discharged on the transfer of a case from one court to another. It continues to be operative until the decision of the case.[39] If the Court is not responsible for the changed situation, for instance there is a compromise or consent decree, it is a question of construction of the surety's contract whether liability was to be limited to a decree for the creditor based upon the merits after a contest.[40] If the effect of the compromise is to give time to the principal debtor, the surety is discharged unless he consented,[41] giving time to the principal debtor discharges the surety under section 135 if the time is given without the assent of the sureties.[42]

In that case a consent decree against the principal debtor by which he agreed to pay Rs. 20,000 out of the claim for Rs. 22 thousand and odd and the creditor gave two years' time to pay on the condition that if the amount was so paid, the creditor will not be entitled to costs. There was extension of time, without the assent of the sureties and they were therefore discharged.[43]

Compromise decree.—A compromise decree without the consent of the surety will not discharge his liability but giving of time will.[44]

Whether a surety is discharged of his bond on a decree passed on compromise and not by the decision of the court on merits *in invitum* depends on the terms of the bond and if the bond shows that it was not applicable to a decree on an amicable settlement, the surety will be discharged.[45] If the parties contemplated that there might be an amicable settlement and a decree thereon and the surety executed the bond with that knowledge, the surety will be liable.[46]

Surety compromise decree.—A surety bond made the surety liable if the decree appealed to the Privy Council was reversed or varied. The Privy Council remitted the matter to the trial court for assessment of the amount due to the creditor. The parties compromised whereby the property in dispute was given to the creditors and the dispute was thus settled. The decree was not immediately executable and gave to the principal debtor time, and also the decree covered a matter extraneous to the judicial proceedings. The surety bond was held to be discharged.[47]

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37 *Narayan* v. *Markandya* (1959) A.B. 516; *Parvatibai* v. *Vinayak* (1939) A.B. 23 folld; *Keshavlal* v. *Pratap Singh* (1932) A.B. 168; *T.N.O. Bank* v. *Official Assignee* (1944) Mad. 708; (1944) A.M. 396; *Kanailal Mookerjee* v. *Kali Mohan* (1957) A.Cal. 645; 62 C.W.N. 136; *Bankim Bihari Roy* v. *Halima Bibi* (1962) A.Or. 54.

38 *John Kuruvilla* v. *Parameshwaram Pillai* (1980) A.Ker. 87; *Raja Dhanraj Girji* v. *Raja P. Parthasarthy* (1963) 3 SCR 921 folld. *Kurian* v. *C.C.M.S. Society* (1975) A.Ker. 44 folld. *Mohanlal* v. *Suraj Mani* (1973) A. J&K 92 not folld.

39 *Inder Singh* v. *State* (1960) A.A. 419.

40 In the following cases the surety was held to be discharged: *Mahomedalli Ibrahimji* v. *Lakshmibai Anand Palande* (1930) 54 Bom. 118, 1930 A.B. 122, 124 I.C. 227; *Narsing Mahton* v. *Nirpat Singh* (1932) 11 Pat. 590, 140 I.C. 564, 1932 A. Pat. 313; *Muhammad Yusaf* v. *Ram Gobinda Ojha* (1927) 55 Cal. 91. In the following the surety was not discharged: *Appuni Nair* v. *Isac Mackadan* (1920) 43 Mad. 272, 53 I.C. 367; *Haji Ahmed* v. *Maruti Ramji* (1931) 55 Bom. 97, 32 Bom.L.R. 1394, 128 I.C. 903, 1931 A.Bom. 55; *Madanlal Motilal* v. *Radhakisan Laxminarain* (1935-36) 31 Nag. 83 (supplement), 1935 A.N. 258.

41 *Annadana* v. *Konammal* (1933) 56 Mad. 625, 141 I.C. 852, 1933 A.M. 309; *Narsing Mahton* v. *Nirpat Singh* (1932) 11 Pat. 590, 140 I.C. 564, 1932 A.P. 313.

42 *Bharat Nidhi Ltd.* v. *Bhagwandas Mehra,* C.A. 939 of 1964 decided Jan. 3, 1967 (S.C.).

43 *Ibid, Kanai Lal* v. *Kali Mohan* (1957) A.Cal. 645; 62 C.W.N. 136; *Prithi Singh* v. *Ram Charan* (1944) A.L. folld,; *Jiabai* v. *Joharmull Bothra* (1932) A.Cal. 858; 36 C.W.N. 749; dist., *Bankim Bihari Lal* v. *Halima Bibi* (1962) A.Or. 54.

44 *Bankim Bihari Roy* v. *Halima Bibi* (1962) A.Or. 54; n. 87 *supra.*

45 *Raja Dhanraj Giri* v. *Raja P. Parthasarathy Rayaniuaru* (1963) 3 SCR. 921 927; *Official Liquidator Travancore & Quillon Bank* v. *Off. Assigne* Mad. 708; *Parvati* v. *Vinayak* (1939) Bom. 794. quoted.

46 *Raja Dhanraj Giriji* v. *Raja Parthasarthy Rayaniuaru* (1963) 3 S.L.R. 921, 926; *Haji Ahmed* v. *Maruti Ramji* (1930) 55 Bom. 97; *Appuni Nair* v. *Isack Mackadan* (1919) 43 Mad. 272; *Kanailal Mookerjee* v. *Kali Mohan Chatterjee* 62 Cal. W.N. 136; (1957) A. Cal. 645.

47 *Raja Dhanraj Giriji* v. *Raja P. Parthasarathy* (1963) 3 SCR 921, 927-8

The mere compromise between the creditor and the principal debtor in execution proceedings by which the decretal amount is to be paid by instalments will not discharge the surety even if the compromise is without the surety's knowledge if its tenor is within the contemplation of the parties as shown by the terms of the surety bond, unless the giving of instalments was within the terms of the surety bond. This decision, it is submitted, must be confined to its own facts.[48]

A surety giving a surety bond for whatever decree is passed in a suit is not *ipso facto* discharged by a compromise decree between the creditor and the principal debtor unless there is fraud or collusion or unless the surety is prejudiced thereby. The bond was for payment of decree amount passed after a trial.[49]

A surety bond given to get attachment raised is literally not within s. 126 but principles underlying s. 126 apply. Therefore if without the consent of the surety, a compromise decree giving the principal debtor nine months to pay is passed the surety will be discharged.[50]

In a suit against defendants 1 and 2 the plaintiff obtained an attachment before judgment. The third defendant stood surety for the decretal amount found due from the first two defendants. A few days later there was a compromise decree giving the principal debtors nine months' time and the third defendant was removed from the array of parties. Default having taken place the plaintiff took out execution making the third defendant a party. In second appeal the High Court held that time having been given without the consent of the guarantor, he was discharged under s. 135 of the Act. And the principle of giving of time does not presuppose that time must be stipulated in the original contract which is enlarged.[51]

Guarantee—Variation by giving time or indulgence—meaning of.—A provision in a deed of guarantee allowing the creditor to give time or other indulgence to the principal debtor does not include the giving of time coupled with material variation in the rate of interest.[52]

What really constitutes giving of time is the extension of the period at which, by the contract between them, the principal debtor was obliged to pay the creditor, by substituting a new and valid contract between the creditor and the principal debtor, to which the surety does not assent.[53] An express agreement to the effect that indulgence given to the principal debtor will not affect the surety's liability does not discharge the contract of guarantee.[54]

The act of giving time to the borrowers to make up the quantity of the goods pledged to the bank found short on weighment by the bank cannot be considered to be a "promise to give time". The contract with the bank was that the borrowers were to be responsible for the quantity and quality of goods pledged and also for the correctness of the statements and returns furnished to the bank. The bank gave time to the borrowers to make up the quantity of the goods pledged.[55]

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48 *Mohan Lal* v. *Suraj Mani* (1973) A. J&K 92 (F.B.); *Raja Dhanraj Girija* v. *Raja Parthasarathy* (1963) 3 SCR 921 reld on; *Manoharlal Beliram* v. *Harkishen Lal* (1968) A.D. 108 disting.

49 *Amin Abdul Kader* v. *Jivraj Outmall* (1972) A.B. 88, 91; *Parvatibai* v. *Vinayak* (1939) A.B. 23 overruled.

50 *Kurian* v. *C.C.M.S. Society* (1975) A.Ker. 44; *Amritlal* v. *Bank of Travancore* (1968) 3 S.C.R. 724; (1968) A.SC. 1432 disting. (Giving of time).

51 *Kurian* v. *Alleppey C.M.C.G. Society* (1974) 2 Ker. 1,9; *Mohant Singh* v. *U. Bayi* (1939) A.C. 601; *Arvatibai* v. *Vinayak Balwant* (1939) A.B. 23; *Ramachandra* v. *Tukaram* (1959) A.B. 516; *Parthi Singh* v. *Ramchand* (1944) A.L. 428; *Mookherjee* v. *Kali Mohan* (1957) A.Cal. 645 reld on; *Amrit Lal* v. *State Bank of Travancore* (1968) A.SC. 432 reld. on; *Dorothy* v. *Williams* (1929) A.PC. 273; *Jaibai* v. *Joharmull* (1932) A.Cal. 858 disting.

52 *Burnes* v. *Trade Credits Ltd.* (1981) 2 All E.R. 122, 124 (P.C.); *Payton* v. *S.G. Brookes & Sons (Pty) Ltd.* (1977) W.A.R. 91 (disting).

53 *Amritlal Goverdhan Lalan* v. *State Bank of Travancore* (1968) A.SC. 1432; *Rouse* v. *Bradford Banking Co.* (1894) 2 Ch. 32, 75 (C.A.) refd. to Halsbury's Laws of England (III Edn.) vol. 18, p. 509 quoted.

54 *Ram Ranjan* v. *Chief Administrator Rehabilitation* (1960) A.Cal. 416; 64 C.W.N. 126.

55 *Amritlal Goverdhan Lalan* v. *State Bank of Travancore* (1968) A.SC. 1432.

R agreed to purchase certain land from *A*, who himself was a purchaser under a contract of sale. *A* assigned his rights to *D* but *R* made default in payment of an instalment of purchase money. *M* guaranteed payment of the instalment in consideration of time for payment given to *R*. When it appeared to *R* that the vendor will be unable to complete the contract he repudiated the contract which was accepted by the vendor. *D* brought an action for the recovery of the instalment guaranteed by *M*..

But the action failed because the unpaid instalment ceases to be payable by the purchasers when the contract is discharged and therefore the purchasers ceased to be liable for the instalment guaranteed. In that particular case the guarantor also was discharged on the terms of the guarantee.[56]

Where surety not personally liable.—The general rule that a surety is discharged if any material alteration is made in the contract between the creditor and the principal debtor without reference to the surety applies to a surety who is under no personal liability but has merely deposited documents by way of security.[57]

Part payment by surety.—If the surety has paid part of the debt, and subsequently there is a compromise between the principal debtor and the surety, the surety cannot recover such part payment from the creditor under s. 135, for as regards such payment he is no longer a surety but a principal creditor, as the effect of part payment is to transfer to him so much of the cause of action against the principal debtor.[58]

Contrary agreement.—The operation of the rule as to giving time to the principal debtor may be excluded by express agreement.[59] If the instrument creating the debt and the suretyship declares that the surety or sureties shall be taken, as between themselves and the creditor, to be principal debtors, and shall not be released by reason of time being given, or of any other forbearance, act, or omission of the creditor which, but for this provision, would discharge the sureties, then any defence on these grounds is effectually barred, and it is unnecessary to consider whether the facts would otherwise raise it.[60] If the agreement creating the suretyship includes a term that the guarantee is not to be avoided by the creditor giving time to the principal debtor, but the creditor must inform the surety if any payment is more than thirty days overdue, the surety is released if time is given by the creditor and the surety is not informed when the payment is more than thirty days overdue.[61]

Pendency of insolvency proceedings against the principal debtor is no bar to a suit against the surety.

Contract allowing giving of time.—Where a creditor can under the terms of a guarantee (clause 5 in this case) give time or indulgence in payment to the debtor and can vary, exchange or take other securities or release "any other securities held by him and such an act will not discharge the surety or affect his liability, the creditor cannot under the above terms act negligently and lose the security in its custody or in its charge. Release of a security is an act of volition and cannot include negligence. Expression "any security" refers to security other than the pledged goods.

Further, the expression "any other guarantee, security or remedy" mentioned in a letter of guarantee must refer to securities other than the goods pledged when giving the cash credit facility when the surety gave his guarantee.

It is submitted that on the facts found and the finding of negligence on the part of the bank creditor in using goods pledged and placed in its godown will be a case of "fundamental

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56 *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457.
57 *Smith* v. *Wood* (1929) 1 Ch. 14; *Jagjivandas* v. *King Hamilton & Co.* (1931) 55 Bom. 677; 134 I.C. 545; 1931 A.B. 337.
58 *Bombay Co. Ltd.* v. *Official Assignee* (1921) 44 Mad. 381; 63 I.C. 173; 1921 A.M. 236.
59 *Ram Raja* v. *Chief Administrator Rehabilitation* (1960) A.Cal. 416.
60 *Greenwood* v. *Francis* (1899) 1 Q.B. 312, C.A.: *Krishnaswami* v. *Travancore National Bank* (1940) Mad. 757; 1940 A.M. 437.
61 *Midland Counties Motor Finance* v. *Slade* 1 K.B. 346, C.A.

Observe that the injurious quality to be considered is tendency to diminish the surety's remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety may object.

"In almost every case where the surety has been released either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficient to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether that has been done lessens that security".[72]

Section, residuary.—Section 139 is a residuary section, the object of which is to ensure that no arrangement different from that contained in the surety's contract is forced upon him and the surety if he pays the debt has the benefit of every remedy which the creditor had against the principal debtor.[73]

But mere passive acquiescence by the creditor in irregularities on the part of the principal debtor such as laxity in the time and manner of rendering accounts by a collector of public moneys whose fidelity is guaranteed, will not of itself discharge the surety.[74]

Neither is the surety discharged from liability for the principal debtor's default in a manner within the terms of the guarantee, because that default would not have happened if the creditor had exercised all the powers of superintending the performance of the debtor's duty which he could have exercised consistently with the contract. The employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work.[75]

"A surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of suretyship has guaranteed the employer".[76]

But if the employer of a servant whose fidelity has been guaranteed continues to employ him after a proved act of dishonesty, the surety is discharged.[77]

Act or omission impairing surety's eventual remedy.—The case in which a party is discharged by an act or omission of the creditor, of which the legal consequence is the discharge of the principal debtor, has been dealt with in s. 134, above. Under the present section a surety will be discharged by acts or (subject to the caution above given) omissions of the creditor specified therein which, though not having the legal consequence of discharging the principal, impair the eventual remedy of the surety against him.[78]

Where the liability of a surety guaranteeing payment by a judgment debtor of the amount

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72 Lord Langdale, *Calvert* v. *London Dock Co.*, 2 Keen, at p. 644; 44 R.R. at p. 304.

73 *Parvataneni* v. *Andhra Bank Ltd.* (1964) A.A.P. 555; relying upon *Calvert* v. *London Dock Co.* (1838) 2 Keen 638.

74 *Mayor of Durham* v. *Fowler* (1889) 22 Q.B.D. 394; *Sonepat Co-operative Society* v. *Kapuri Lal* (1935) 16 Lah. 583; 157 I.C. 124; 1936 A,L. 305.

75 *Mayor of Kingston-upon-Hull* v. *Harding* (1892) 2 Q.B. 494, C.A. (Subject of guarantee was due performance of contract for public works. The work was scamped, and the defects fraudulently concealed from the town council's engineer and his deputy); *Radha Kanta* v. *United Bank of India,* 1955 A.Cal. 217, 221.

76 Bowen L.J. (1892) 2 Q.B. at p. 504.

77 *Phillips* v. *Foxall,* L.R. 7 Q.B. 666, see notes on s. 130, "Future transactions" above. The act must be proved: suspicion does not suffice: *Radha Kanta* v. *United Bank of India,* 1955 A.Cal. 217, 223.

78 See *Pogose* v. *The Bank of Bengal* (1877) 3 Cal. 174, where it was held that a deed of trust for the benefit of creditors did not impair the "eventual remedy" of the surety against the principal debtor. *Ghuznavi* v. *National Bank of India* (1916) 20 C.W.N. 562; 33 I.C. 34; *Radha Kanta* v. *United Bank of India,* 1955 A.Cal. 217, 221.

of a decree by instalments was expressly made dependant on the execution of the decree by the decree-holder on the occurrence of a single default, it was held that the omission to execute the decree on the happening of the default until execution had become time-barred discharged the surety under the provisions of this section.[79] The decision was based on the ground that the decree-holder owed a duty to the surety under the terms of the guarantee, and that the failure to perform that duty until the decree became defunct by lapse of time must necessarily have impaired the "eventual remedy" of the surety against the judgment debtor.

An equitable mortgage executed by the principal debtor of most of his properties for another debt of the principal debtor does not discharge the surety as there is no breach of duty owed by the creditor to the surety and section 139 is not applicable.[80] If a surety pledges his deposit with a bank as security for the loan of a third party, he cannot have the loan set off against the deposit, unless the deposit becomes due and if in the meanwhile the bank goes into liquidation there can be no set-off but the dividend payable by the Bank in liquidation will be payable towards the deposit.[81]

The principle of impairment of security does not apply to discharge the surety in the case of security of a bank deposit of the surety unless the creditor improperly does away with the security. Going into liquidation of a bank holding the deposit is not such doing away.[82] As security for the overdraft with a bank, a surety created a lien over his deposit with the bank. The bank went into liquidation. It was held that the suretyship was not discharged because the bank had not done away with the security improperly and was therefore unable to return it to the surety.[83]

A guarantor gave a guarantee of payment in consideration of the creditor "undertaking not to sue or to take any proceedings against" a company "in respect of the debt, the company owed to the creditor, for a period of six months." The creditor made a written demand within the six months pursuant to section 222(2) of the Companies Act intimating that unless the payment was made within a specified time a petition for winding up would be taken. The demand was not complied with but no petition was presented.

Such notice was held not to be the taking of proceedings within the guarantee. Proceedings denoted curial proceedings though in certain cases taking of extra curial action might be included but not mere putting pressure on the debtor to pay his debt.[84]

Negligence of Creditor.—Where due to negligence of the creditor the security given by the principal debtor is lost and the right of the surety against the principal debtor is impaired due to any action or inaction of the creditor, the surety is discharged to that extent under the combined effect of ss. 139 and 141 of the Act.[85]

Where a creditor can under the terms of a guarantee (clause 5 in this case) give time or indulgence in payment to the debtor and can vary, exchange or take other securities or release

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79 *Hazari* v. *Chunni Lal* (1886) 8 All. 259. The case resembles, on this point, *Watson* v. *Allcock*, noted on illustration (b) to s. 139, above. See for a case where the special provisions of a Provincial Debt Conciliation Act affected the surety's rights, *Babu Rao* v. *Babu Manaklal*, 1938 A.N. 413; 176 I.C. 686.

80 *Parvataneni* v. *Andhra Bank Ltd.* (1964) A.A.P. 555.

81 *Re Travancore N. & Quillon Bank Ltd.* (1941) A.M. 622; *Mani Bhushan* v. *Pioneer Bank Ltd. in Liquidation* (1959) A.Cal. 746.

82 *Mani Bhushan* v. *Pioneer Bank Ltd. in Liquidation* (1959) A.Cal. 746.

83 *Mani Bhushan* v. *Pioneer Bank in Liquidation* (1959) A.Cal. 746; *In re Travancore National & Quillon Bank Ltd. in Liquidation* (1941) A.M. 622 reld. on: *Ellis & Co.* v. *Dixon Johnson*, 1925 A.C. 489 refd. to.

84 *Clarke & Walker Pty. Ltd.* v. *Thew* (1967-68) 41 A.L.J.R. 139.

85 *State Bank of Saurashtra* v. *Chitranjan Rangnath Raja* (1980) A.SC. 1528, 1531; Halsbury's Laws of England Vol. 20 (4th Ed.) Para 820, p. 152 quoted with approval; *State of Madhya Pradesh* v. *Kaluram* (1967) 1 SCR 266; (1967) A.SC. 1105 folld.; *Hannen J's dictum in Wulff* v. *Jay* (1872) 7 Q.B. 756 quoted with approval.

"any other securities held by him and such an act will not discharge the surety or affect his liability, the creditor cannot under the above terms act negligently and lose the security in its custody or in its charge. Release of a security is an act of volition and cannot include negligence. Expression "any security" refers to security other than the pledged goods.

Further the expression "any other guarantee security or remedy" mentioned in a letter of guarantee must refer to securities other than the goods pledged when giving the cash credit facility when the surety gave his guarantee.[86]

Delay by Creditor.—A debt was borrowed on a promissory note and the security of the debtor's truck and on the guarantee of sureties. The creditor had the power of seizure of the truck which it did not exercise. When it filed a suit for recovery of the debt the truck had become a scrap. But it was held that mere passivity or passive negligence does not discharge the surety.[87]

As to negotiable instruments, it is specially provided by the Negotiable Instruments Act, 1881, s. 40 that

"when the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorse's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity."

The defendant had borrowed money from the plaintiff bank and deposited title deeds of properties by way of security. The Bank also discounted a hundi drawn by third parties in favour of the defendants. On default of payment the Bank brought a suit and it was held that even if the Bank does not enforce the clause on the hundis the customer debtor could not plead that as a bar to the suit on the mortgage.[88]

Rights of surety on payment or performance.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that is liable for, is invested with all the rights which the creditor had against the principal debtor.[89]

This section lays down a general principle of which the most important practical application is to be found in s. 141. It seems that the intention of the Act is to keep alive for the surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of the debt or performance of the duty. Such an intention, at any rate is more elaborately expressed by the English Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 5), with which the framers of the present Act were undoubtedly acquainted. English Courts of Equity had seen their way to put the surety in the creditor's place for the purpose of using all existing securities and remedies, but not to revive or save for the surety's benefit securities which, on payment of the debt, ceased to exist by operation of law. The practical importance of this exception or limitation, while it lasted, was bound up with technical rules as to the preference of "speciality" over simple contract debts which have now largely ceased to be operative in England, and were never introduced in India.

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86 *Bank of Saurashtra* v. *Chitranjan Rangnath Raja* (1980) A.SC. 1528, 1532; *Goverdhanlal* v. *State Bank of Travancore* (1968) 3 SCR 724, 731; (1968) A.SC. 1432 (where there was a similar clause).

87 *Karnataka Bank Ltd.* v. *Gajanand Kulkarni* (1977) A.Knt. 14, 17, 18; American Jurisprudence Vol. 50 Para 114 p. 978 quoted; *Rainbow* v. *Juggins* (1879) 5 Q.B.D. 138; *Wulff* v. *Jay* (1872) 7 Q.B.D. 756; *State of Madhya Pradesh* v. *Kalaram* (1967) A.SC. 1105; disting.

88 *Shambumal Gangaram* v. *Bank of Mysore* (1971) A.My. 156.

89 *Bank of Bihar* v. *Damodar Prasad* (1969) A.SC. 297. For example, the right to stop in transit, and, in an appropriate case, seller's lien. Where, by the custom of trade, a broker who buys for an undisclosed principal is liable to the seller of the goods for the buyer's default, and has himself paid the seller, he is entitled to the seller's lien as against the buyer; *Imperial Bank* v. *London and St. Kathrine Docks Co.* (1877) Ch.D. 195.

Early in the nineteenth century the rule was expounded in an argument of Sir Samuel Romilly's which, like another and better known one of the same learned counsel,[90] has attained the very rare honour of being made authoritative by the approval of the Court: "The whole doctrine of principal and surety, with all its consequences of contribution, etc.[91] rests upon the established principles of a Court of Equity, not upon contract, except as it may be so represented upon the implied knowledge of those principles. There is no express contract for contribution, the bonds generally, if not universally, being joint and several, creating several obligations by each.... (The general reason of the equitable doctrines is) that a surety is to be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also stands not upon contract, but upon a principle of natural justice".[92]

On the same foundation stands the right of the surety who has paid the debt, or the portion of it which he guaranteed, to stand in the creditor's place in the administration of the debtor's estate. The principle is undoubted, and the only difficulty is to be sure whether the surety has really guaranteed only a certain part of the debt, or is surety for the whole, but with a limit of liability (see notes on s. 128, above).

"When a surety is only a surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged".[93] In such a case it may be said that "the right of the surety arises merely by payment of the part, because the part, as between him and the principal creditor, is the whole." But a surety who has become such, though with limited liability, in respect of the entire debt, has no rights by way of subrogation or in preference to the creditor until the creditor is fully paid.[94]

Moreover, the benefit of this principle is extended to persons who, though not actually sureties, are in an analogous position. The indorser of a bill of exchange "is primarily liable as principal on the bill, and is not strictly a surety for the acceptor"; but "he has this in common with a surety for the acceptor, that" after notice of dishonour "he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor".[95]

A surety (or person in a similar position) who has paid his principle's debt is entitled, in the practice of the English Courts, to the same rate of interest as a stranger who has made advances.[96]

Surety for one debt only—assets in other accounts.—Where the surety's liability is on the credit loan account of the debtor, he cannot on payment of that loan claim the benefit of money lying in the cash credit account.[97]

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90 In *Huguenin* v. *Baseley* (1807) 14 Ves. 273; 9 R.R. 148. See notes on s. 16 above.

91 See ss, 146, 147, below.

92 *Craythorne* v. *Swinburne* (1807) 14 Ves. 160; 9 R.R. 264; and see Lord Eldon's judgment, 14 Ves. 169; 9 R.R. 270; *Rajagopala Iyer* v. *Ramachandra Iyer,* 1942 A.M. 628. *Cp. Krishnasami Pattar* v. *Gopala Krishna Reddiar,* 99 I.C. 676; 1927 A.M. 421.

93 *Gray* v. *Seckham* (1872) L.R. 7 Ch. 680, 683, *per* Mellish L.J.; *Bhushayya* v. *Suryanarayan* (1944) Mad. 340, 1944 A.M. 195.

94 *Re Sass* (1896) 2 Q.B. 12, 15; he becomes only a creditor of the principal debtor for what he has paid: *Darbari Lal* v. *Mahbub Ali Mian* (1927) 49 All. 640; 101 I.C. 513; 1927 A.A. 538.

95 *Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Cas. 1, 18. *per* Lord Blackburn. *A* was surety for *B* for a liquor shop license and deposited cash security with Government. *B* then took *C* as a partner in the business. They having failed to pay the license fee, Government recovered it from the cash security. It was held that *A* could recover the amount from both *B* and *C* as both had benefited: *Pheku Ram* v. *Ganga Prasad,* 1938 A.A. 206; (1938) All.L.J. 223; 174 I.C. 900.

96 *Re Beulah Park Estate* (1872) L.R. 15 Eq. 43.

97 *Bank of Baroda* v. *Krishna Ballab* (1975) A.Raj. 1,5.

See as to the right of a payer of a bill of exchange for the honour of any party liable upon it the provisions of the Negotiable Instruments Act, 1881, s. 114.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.[98]

Surety's right to benefit of creditor's securities.

Illustrations.

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues A on his guarantee. *A* is discharged from liability to the amount of value of the furniture. (*Cp. Pearl* v. *Deacon* (1857) 1 De G. & J. 461, where the creditor, being also the debtor's lessor, destroyed the security on the furniture by distraining for rent (which in English law is a paramount right).

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged. (*Mayhew* v. *Crickett* (1818) 2 Sw. 185; 19 R.R. 57.)

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged. (The modern doctrine of English equity is *contra*; see below.)

Difference between.—Under s. 140 a guarantor becomes entitled to the rights of the creditor on making payment or performing the guaranteed duty. But under s. 141 the payment or the performance of the duty is not a condition precedent for getting the benefit. Under that section he is entitled to any benefit available before that date. Thereafter where the security was of the goods of the debtor company, the sale proceeds of the goods should be brought in towards the debt due and also future transactions of sale upto the date of resignation of the directors should be taken into account to reduce the liability.[99]

S. 141 applies where the principal debtor offers more than one security one of them being the personal guarantee of the surety and this would be so even when the surety is ignorant of the other security offered by the principal debtor.[1]

Surety's right to benefit of securities.—The English law is as follows:—"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship,[2] if the creditor who has, or ought to have had, them in his full possession or power loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released, if the creditor, by reason of what he has done, cannot on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands".[3]

"The surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment",[4] or if a settlement of accounts is otherwise required, *e.g.*, if the surety brings a redemption suit in respect of a security given by

98 See s. 139, above.
99 *Hargopal Aggarwal* v. *State Bank of India* (1976) A.M. 211, 213.
1 *State Bank of Saurashtra* v. *Chitranjan Rangnath Raja* (1980) A.SC. 1528, 1531.
2 See judgment of Hall V.C., in *Forbes* v. *Jackson* (1882) 19 Ch.D. 615, 619.
3 Notes to *Rees* v. *Berrington* (1795) in 2 Wh. & T.L.C. as approved by Hannen, J., *Wulff* v. *Jay* (1872) L.R. 7 Q.B. 756, 764; as the last point, *Pledge* v. *Buss* (1860) Johns. 663.
4 See judgment of Hall V.C., in *Forbes* v. *Jackson*, *supra*, note 39.

him.[5] The creditor, however, is not bound to use extraordinary, or, it would seem, any, diligence about preserving or retaining a security which is in fact worthless.[6]

Section 141 embodies the general rule of equity expounded by Sir Samuel Romilly as counsel and accepted by the Court of Chancery in *Carythorne* v. *Swinburne*.[7] It incorporates the rule of English Law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him.[8] But the section limits the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of surety.[9]

When the contract of suretyship is entered into.—The expression "when the contract of suretyship is entered into" only means that the surety cannot claim the benefit of security available before that date.[10]

It will be seen that the present section, by limiting the surety's right to securities held by the creditor at the date of his becoming surety, has adopted a view which was still not wholly abandoned in England when the Act was framed,[11] but which has for a good many years been treated as untenable. One cannot help suspecting that this is not deliberate policy, but merely codification of equity somewhat out of date. The law in India is, however, as stated in illustration (c).[12] But it has been held that this section does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid by the surety: this section merely gives the creditor the right to surrender a security not held by him at the time of the contract provided exercises that right before payment by the surety.[13]

If a successful bidder at an auction of forest felled trees is allowed to remove the trees without making payment, the sureties for payment of the price will stand discharged thereby as the security is lost by the creditor it being immaterial whether the loss is due to a positive act on the part of the creditor or his inaction.[14]

In *Kaluram's case*[15] Shah J. observed:

"... The expression 'security' in section 141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability; he is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or has parted with the security without the consent of the surety, the latter is, by the express provision contained in section 141, discharged to the extent of the value of the security lost or parted with."

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5 *Dixon* v. *Steel* (1901) 2 Ch. 602 (surety, who had not been called on for payment, entitled to be credited in account with proceeds of security given by principal debtor). "It certainly is not the law that a surety has no rights until he pays the debt due from his principal": (1901) 2 Ch.D. 607.

6 *Rainbow* v. *Juggins* (1880) 5 Q.B.D. 422 (a policy on the debtor's life which had lapsed by non-payment premiums).

7 (1807) 14 Ves. 160 quoted in *Amritlal Goverdhan* v. *State Bank of Travancore* (1968) A.SC. 1432.

8 *Wulff & Billing* v. *Jay* (1872) 7 Q.B. 756; *State of M.P.* v. *Kaluram* (1967) 1 S.C.R. 266, 273; (1967) A.S.C. 1105.

9 *Amritlal Goverdhan* v. *State Bank of Travancore* (1968) A.SC. 1432.

10 *Hargopal Aggarwal* v. *State Bank of India* (1976) A.M. 211, 213.

11 Blackburn J. seems to have thought the point doubtful in 1876. See *Polak* v. *Everett* (1876) 1 Q.B.D. 669, at p. 676. We do not believe he would have found many equity lawyers to share his doubt: see *Pearl* v. *Deacon* (1857) 1 De G & J. 461; 116 R.R. 89.

12 *Chinna Desappa* v. *Gopalakrishna Co.*, 1949 A.M. 194.

13 *Bhushayya* v. *Suryanarayana* (1944) Mad. 340, A.M. 195.

14 *State of Madhya Pradesh* v. *Kaluram* (1967) 1 S.C.R. 266; (1967) A.SC. 1105; (1967) S.C.J. 823; *Bank of Baroda* v. *Krishna Ballabh* (1975) A.Raj. 1,5.

15 *State of M.P.* v. *Kaluram* (1967) 1 S.C.R. 266, 273; (1967) S.C.J. 823, 827; (1967) A.SC. 1105; *Rees* v. *Barrington*, 2 White & Tudor's L.C., 4th Edn. at p. 1002 refd. to in *Amritlal Goverdhan* v. *State Bank of Travancore* (1968) A.SC. 1432; *Wulff & Billing* v. *Jay* (1877) 7 Q.B. 756 quoted. *Janakiram* v. *Punjab National Bank Ltd.* (1968) A. My. 56.

In *Amritlal's case*[16] there was a shortage of goods pledged to the extent of Rs. 35,000 due to the negligence of the bank and the surety was discharged to that extent.

Where the surety becomes a surety for one of the several debts owed by the debtor to the creditor who holds different securities for different debts the surety is entitled to the benefit of the security for the debtor which the surety is liable for and the creditor losing other securities does not discharge the surety. The surety is not entitled to the credit with the bank in the cash credit account which was a separate account.[17]

The rule is not confined to securities in any technical sense. A surety is entitled to the benefit of the principal debtor's set-off against the creditor, if it arises out of the same transaction; this follows from the surety's right to be indemnified by his principal, combined with the equitable maxim of avoiding circuity of action.[18]

The High Court of Bombay has cited the reason of the present rule as laid down by Turner V.C.:[19]

"I take it to be, because as between the principal and surety, the principal is under an obligation to indemnify the surety (see s. 145, below); and it is, as I conceive, from this obligation that the right of the surety to the benefit of securities held by the creditor is derived."

"To the extent of the value of security."—Where a creditor sued the principal debtor and the surety on a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property which was worth the amount guaranteed by the surety, it was held that the surety was discharged[20]....

When surety becomes entitled to benefit of creditor's securities.—Under s. 140, a surety is invested with the *rights* of the creditor as against the principal debtor *upon payment or performance of all that he is liable for*. The words last italicised are not repeated in the present section. The Act does not lay down at what point of time the surety is entitled to have the creditor's *securities* made over to him wholly or in part, whether it is when the debt of the creditor is paid off, or when the surety pays the amount of his guarantee. The point arose in *Goverdhandas* v. *Bank of Bengal,*[21] where it was held that a surety was not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. In that case a surety who had guaranteed an *aliquot* and defined portion of a past due debt secured by a mortgage claimed to be entitled, *on payment by him of the portion of the debt* which he had guaranteed, to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgage had been paid the full amount of his mortgage debt. Farran J., in rejecting the surety's claim said:

"It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety; or that a person advancing say Rs. 10,000 on a mortgage which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which has that effect. If such were the result of s. 141 of the Contract Act, I should expect to find the wording of s. 140 repeated in s. 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention".[22]

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16 *Amritlal Goverdhan* v. *State Bank of Travancore* (1968) A.SC. 1432.

17 *Bank of Baroda* v. *Krishna Ballabh* (1975) A.Raj. 1, 5; *State of Madhya Pradesh* v. *Kaluram* (1967) A.SC. 1105; (1967) 1 SCR 266 refd. to.

18 *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372.

19 *Yonge* v. *Reynell* (1852) 9 Hare, at pp. 818, 819; *Goverdhandas* v. *Bank of Bengal* (1890) 15 Bom. 48, 63. The facts of the case is Hare were complicated by fraud, and are not thought useful for any purpose of illustration. *Cp.* Sir S. Romilly's argument in *Craythorne* v. *Swinburne,* on s. 140 above.

20 *Narayan* v. *Ganesh* (1870) 7 B.H.C.A.C. 118.

21 (1890) 15 Bom. 48.

22 *Ibid,* p. 64.

A bench of the Madras High Court,[23] while approving of the decision on the particular facts on the ground that the surety's guarantee did not relate to the secured part of the debt[24] refused to accept the opinion of Farran J. that the surety's claim against the securities arises only when the creditor's claim has been satisfied. Farran J. was dealing with a case where only s. 141 had been pleaded, whereas the Madras Court had to consider the combined effect of sections 140 and 141. In the Madras case, unlike the Bombay case, the security was given subsequently to the contract of suretyship. The Court held, however, that s. 140 applied to such a security, as noted above. The surety had guaranteed only part of a debt, and had discharged his part. The Court decided that he was entitled, as against a subsequent assignee of the creditor, to a proportionate share in a security held by the creditor at the time the surety discharged his liability, even though the creditor was still not fully paid. The brief facts were that *X* owed three distinct debts to a bank. *B* was surety for debt 1, *H* for debt 2, and *K* for debt 3. The Bank later demanded security from *X*, who executed a mortgage to the bank to secure the three debts. Subsequently the bank brought three suits to recover the debts and obtain decrees. The bank, for a consideration less than the balance due to them, assigned the decree for debt 3 and also the mortgage to *H*. *B* obtained from the Court a declaration that he was entitled to share in the mortgage in proportion to the amount he had paid, the Court holding that as each debt was discharged a right to a proportionate part of the security passed to the surety making the payment. The Court doubts the view of Farran J., but no attempt is made to deal with his argument on the equities, noted above. Further the solution in the Madras case is, it is submitted, inequitable. The Court considers that any other view would enable a creditor to make an appropriation to the detriment of surety who has already paid. But it is submitted that if the creditor has negligently sold the security to *H* at less than its market value, the surety is *pro tanto* released.[25] If, on the other hand, *H* has paid the full market value, it is inequitable that he should be called upon to share it with *B*. Further, the very basis of the surety's right to securities rests upon the obligation of the principal debtor to indemnify the surety. It would be strange if the surety could use these rights to hamper the creditor in recovering his debt.[26] It is submitted that the creditor's right to hold securities until the whole debt has been paid is paramount to any claim of the surety whether based upon s. 140 or s. 141.

Joint promisors.—Joint promisors are not sureties under s. 126, and s. 141 has therefore no application if one of two joint promisors pays the entire debt.[27]

Guarantee obtained by misrepresentation invalid.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

The English authorities on the subject-matter of this and s. 143 will be dealt with together under that section.

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid.

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23 *Bhushayya* v. *Suryanarayana* (1944) Mad. 340, 1944 A.M. 195.
24 See *Wade* v. *Coope* (1827) 2 Si. 155, 57 E.R. 747.
25 *Pearl* v. *Deacon* (1857) 1 De.G. & J. 461, 53 E.R. 328. See also s. 139, illustration (b).
26 See *per* Farren J. in 15 Bom. 48, 63.
27 *Vyravan Chettiar* v. *Official Assignee, Madras* (1933) 55 Mad. 949; 139 I.C. 562; 1933 A.M. 39, where the English authorities are reviewed.

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A*, in consequence, calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct *B* afterwards makes default. The guarantee is invalid. (*Railton* v. *Mathews* (1844) 10 Cl. & F. 934; 59 R.R. 308.[28])

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed and *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety. (*Pidcock* v. *Bishop* (1825) 3 B. & C. 605; 27 R.R. 430.)

Guarantee obtained by misrepresentation or concealment—Uberrima fides.—English law is settled that, although the contract of suretyship is "one in which there is no universal obligation to make disclosure"—that is, it is not, like a contract of insurance, liable to be avoided by the mere non-disclosure of any material fact whatever—still the surety is entitled to know so much as will tell him what is the transaction for which he is making himself answerable; and he will be discharged if there is either active misrepresentation of the matter by the creditor, or silence amounting in the circumstances to mispresentation.

"Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid.[29]

Guarantee—Uberrima fides.—Ordinary contracts of guarantee are not amongst those requiring *uberrima fides* on the part of the creditor towards the surety.[30] But a contract of guarantee like any other contract is liable to be avoided if induced by material misrepresentation of an existing fact even if made innocently.[31]

"It is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglects to do so, it is at his peril....A surety ought to be acquainted with the whole contract entered into with his principal."[32]

Thus where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee and the statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part.[33]

But it is not every disclosure that a surety can require. Where a customer's credit with his bankers is guaranteed, the fact that the new credit is to be applied to paying off an existing debt of the customer to the bank is not such as need be disclosed. For this is nothing out of the ordinary course of business, but rather to be expected. The test is

"whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect."[34]

The creditor's description of the transaction to be undertaken, if it makes no mention of any such circumstance, implies a representation that there is none.[35]

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28 *Railton* v. *Mathews* followed, and the distinction between such intrinsic circumstances as were here not disclosed, extrinsic ones such as a state of account, as in *Hamilton* v. *Watson, infra,* note 61f, explained in *L.G.O. Co.* v. *Holloway* (1912) 2 K.B. 72 C.A.

29 Fry J., *Davies* v. *London and Provincial Marine Insurance Co.* (1878) 8 Ch.D. 469, 475.

30 *Scaton* v. *Heath* (1899) 1 Q.B. 782, 792-3.

31 *Jean Mackenzie* v. *Royal Bank of Canada* , 1934 A.C. 468, 475.

32 Bayley J. and Littledale J., *Pidcock* v. *Bishop,* 27 R.R. at pp. 433, 435.

33 *Lee* v. *Jones* (1863) 17 C.B.N.S. 482, Ex.Ch. A minority of the Court dissented strongly on the facts, holding that it was the debtor's business to inform the sureties of his financial condition, and theirs to inquire of him rather than of his employers. Generally a surety is not the less bound though he may have acted on some misrepresentation made by the debtor: *Debendra Nath Dutt* v. *Adm. Gen. of Bengal* (1906) 33 Cal. 713, 756.

34 *Hamilton* v. *Watson* (1845) 12 Cl. & F. 109, 119: 69 R.R. 58, 65 (Lord Campbell).

35 *Lee* v. *Jones,* note 61c above, judgment of Blackburn J.

Accordingly the creditor is not bound to tell the surety that the intended guarantee is to be in substitution for a former one given by some one else.[36] Where the solvency of a surety for a debt is guaranteed in turn, the terms of the loan as between the creditor and the original debtor are not material for the last-mentioned guarantor's risk, and non-disclosure of them is no defence to an action on his guarantee.[37]

To avoid a guarantee under this section it must be proved not only that there was silence as to a material circumstance, but that the guarantee was obtained by means of such silence.[38] The meaning of the words "keeping silence" in this section was considered by Sargent C.J. in a Bombay case.[39] The expression "keeping silence," said the learned Judge, "clearly implies intentional concealment as distinguished from mere non-disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Co.* v. *Lloyd,*[40] that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed."

"Material circumstance."—As to what amounts to this, further illustrations are afforded by the following cases:—

1. *A* becomes surety to a bank for *B*'s conduct as *khajanchi,* whose duties are to examine, verify, and guarantee all native signatures or documents for money. Before his appointment as *khajanchi B* held the office of an ordinary clerk in the bank, and it was arranged between *B* and the bank that he should continue to fill that office also. The bank do not acquaint *A* with this part of the agreement. *A* is liable as a surety.[41]

2. In the above case, after *B* assumes the office of *khajanchi,* the bank discovers that the names of certain bills discounted with them are forged, and they make a claim upon *B,* but *B* repudiates his liability. The bank do not acquant *A* with this fact, and *B* is allowed to continue in his office, and subsequently makes defalcations. *A* is liable as a surety, for it could not have been assumed that *B* was infallible in detecting forgeries, and the guarantee could not be said to be founded on that assumption.[42]

3. *A* purchases an *abkari* farm from Government subject to his furnishing the required security for the due fulfilment of the conditions of the lease. *A* fails to furnish the security, and the farm is resold at his risk and on his account at a loss of Rs. 4,000, for which he becomes liable. *A* purchases the farm at the resale, and *B* stands surety for the performance of the conditions of the lease. *B* is not informed by Government of *A*'s liability for Rs. 4,000. *B* is liable as a surety, the guarantee not extending to the liability for Rs. 4,000.[43]

4. *A* was appointed manager of a Society in 1929. From 1929 to 1931, *A*'s conduct if not dishonest, would have justified his dismissal. The Society considered that *A*'s conduct entitled them to ask him for further security. *B,* who furnished the additional security, was not informed of *A*'s past conduct. On *A* making defalcations, it was held that *B* was not liable.[44]

The language of these two sections, 142 and 143, is not very well fitted to exclude doubts whether they go beyond the English authorities or not. S. 143 might be read so as to impose on the creditor an unqualified duty of giving the surety full information of all material facts. But the words "obtained by means of keeping silence," coupled with the fact that the illustrations are both taken, with no substantial change, from English decisions, appear to limit the operation of the section to cases of wilful concealment which in fact amounts to a misrepresentation of what the surety is undertaking.

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36 *North British Insurance Co.* v. *Lloyd* (1854) 10 Ex. 523; 102 R.R. 686.
37 *Seaton* v. *Burnand* (1900) A.C. 135.
38 *Per Cur.* in *Secretary of State for India* v. *Nilamekam* (1883) 6 Mad. 406, 408.
39 *Balkrishna* v. *Bank of Bengal* (1891) 15 Bom. 585, 591. See also *Delhi and London Bank* v. *Hunter* (1871) 3 N.W.P. 264.
40 10 Ex. 523, 532; 102 R.R. 686, 694.
41 *Balkrishna* v. *Bank of Bengal* (1891) 15 Bom. 585.
42 *Ibid.*
43 *Secretary of State for India* v. *Nilamekam* (1883) 6 Mad. 406, 410. The surety bound in this case was executed before the Contract Act came into force, and the Court stated that, whether s. 143 did or did not embody the rule of English law, the case was to be decided according to the principles of English law, and proceeded to decide the case accordingly.
44 *Co-operative Commission Shop Ltd.* v. *Udham Singh,* 1944 A.L. 424; *London General Omnibus Co.* v. *Holloway* (1912) 81 L.J.K.B. 602.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

A surety who "entered into the obligation upon the understanding and faith that another peron would also enter into it...has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety.[45] Whether such a contract is to be inferred from the transaction as a whole is conceived (apart from the construction of any written document) to be purely a question of fact. The rule will not be extended to cases of joint and several obligation where the transaction is not really a guarantee, though that word may be used, but a primary undertaking.[46]

Implied promise to indemnify surety.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* is indebted to *C* and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A*, to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B*, the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

Surety's right to indemnity.—The proposition "that, as soon as his obligation to pay is become absolute (a surety) has a right in equity to be exonerated by his principal"[47] is treated throughout the English authorities as fundamental, and as furnishing the reason for several of the more specific rules (see notes on s. 141, above). It depends in turn on the more extensive principal laid down in s. 69 (*ante*). In the second clause of the section the words "rightfully" and "wrongfully" do not seem felicitous. There is nothing wrongful in paying money which one need not have paid, and for which therefore one cannot have a remedy over against the principal debtor. One would rather have expected "reasonably" and "unreasonably." Here, again, a wider rule is applied to the special case of the contract of suretyship.[48] Further, it has long been settled in England that "surety is entitled to come" to the Court "to compel the principal debtor to pay what is due from him," provided that an ascertained debt is actually due; and the relief is not limited, as at one time supposed, to cases where the creditor has refused to sue the principal debtor,[49] nor need the creditor even have demanded the sum from the principal debtor.[50]

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45 *Evans* v. *Bremridge* (1856) 8 D.M.G. 100, 109; 110 R.R. 156, *per* Turner L.J. *Cp. Bonser* v. *Cox*, notes on s. 133, above.

46 *Ex parte Harding* (1879) 12 Ch.D. 557.

47 *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372, 377.

48 See *Agius* v. *G.W. Colliery Co.* (1899) 1 Q.B. 413, C.A.; *Hammond & Co.* v. *Bussey* (1887) 20 Q.B.D. 79, cited on s. 73, illustration (j), above.

49 *Ascherson* v. *Tredegar Dry Dock etc., Co.* (1909) 2 Ch. 401, 406; *Sripatrao* v. *Shankarrao*, 1930 A.B. 331: 32 Bom. L.R. 207: 127 I.C. 330.

50 *Tate* v. *Crewdson* (1938) Ch. 869.

It is not to be inferred from the language of this section that the surety might not, in an appropriate case, be entitled to recover for special damages beyond the sum he has actually been compelled to pay. His right is not merely a right to stand in the creditor's place, but is founded on an independent equity.[51]

On the other hand, the surety's only claim is to be fully indemnified. He cannot compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the full amount.

"Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the common obligation".[52]

"Whatever sum he has righfully paid."—This expression includes "not only coin, but also property, of whatever kind, which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of[53] the creditor in lieu or discharge of the debt owing to him".[54] The giving, therefore, by the surety of a promissory note jointly with a third party as his surety, though accepted by the creditor as payment of the debt and not as a mere collateral security therefor, cannot be treated as payment as between the surety and the principal debtor.[55] The reason is that, the principal debtor being bound to indemnify the surety, the cause of action cannot be merely the procuring by the surety of the principal debtor's exoneration from liability to the creditor, but must also include the surety himself damnified;[56] and the surety cannot be said to be damnified unless the payment is actually made.

The payment of a barred debt is not a "rightful" payment.[57]

Guarantee without concurrence of principal debtor.—Where a person becomes a surety without the knowledge and consent of the principal debtor, the only rights which he acquires are those given by ss. 140 and 141, and not those given by this section.[58]

There are conflicting opinions on the question whether a surety paying a debt which is barred by limitation can be said to have paid "rightfully" within the meaning of this section.[59]

The surety is liable to pay at the suit of the creditor even though a suit against the debtor may be barred (see notes on s. 134, above); and in these circumstances it would seem impossible to say that payment by the surety is anything but rightful. The rights given to the surety by s. 145 arise from the discharge of his own liablity to the creditor and not from the liability of the debtor.[60]

Depositing money with Banks for performance of contracts with others:

For due performance of the conditions of a scheme of grain procurement a company was required to deposit the security amount in a recognised bank. The deposit receipt acknowledged the deposit A/c. District Magistrate, Montgomery, stipulated the rate of interest and the period of notice of withdrawal; and the receipt was handed over to the District Magistrate. On the partition of the country the depositors migrated to India and demanded the money from the bank

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51 See *per* Stirling J., *Bedeley* v. *Consolidated Bank* (1886) 34 Ch.D. at p. 556. The reversal of the decision on the main point, 38 Ch.D. 236, does not affect this.

52 *Reed* v. *Norris* (1837) 2 My. & Cr. 361, 375; 45 R.R. 88, 94 (Lord Cottenham). On the point that there is no subrogation, *cp. Periammanna Marakkayar* v. *Banians & Co.* (1925) 49 Mad. 156; 95 I.C. 154; 1926 A.M. 544.

53 *Sic* 'to the creditor' is clearly intended.

54 *Per* Bhashyam Ayyangar J., in *Putti Narayanamurthi* v. *Marimuthu* (1902) 26 Mad. 322, 328.

55 26 Mad. 322, 328; *Muthuswamy* v. *Konar* (1936) 14 Rang. 511; 163 I.C. 668; 1936 A.R. 235.

56 *Ibid*, 326.

57 *Rewal Singh* v. *H.D. Goil* (1959) A.M.P. 297; *Jawala Singh* v. *Mst. Raj Kaur* (1930) A.L. 812. (Payment of debt by surety after suit filed for recovery); See n. 82 *infra*.

58 *Muthu Raman* v. *Chinna Vellayan* (1916) 39 Mad. 965; 33 I.C. 508.

59 No, *Suja* v. *Pahlwan* (1878) Punj. Rec. No. 30. Yes (at any rate if he pays under a decree). *Raghavendra Gururan* v. *Mahipat Krishna* (1924) 49 Bom. 202; 86 I.C. 883; 1925 A.B. 224.

60 *Anand Singh* v. *Collector of Bijnor*, 1932 A.A. 610; (1932) All.L.J. 868.

They were held entitled to recover as the transaction created no contractual relationship in favour of the District Magistrate who was not constituted owner of the deposited money nor was there any contractual or fiduciary obligation undertaken by the bank in favour of the District Magistrate and hence the bank was liable to pay the depositors. Nor was it proved that the money had been forfeited by Government or vested in the Custodian.[61]

Co-sureties liable to contribute equally.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations.

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees, and *C* 500 rupees.

Contribution by co-sureties.—This has long been elementary. The earliest case usually cited settled that the co-sureties need not be bound under the same contract and laid down that the right to contribution is independent of any agreement for that purpose.[62]

It must be observed that a "surety has no claim against his co-sureties until he has paid more than his share of the debt to the principal creditor",[63] for only then does it become certain that there is ultimately any case for contribution at all. But a judgment against the surety at the suit of the creditor for the full amount of the guarantee (or an equivalent process, such as the allowance of a claim for the sum in the administration of the surety's estate) will have the same effect as payment for this purpose, and entitle the surety or his representatives to a declaration of the right to contribution; it seems that this is a matter of purely equitable jurisdiction.[64] The like principles apply to contribution among co-trustees.[65]

All the co-sureties are entitled to share in the benefit of any security or indemnity which any one of them has obtained from the principal debtor, and this whether they knew of it or not.[66] The surety bringing in, under this rule, what he receives from his security, may resort again to that security for the liability to which he remains subject, and the co-sureties may again claim the benefit of participation and so on until the co-sureties have been fully reimbursed or the counter-security exhausted.[67]

There is no right of contribution between persons who become sureties not for the same debt, but by distinct and separate obligations for different portions of a debt.[68] Nor is there

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61 *United Commercial Bank* v. *Okara Grain Syndicate Ltd.* (1968) A.SC. 1115.

62 *Dering* v. *Earl of Winchilsea* (1787) 1 Cox, 318; 2 Bos. & P 270; 1 R.R. 41; and see other judgments cited by Wright J. in *Wolmershausen* v. *Gullick* (1893) 2 Ch. 523 *sqq*.

63 *Ex parte Snowdon* (1881) 17 Ch.D. 44, at p. 48, *per* Brett L.J. following *Davies* v. *Humphreys* (1840) 6 M. & W. 153; 55 R.R. 547, 559. It is not enough that he had paid more than his share of a part of the debt which has become due: *Shirley* v. *Burdett* (1911) 2 Ch. 418. It must be determined by the circumstances of each case whether there is an indivisible principal debt or several debts.

64 *Wolmershausen* v. *Gullick* (1893) 2 Ch. 514.

65 *Robinson* v. *Harkin* (1896) 2 Ch. 415.

66 *Steel* v. *Dixon* (1881) 17 Ch.D. 825.

67 *Berridge* v. *Berridge* (1890) 44 Ch.D. 168.

68 *Coope* v. *Twynam* (1823) Turn & Russ. 426; 24 R.R. 89.

any such right between an ultimate surety for payment of a debt and a person who, though a surety as between himself and the principal debtor, has authorised the creditor to treat him as a principal. Where *B* joined with *A* in a mortgage of *A*'s property to *Z*, and agreed to be considered, as regards *Z*, as a principal debtor for the whole, though as between *A* and himself he was a surety, and the debt was insured with *M*, who knew the terms of *B*'s engagement, in the name of *Z*, *M* undertaking to pay the debt on notice that *Z*'s power of sale had become exercisable, it held that *M* was a guarantor to *Z* against the default of both *A* and *B*, and was not a co-surety with *B*.[69] An express contract between *Z* and *M* that *M* was to be a surety *for*, but not *with B*, by way of "collateral security," would have the same effect.[70]

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees. conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

(b) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to E. D makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in a penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A B* and *C* have to pay each the full penalty of his bond.

The wording of this section and its effect as shown by the illustrations are perfectly clear, and the question why it says "equally" and not "rateably", thus making what seems an arbitrary departure from the rule as previously understood, is not one which we have any means of answering. There is no variation between this section and the original draft.

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69 *Re Denton's Estate* (1904) 2 Ch. 178, C.A., following the distinction laid down in *Craythorne* v. *Swinburne* (1807) 14 Ves. 160; 9 R.R. 264.

70 *Craythorne* v. *Swinburne* (1807), *supra*.

CHAPTER IX

OF BAILMENT

"Bailment," "bailor," and "bailee" defined.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

The late Mr. Justice Story's[71] works on bailment and agency acquired a classical reputation, and were already used in this and the following chapter by the framers of the present Act, on the whole with very good results. But, as those works have not been re-edited for many years, and have, in England at any rate, ceased to be in common use, though fairly recent judicial citations occur, it is not thought worth while to furnish the text of the Act, which after all its own sufficient authority, with specific references to them.

Nature of the transaction.—"Bailment" is a technical term of the Common Law, though etymologically it might mean any kind of handing over (Fr. *bailler*). It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. But constructive delivery will create the relation of bailor and bailee as well as actual, as stated in the Explanation.

The bailee's duty to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arises on the delivery of the goods, although those orders may have already been given and accepted in such a manner as to constitute a prior special contract.[72] As a matter of pleading this is no longer material in England or India, but it might still be material with regard to the period of limitation.

Bailment is necessarily dealt with by the Contract Act only so far as it is a kind of contract. It is not to be assumed that without an enforceable contract there cannot in any case be a bailment.[73]

"Bailment is a relationship *sui generis* and unless it is sought to increase or diminish the burdens imposed upon the bailee by the very fact of bailment, it is not necessary to incorporate it into the Law of Contract and to prove a consideration."[74]

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71 Of the Supreme Court of the United States from 1811 to 1845. Story was not a subtle or always a thorough critic in dealing with authorities, but he was an admirable exponent of the common sense of the law when the state of authority left him a free hand. He drew largely on Pothier and other civilian writers.

72 *Streeter* v. *Horlock* (1822) 1 Bing. 34; 25 R.R. 579.

73 In *Ram Gulam* v. *U.P. Government,* 1950 A.A. 206, 207,, Seth J. unjustifiably made the assumption that a bailment cannot arise independently of contract. His Lordship held that the Government was not a bailee of stolen goods recovered by the police.

74 Pollock & Wright: The Possession in the Common Law, page 163 quoted in the *State of Gujarat* v. *Memon Mohammad* (1967) 3 S.C.R. 938; (1967) A.S.C. 1885, 1888; (1968) 1 S.C.J. 273.

In a case where the Board of the Port Trust of Bombay took charge of the plaintiffs machinery imported from Italy, and while being carried on a trolley it fell down due to the negligence of the Board's employees and the plaintiff sued for damages, the Supreme Court held that the essence of bailment was possession and even if the goods came into the possession of the Board without any contract or consent of the owner, bailment would be constituted but subject to the reservations and limitations of S.61-B of the Bombay Port Trust Act. Further a bailment is not "essentially subject to the limitations of agreement and the notion of priority need not be introduced in an area where it is unnecessary, for....it arises out of possession and connoted the relationship between the person and a thing in his charge". Bailment therefore may exist without the creation of a contract between the parties and may give rise to remedies which in substance may not be contractual.[75]

It is dealt with by the Contract Act where it arises from a contract but it is not correct to say that there cannot be a bailment without an enforceable contract. Bailment can arise *de hors* a contract, latter alone being dealt with in the Contract Act.[76] There can therefore, be bailment and relationship of a bailor and a bailee in respect of specific property without there being an enforceable contract.[77]

In England the conviction of an infant for the statutory offence of larceny by a bailee has been upheld.[78] "It is conceived," says Sir R.S. Wright,[79] "that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep or return or deliver to him the specific thing or to convey and apply the specific thing according to the directions antecedent or future of the other person."

The words "otherwise disposed of" in the present section express the common law as now understood. "It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him," *e.g.*, a factor for sale.[80] On the whole a bailment may be described as a delivery on condition, to which the law usually attaches an obligation to redeliver the goods, or otherwise deal with them as directed, when the condition is satisfied; but there may be, in particular cases, a bailment without an enforceable obligation.[81]

In *Memon Mohammad's case*[82]

vehicles and goods belonging to the respondent were seized pursuant to the powers under the Customs Act but it was found that the seizure was unsustainable. In the meanwhile the vehicles were sold as unclaimed property and could not be returned to the owner.

The Government was held liable, as being in the position of a bailee, either to return the vehicles or the price thereof. Property seized by Customs Officials belongs to its owner till the final order of confiscation. And in the meanwhile the State is bound to preserve it and return it to the owner in case the order of confiscation is not made final. The mere fact of an order of a magistrate passed in the meanwhile for disposal of the article seized and treated as unclaimed property does not absolve the Government of its liability even though strictly it may not be a bailee.

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75 *Trustees Port of Bombay* v. *Premier Automobiles Ltd.* (1981) ASC 1982, 1985 Palmer: On Bailment (1979 Ed.) p.2.
76 *Ibid.*
77 *Ibid.*
78 *R.* v. *McDonald* (1885) 15 Q.B.D. 323. (No such question could arise under the Indian Penal Code).
79 Pollock and Wright on Possession, 163; See n. 97 *supra.*
80 Sir R.S. Wright, *op. cit.* 161, 162.
81 Judgment of Cave J., *R.* v. *McDonald* (1885) 15 Q.B.D. 323, at p. 328. Cited in *Annamalai Timber Trust* v. *Trippunithura Deviswami,* 1954 A.T.C. 305, 308.
82 *State of Gujarat* v. *Memon Mohammad* (1967) A.S.C. 1885; (1968); 1 S.C.J. 273; (1967) 3 S.C.R. 938.

Where a chattel is delivered by mistake, the intention being to deliver another chattel either with or without conditions, the legal result, whatever it may be, is not a bailment; for there is no intention at all to deliver the chattel which is in fact delivered, and no contract with respect to it. The late Lord Coleridge's opinion "that bailment is not a mere delivery on a contract, but is a contract itself[83] may not be a very clear or convincing reason for this proposition, but does not affect its truth. In the converse case of a mistake on the part of the bailee, a bench of the Madras High Court has held that the same principles apply.[84] The facts were that in March, D1, a mercantile agent and motor distributor, pledged three new Bradford motor vans and six chassis with D3. Two vans and six chassis were numbered in the letter of pledge, and two vans and five chassis were delivered to D3, but one unnumbered van and one chassis were retained by D1 for display purposes. In April, D1 fraudulently sold the retained van, engine No. 3651, to M. On the 5th May, the debt to D3 still being largely unpaid, there was a fresh agreement of pledge between D1 and D3 covering four chassis and three vans. No engine numbers were specified, and one chassis and one van were to be retained by D1 for display. There was no evidence whether on the 5th May the van sold to M. was still in the possession of D1. On the 4th June, the debt being still unpaid, D3 demanded possession of the van left with D1 for display, and on the 7th June, D1 fraudulently sent to D3 a new Bradford van similar to No. 3651, but with engine number 3654, which the owner P. had on the 5th June left with D1 for sale. D3 took in good faith, and in due course, his debt being unpaid, sold the van to D2. Subsequently, P. sued D1, D2 and D3 for conversion. D3 pleaded that s. 178 applied, but the Court held that there was no valid pledge to him of van No. 3654. Two different factual situations had to be considered, as it was not clear whether van No. 3651 was still in the possession of D1 on the 5th May, the date of the second pledge. Assuming that it was, the Court held that there was no valid pledge, as D3 intended to demand possession of a van left with D1 for display, under the first pledge in March. There was therefore a mistake on the part of the bailee as to the identity of the chattel pledged, which prevented possession passing to him, on the authority of *R.* v. *Ashwell,*[85] and the *dictum* in *R.* v. *Middleton,*[86] admittedly cases of mistake by the transferor, but the Court held the same principle applied to a mistake by the transferee. Further, D1 could not, without the consent of D3, substitute van No. 3654 for van No. 3651 as the subject of the pledge. Taking the other possible view of the facts, that van No. 3651 was no longer in the possession of D1 on the 5th May, the Court also held that there was no pledge in that case, as not even D1 intended to constitute a pledge by the despatch of van No. 3654 on the 7th June.

It is submitted, with respect, that the learned Court erred in applying *R.* v. *Ashwell* and the *dictum* in *R.* v. *Middleton* to the facts before them. Those were cases where the transferor by mistake delivered goods more valuable than those intended, and in the case of the *R.* v. *Middleton dictum* in a different category,[87] and, on discovering the mistake, refused to stand by the transaction, whereas here the transferor delivered goods of the same value and of an identical category, to a transferee, who, though perhaps mistaken as to the full facts, was nevertheless, on discovering the real position, willing to affirm the transaction. It is true that the bailor could not substitute a new security for the old one, but it was not for the bailor, who deliberately made the substitution, to object to the bailee's accepting the new security. After despatching van No. 3654 on the 7th June, D1 was estopped from denying that this was the

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83 *R.* v. *Ashwell* (1885) 16 Q.B.D. 190, at p. 223.

84 *Appa Rao* v. *Salem Motors,* 1955 A.M. 505.

85 *K,* intending to lend a shilling, passes a sovereign to *A* in the darkness of an inn yard. Held no bailment.

86 'Let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested?... Surely there can be no doubt he could not.' (1873) L.R. 2 C.C.R. 38, 44-5.

87 In the *dictum* in *R.* v. *Middleton,* the mistake being fundamental, the arrangement is void, coffee being fundamentally different from beans, but in the case under discussion the agreement is not void, one new Bradford van being essentially similar to another, but only voidable. See notes to s. 13.

pledged van. The transaction was doubtless voidable at the instance of D3, but he chose to affirm the transaction not merely where he was ignorant of the true facts, but also subsequently when he was aware of the fraud of D1, in a compromise decree of a suit brought by D1 against D2 and D3. Once it is held that D1 is estopped from denying a pledge of van No. 3654, D3 has, to bring himself within the ambit of s. 178, merely to prove that D1 was a mercantile agent, which was admitted, and that he himself acted in good faith and without notice at the time of the pledge.[88]

The judgment of Holt C.J. in *Coggs* v. *Bernard*[89] is celebrated as the first judicial exposition of this branch of law, as indeed it is one of the earliest attempts, outside the law of real property, to give a connected and rational exposition of any branch of the Common Law as a whole. But the somewhat minute distinctions there laid down were really taken from the Roman law through Bracton, and whether they were ever operative in the law of England or not, they are not adopted in this Act (see s. 151, below).

One result of Lord Holt's reliance on Bracton is that in later times English Courts have felt themselves rather specially free to refer to the Roman law in questions on the contract of bailment,[90] but this is now in India, and probably in England, rather a matter of literary curiosity than anything else.

No bailment where whole property transferred.—Obviously no transaction can be a bailment within the Act which does not satisfy the terms of this section. Accordingly there is not a bailment if the thing delivered is not to be specifically returned or accounted for; and so is the Common Law.

A delivery of property on a contract for an equivalent in money or in other commodities (whether like the property delivered or not) is a sale or exchange and not a bailment, as where farmers deliver grain to a miller to be used by him in his trade, and are entitled to claim an equal quantity of corn of like quality or its market price.[91]

An agent authorised to receive payment, and bound to hand over to his principal an equivalent sum, but not necessarily the actual coin or instruments of credit received by him, is not a bailee.[92]

Similarly the delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note is not a bailment, for there is no contract in such a case that the notes shall be returned or otherwise disposed of according to the directions of the owner.[93]

Again the relation between an indigenous banker and the person depositing money with him in the ordinary way of business is that of borrower and lender, and the money so lodged can be recovered only as "money lent" under art. 59 of the Limitation Act, and not as "money deposited" under an agreement that it shall be "payable on demand" under art. 60. In the former case the period of limitation runs from the date of the loan, and in the latter from the date of demand.[94] The mere use of the term 'deposit' cannot alter the substance of the transaction".[95] It is in each case a question of fact whether a transaction amounts to a

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88 The Court in fact held that *D3* was fixed with notice of *P*'s claim, but see notes under s. 178.
89 (1703) 2 Ld. Raym. 909; 1 Sm. L.C. 175.
90 See the judgment of the Court in *Blakemore* v. *Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 1050; 112 R.R. 880, 887.
91 *South Australian Insurance Co.* v. *Randell* (1869) L.R. 3 P.C. 101.
92 See *Bridges* v. *Garrett* (1870) L.R. 5 C.P. 451, in Ex. Ch., judgment of Blackburn J. See *Shanker Lal* v. *Bhura Lal*, 1951 A.Ajm. 24.
93 *Secretary of State for India in Council* v. *Sheo Singh* (1880) 2 All. 756, 760.
94 *Ichha Dhanji* v. *Natha* (1888) 13 Bom. 338; Arts. 21 & 22 of Act of 1963.
95 *Per Cur.* in *Ram Sukh* v. *Brohmoyi Dasi* (1879) 6 Cal. L.R. 470; *Devendrakumar* v. *Gulabsingh* (1946) Nag. 210, 1946 A.N. 114.

mere loan or a deposit under art. 22 of 1963 Act.[96]

A bailment relates to a specific movable property of which delivery has been given. Therefore, when under an agreement the property of a Company movable and immovable was liable for the dues of the other partners and they were in possession under the contract but the right of realisation had extended to other assets also, it could not be said that the parties could enforce their right to recovery of dues from any specific movable property as it could not be said that the transaction was a bailment much less a pledge.[97]

A bank a bailee for contingent debts.—Where a person has a contingent right to the amounts standing to his credit in a foreign bank, there is no debt due to him *in praesenti,* because the contingency on the happening of which his right arises—in that case an import licence by Government—was one the fulfilment of which was wholly beyond his control. The bank under such an arrangement is a bailee or a stakeholder and not a debtor or a trustee.[98] The liability of a bank towards the hirers of a locker in the bank is that of a bailee as was held in some American cases.[99]

Gratuitous Bailee.—The Privy Council held in a case from Malayasia that a bank which offers its customers in the ordinary course of business its services of looking after the goods deposited with it, it can hardly be described as a gratuitous bailee.[1]

The Council removed the plaintiffs furniture from a Council flat into which the plaintiff had moved as a squatter. It was stored by the Council in a locked garage. The plaintiff demanded the furniture and it was arranged that delivery will be given on a particular day. But the Council's representative never turned up at the proper place. Fresh arrangements were made and when the plaintiff went there, it was found that the furniture had been stolen. The plaintiff brought an action for the return of the furniture and in the alternative for its value. It was held that the Council became gratuitous bailees. Their failure to send their representative to the arranged place was a negligent failure leading to inexcusable delay in complying with a lawful demand of the bailor. From the moment of their negligent failure the Council became insurers and were liable for the loss despite their being no refusal on their part. The plaintiff was entitled to judgment.[2]

Gratuitous Bailment—Onus.—If goods are entrusted to a gratuitous bailee and are lost, the onus is on him to prove that the loss was not caused by fault of the bailee or the employee or agent to whom the goods were entrusted by him.[3]

Property of Ward handed over by Court of Nazir.—Bailment arises from contract and therefore handing over of minor's property to the Nazir of a Court under orders of the District Judge does not create a relationship of bailment either with the District Judge or the Nazir.

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96 *Ishur Chunder* v. *Jibun Kumari* (1888) 16 Cal. 25; *Perundevitayar* v. *Nammalvar* (1895) 18 Mad. 390; *Dorabji* v. *Muncherji* (1894) 19 Bom. 352, in app. *ibid.*, p. 775 *Cp. Re Tidd* (1893) 3 Ch. 1954, where there seems to be some want of adequate distinction between a deposit of specific goods or coins and a deposit in the banking sense, i.e., a loan not immediately repayable, though the decision is clearly correct.

97 *Official Liquidator* v. *Swaroop Cold Storage* (1976) A.A. 88, 91.

98 *Shanti Prasad* v. *Director of Enforcement* (1962) A.S.C. 1765; (1963) 2 S.C.R. 297.

99 *National Bank of India Ltd.* v. *Sohan Lal* (1962) A.Punj. 534; *Sporsen* v. *First National Bank of Poulsho,* 233 Pac. Rep. 641; and *Blair* v. *Riley,* 175 N.E.R. 210 refd. to.

1 *Port Swettenham Authority* v *T.W. Wu & Co.* (1978) 3 All E.R. 337. 340.

2 *Mitchell* v. *London Borough & Ealing* (1978) 2 All E.R. 779, 782, 784; *Shaw & Co.* v. *Symmons & Sons* (1916-17) All E.R. Rep. 1093 applied.

3 *Port Swettenham Authority* v. *T.W. Wu & Co. (M) Sdn. Bhd.* (1978) 3 All E.R. 337, 340 (P.C.); *Hunt & Winterbottom (West of England) Ltd.* v. *BRS Percis Ltd.* (1962) 1 All E.R. at p. 119 applied; *Morris* v. *C.W. Martin Sons* (1965) 2 All E.R. 725 approved; *Gibbin* v. *McMullen* (1868) 2 P.C. 117; *Cheshire* v. *Bailey* (1905) 1 K.B. 237; *Dwarka Nath* v. *Rivers Steam Navigation Co.* (1917) A.P.C. 173 at p. 175 disapproved.

The Government is therefore not liable. The deposit was under a judicial order passed for which Government is not liable. Besides, there was no contract in view of section 175(3) of Government of India Act. The case was one of tort.[4]

Hire purchase Agreements.—The contract of hiring, under the Common Law, is one of the species of a contract of bailment and has undergone a series of refinements as a result of modern industrial and commercial refinements, e.g. a hire purchase.[5] A modern hire purchase agreement is bailment with an element of sale and is not bailment *simpliciter*.[6] In *Damodar Valley Corporation case,* [7] for the purposes of determining whether a particular contract is a contract of hire or of hire-purchase, the following tests were laid down by the Supreme Court:

(1) Whether there is a binding obligation on the hirer to purchase the goods;

(2) Whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If such a right is reserved, then there is no contract of sale.

The Supreme Cout observed in that case:[8]

"It is well settled that a mere contract of hiring, without more, is a species of the contract of bailment, which does not create a title in the bailee, but the law of hire purchase has undergone considerable development during the last half a century or more and has introduced a number of variations, thus leading to categories, and it becomes a question of some nicety as to which category a particular contract between the parties comes under. Ordinarily, a contract of hire purchase confers no title on the hirer, but a mere option to purchase on fulfilment of certain conditions. But a contract of hire purchase may also provide for the agreement of purchase the thing hired by deferred payments subject to the condition that title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire purchase depending upon the terms agreed between the parties."[9]

Hire purchase agreements are movable property and also documents of title. When such documents are delivered to a creditor with a declaration that the creditor can retain them with a lien against repayment of the debt they are to be treated as agreements to pledge moveable property.[10] Under a hire purchase agreement a farmer acquired 84 ewes from a finance company. Lanks bred by the hirer during the period of the agreement of hire purchase were held to belong to the hirer and not the finance company.[11] After a hire purchase agreement has been entered into, both the owner and the hirer possess two sets of rights each. In the owner are vested his rights under the contract and the right of reversion in the goods subject to the agreement. In the hirer are vested two rights, namely, the benefit of hiring, i.e. the bailment part of the contract and the option to purchase. The rights vested in both the parties are capable of independent assignment. In a lawful assignment of the benefit of hiring, the assignee becomes a trustee for the hirer and it is his duty to protect the goods. Such a fiduciary relationship need not be in writing, an oral declaration being enough.[12] If the assignee allows the owner to seize the goods and also purchase them himself without disclaiming the trust he is liable for the loss sustained by the hirer even where the assignee sells to third parties.[12]

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4 *Mohamad Murad* v. *U.P. Government* (1956) A.A. 75; (1957) 1 All 94; But see *State of Gujarat* v. *Memon Mohammad,* 3 S.C.R. 938 (1967) A.S.C. 1885, where bailment was held to be possible *dehors* the Act.

5 *Instalment Supply (Pt.) Ltd.* v. *Union of India* (1962) 2 S.C.R. 644; (1962) A.S.C. 53 *(per* Sinha C.J.); *Damodar Valley Corporation* v. *State of Bihar* (1961) 2 S.C.R. 522; (1961) A.S.C. 440.

6 *Instalment Supply (Pt.) Co. Ltd.* v. *Union of India* (1962) 2 S.C.R. 644; (1962) A.S.C. 53; *Tirathraj Pandey* v. *Amar Credit Corpn.,* 72 C.W.N. 243; *Karflex Ltd.* v. *Poole* (1933) 2 K.B. 251; (1933) All E.R. Rep. 46. Halsbury's Laws of England, (3rd Edn.), Vol. 19, pp. 510-511.

7 *Damodar Valley Corporation* v. *The State of Bihar* (1961) 2 S.C.R. 522; (1961) A.SC. 440. See *Helby* v. *Matthews & others* (1895) A.C. 471.

8 *Ibid.* p. 535.

9 Relied upon in *Enayatullah* v. *Jalan T. Co.* (1965) A.P. 214.

10 *Chief Controlling Revenue Authority* v. *Sundaram Finance (P.) Ltd.* (1966) A.M. 177; (1966) 1 Mad. 570 (F.B.).

11 *Tucker* v. *Farm & General Investment Trust* (1966) 1 All E.R. 1241.

12 *D.E. Kasisah* v. *N.T. Engineer* (1964) 2 Mad. 853; 1965 AM. 257. R.M. Goode: Hire-Purchase Law and Practice, p. 255 (5th Ed.) refd. to.

A hirer handed over the management of a Cinema House and equipment to the defendant who undertook to pay the instalments of the hire to the owner and also to pay the rent of the premises. But the defendant committed default in payments. The cinema machinery was then seized by the owner in collusion with the defendant and sold to the defendant who then sold it to a third party. The plaintiff brought a suit for loss incurred by him as a consequence of defendant's default and this was assessed at the amount the hirer had paid to the owner by way of instalments.[12]

Hire purchase of cars: conversion—Auctioneers liability.—A hirer agreed to pay the hire by way of monthly instalments till the full amount was paid and purchase effected. In case of default the owner could give notice and terminate the agreement and till the full amount of the hire was paid the car's ownership was in the owners. The hirer sold the car through the defendants, a firm of auctioners. The owner on coming to know of it brought an action for damages claiming the amount the car was sold for. Previously the owner had given notice of default. The trial judge held in favour of the owner. On appeal it was urged that (i) the defendant auctioneer could not be guilty of conversion and (ii) at any rate the owner could enter into possession under the agreement after notice of default and as sale had taken place before, the action was not maintainable.

The court of Appeal held that (i) on the facts it was, not open to the auctioneer defendant that he was not guilty of conversion[13]; and (ii) the clause in the agreement of taking possession of the car after notice of default was in addition to the common law right of terminating the bailment without notice if the hirer acted in a manner repugnant to the terms of the agreement.[14]

Delivery to bailee how made.

149. The delivery of the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

Compare ss. 33, 34 of the Indian Sale of Goods Act, 1930.

The bailor's part need not be very active. Mere assent, for example, of a guest at a place of public entertainment to a servant's officious assumption of custody may be sufficient evidence of delivery to make the proprietor of the house a bailees and responsible for loss.[15] To constitute bailment all that has to be proved is delivery, e.g. to a Railway. No formalities are necessary, if actual delivery has been made and the Railway servant has assented to take delivery, bailment is constituted.[16] The railway authorities were held liable as bailees where cotton was stacked on a station platform, with the consent of the station-master, no wagon being available, and was set on fire three days later by a spark from a passing train.[17] Having regard to the course of dealing of a railway company, the mere fact that a loading clerk in the employ of a railway company filled up a forwarding note and marked a number on it has been held not to amount to delivery of goods to the company within the meaning of this section. It was further necessary that a number corresponding to the number of the forwarding note should be marked on the goods by a railway official.[18] A lady employed a goldsmith for the purpose of melting old jewellery and making new jewels. Every evening she used to receive the half-made jewels from the goldsmith and put them into a box which was left in a room in the goldsmith's house, of which she retained the key. It was held that there was a redelivery of the

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13 *Union Transport Finance Ltd.* v. *British Car Auctioneers* (1978) 2 All E.R. 385, 387, 391, 392; *Hollins* v. *Fowler* (1874-80) All E.R. Rep. 118 applied.

14 *Union Transport Finance Ltd.* v. *British Car Auctioneers* (1978) 2 All E.R. 383, 390-391; *North Central Wagon & Finance Co. Ltd.* v. *Graham* (1950) 1 All E.R. 780 applied.

15 *Ultzen* v. *Nicols* (1894) 1 Q.B. 92, which really decides very little.

16 *Dhanraja Aggarwala* v. *Union of India,* (1958) A.Asm. 5; (1959) 9 Assam 290; *Governor-General in Council* v. *Jubilee Mills Ltd.* (1953) A.B. 46; (1953) Bom. 242.

17 *Governor-General of India in Council* v. *Jubilee Mills,* 1953 A.B. 46.

18 *Lachmi Narain* v. *B.B. & C.I. Railway* (1923) 45 All. 235; 74 I.C. 248; 1923 A.A. 449.

jewels to the lady and that they were not in the possession of the goldsmith when during one night they were stolen.[19]

A bailor, holding possession of the goods pledged on behalf of the bailee, e.g. in trust for the latter, being constructive delivery constitutes a valid bailment.[20] There is no bailment where elephants with mohuts are hired on a daily basis. The fact that the mohuts worked under the direction of the hirers would not affect the relationship. The hirer would not be liable for loss of elephants or for loss of hire charges or for cost of searching for the missing elephants.[21]

Contravention of Gold Control.—A bailor cannot sue for the return of gold bailed in contravention of the Australian National Security (Exchange Control) Regulation, the bailment being illegal.[22]

Bailor's duty to disclose faults in goods bailed.

150. The bailor is bound to disclose to the bailee defaults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them,[23] or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury. (*Hyman* v. *Nye* (1881) 6 Q.B.D. 685 confirms this.)

There is no doubt that such is the Common Law, though there is not much positive authority. The rule of Roman Law is that if a man knowingly lends his neighbour foul or leaky vessels, whereby the wine or oil put into them perishes or is lost, he is liable for the damage;[24] and this was approved in a modern case by the Court of Queen's Bench, though it was decided that the plaintiff, on the facts, represented a person who was not a party to a contract of loan for use, or any contract at all, with the defendants. The case of Illustration (a) is put by the Court and treated as clear.

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19 *Kaliaperumal* v. *Visalakshi*, 1938 A.M. 32; 175 I.C. 343.

20 *Bank of Chittoor Ltd.* v. *Doraiswami Ayyar* (1966) A.A.P. 163.

21 *Surendra Nath* v. *Kali Kumar* (1956) A.Asm. 55; (1956) 8 Assam 7.

22 *Thomas Brown & Sons Ltd.* v. *Fazal Deen* (1962) 108 C.L.R. 391; (1962) A.L.J.R. 229, 236; *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (1945) 1 K.B. 65, 71; (1944) 2 All E.R. 579 dist.

23 These words seem to cover the case of a bailment for hire 'where it is found that the article is not fit to be used for the purpose for which it is hired," notwithstanding that apparently the Bombay High Court has assumed the contrary: *Issufalli Hassanally* v. *Ibrahim Dajibhai* (1920) 45 Bom. 1017, 1019; 61 I.C. 507. In the English case of *Hyman* v. *Nye* (1881) 6 Q.B.D. 685, the bailor's duty is laid down, by Lindley J., as being "to supply a carriage" (or, of course, as the case may be) "as fit for the purpose for which it is hired as care and skill can render it." The Bombay decision, however, that on the ground of breach of implied warranty the bailee not only need not pay the hire, but is dispensed from any active duty as to returning the goods, really belongs to s. 160, below. As the arguments are not reported, one cannot see how the case was presented to the Court or what sections of the Act were referred to.

24 D. 13, 6, 18 § 3 (Gaius).

But in another case

In an agreement for hire of a crane the hirer accepted responsibility for all damage "arising directly or indirectly out of or in connection with ... use of the ... crane". Injury was caused to a docker while unloading timber due to negligence of the capstan driver employed by owners and the crane driver's attempt to move timber away from the docker.

This was held to fall within the clause of indemnity, and the hirer was held liable to indemnify the owners in a third party proceedings.[46]

Care to be taken by bailee.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances,[47] take of his own goods of the same bulk, quality and value as the goods bailed.

This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established by the judgment of Holt C.J. in *Coggs* v. *Bernard.*[48] The Privy Council has laid down the duty of a bailee for reward in English law as being 'to exercise the same degree of care towards the preservation of the goods entrusted to him from injury which might reasonably be expected from a skilled storekeeper, acquainted with the risk to be apprehended either from the character of the storehouse itself or of its locality'.[49] English law is not so clear as to the standard of care to be expected from a gratuitous bailee. In *Coggs* v. *Bernard,* Holt C.J., following Roman law, drew a distinction between mandate, where the duty was to use reasonable care,[50] and deposit where there was no liability except for gross negligence.[51] The balance of English judicial opinion is in favour of the view that the duty of a gratuitous bailee is to use reasonable care whether in mandate or in deposit.[52] This assimilates the duty of a gratuitous bailee to that of a bailee for reward. It has, however, sometimes been held that there is liability only for gross negligence,[53] or for failure to show such skill as the profession of the bailor implies.[54] It is clearly not sufficient for a gratuitous bailee to show the same care as he bestows upon his own goods.[55] The learned authors expressed the view that according to modern English law a gratuitous bailee is bound to take the same care of property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description.[56] This is an objec-

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46 *Wright* v. *Tyne Improvement Commissioners* (1968) 1 W.L.R. 336; (1967) 2 L1 Rep. 411 revd.

47 Similar to those of the particular case, not necessarily to the proved or assumed average circumstances of the bailee's business in matters of that class; *Bengal N.W.R Co.* v. *Bansidhar* (1925) 1 Luck. 106; 92 I.C. 603; 1926 A.O. 218. In *Shanti Lal* v. *Tara Chand,* 1933 A.A. 158; 142 I.C. 691, a bailee of grain was held not liable for the damage caused by a flood the appearance of which was described as "unknown and unprecedented in the annals of Agra."

48 (1703) 2 Ld. Raym. 909; 1 Sm. L.C. 175.

49 *Brabant & Co.* v. *The King* (1895) A.C. 632, 640 (appeal from Queensland).

50 2 Lord Raym. 909, 918; 92 E.R. 107, 113; *Swire* v. *Leach* (1865) 18 C.B.N.S. 479; (1861-73) All E.R. Rep. 768 refd. to in *The Winkfield* (1902) P. 42, 60; (1900-3) All E.R. Rep. 346.

51 2 Lord Raym. 909, 913; 92 E.R. 107, 110.

52 At least the Privy Council has so held in *Commonwealth Portland Cement Co.* v. *Weber* (1905) A.C. 66 (mandate—appeal from New South Wales), and *Giblin* v. *McMullen* (1868) L.R. 2 P.C. 317 (deposit—appeal from Victoria). See also the deposit cases of *Blount* v. *War Office* (1953) 1 W.L.R. 736, 739; *Turner* v. *Merrylees* (1892) 8 T.L.R. 695; and *Ronneberg* v. *Falkland Islands Co.* (1864) 17 C.B. (N.S.) 1, 144 E.R. 1, where the test of reasonable care is laid down.

53 *Shiells* v. *Blackburne* (1789) 1 H.B1. 158 (mandate); *Beauchamp* v. *Powley* (1831) 1 M. & R. 38 (mandate); *Doorman* v. *Jenkins* (1834) 2 Ad. & E. 256, 111 E.R. 99 (deposit).

54 *Shiells* v. *Blackburne, ibid.,* at p. 162 *per* Lord Loughborough, at p. 161 *per* Heath J.; *Wilson* v. *Brett* (1843) 11 M. & W. 113, 115, 152 E.R. 737, 738, *per* Parke B.

55 *Doorman* v. *Jenkins* (1834) 2 Ad. & E. 256, 111 E.R. 99. *Contra Jones* v. *Lewis* (1751) 2 Ves. Sen. 240, 28 E.R. 155.

56 Relying on *Giblin* v. *McMullen* (1868) L.R. 2 P.C. 317, 339.

tive standard similar to that of reasonable care, and was applied to India in *Munnalal Pansari* v. *Ganga Prasad:* [57]When goods are destroyed by a riotous mob, the bailee is not responsible for the loss.[58]

A special and higher responsibility, not being part of the ordinary law of bailment at all, was imposed by the law of England upon common carriers and innkeepers.[59] How far this remains unaffected by the Contract Act in India must be separately considered.

Common carriers.—The provisions of ss. 151 and 152 of the Contract Act embody in effect the Common Law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods; in other words, the liability was one for *negligence* only, in the absence of special contract. Common carriers[60] and innkeepers, on the other hand, were liable as insurers of goods; that is, they were responsible for every injury to the goods occasioned by *any means whatever,* except only the act of God and the King's enemies. Therefore the mere proof of delivery of goods and injury thereto, unless caused by the act of God or the King's enemies, was sufficient to entitle the plaintiff to compensation without proof of negligence on the part of the defendant.[61] These principles of the English Common Law applied in India,[62] but they were subsequently modified by legislation as respects common carriers, and the Carriers Act, 1865 now enables a bailee of this class to limit his liability by special contract in the case of certain goods, but not so as to get rid of liability for negligence.[63] The question whether the liability of common carriers was still further reduced by the enactment of ss. 151 and 152 of the Contract Act, so as to render them liable for negligence only as in the case of other baileees, came up before the High Court of Bombay in 1878. That Court held that the definition of "bailment" in s. 148 was large enough to include bailment for carriage,[64] and that the provisions of those sections, therefore, applied to common carriers, so as to supersede altogether the stringent rule of the English Common law.[65] The High Court of Calcutta, on the other hand, held in a subsequent case that the liability of common carriers was not affected by the Contract Act.[66] The same point arose before the Privy Council in an appeal from the Court of the Recorder of Rangoon, where it was held, approving the Calcutta decision, that the duties and liabilities of a common carrier in India are governed by the principles of the English Common Law in conjunction with the provisions of the Carriers Act and that, notwithstanding some general expressions in the chapter on Bailments, the responsibility of a common carrier is not within the Contract Act.[67] The decision proceeded on the grounds (1) that, if the liability of a common carrier was governed by ss. 151 and 152 of the Contract Act, the provisions of ss. 6 and 8 of the Carriers Act would be rendered *nugatory* , though s. 1 of the Contract Act declares that nothing in that

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57 A.I.R. 1955 V.P. 30.

58 *Sunder Lal* v. *Ram Sarup,* 1952 A.A. 205; *Jusaf & Ismail Co.* v. *Governor-General in Council* (1947) Nag. 335, 1948 A.N. 65, 231 I.C. 185.

59 It would be useless for Indian purposes to speak of the later modifications introduced by statutes.

60 "Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately: Carriers Act, 1865, s. 2.

61 Carriers of passengers are not liable as insurers so as to render them liable under all circumstances for not carrying the passengers safely. Their duty is to exercise reasonable care and diligence, and they cannot, therefore, be held responsible except for neglect of that duty; *East Indian Ry. Co.* v. *Kalidas* (1901) 28 I.A.. 144; 28 Cal. 401.

62 *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 I.A. 121, 125; 18 Cal. 620, 625; *Whateley* v. *Palanji* (1866) 3 B.H.C.O.C. 137.

63 Ss. 6 and 8.

64 The only section in which bailment for the purpose of carriage is mentioned is s. 158. That section, however, deals merely with gratuitous bailments.

65 *Kuverji* v. *G.I.P Ry. Co.* (1878) 3 Bom. 109.

66 *Moothora Kant* v. *I.G.S.N. Co.* (1883) 10 Cal. 166.

67 *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 I.A. 121; 18 Cal. 620; *Orient Ship Supply Co.* v. *Kalamarsand Co.,* 1951 A.T.C. 1; See *Canara Banking & Syndicate Bank Ltd.* v. *Ramachandra* (1968) A.Mys. 133 (a public carrier a transport company not liable for non-delivery to the endorsee—a bank.)

Act contained shall *affect* the provisions of any Act not thereby "expressly repealed," and the Carriers Act is not one of the Acts so repealed; (2) that at the date of the Contract Act the law in force in British India relating to common carriers was partly written, being the Carriers Act, and partly unwritten, being the English Common Law which together formed a code at once simple, intelligible, and complete, and that, had it been intended to codify the law of common carriers by the Contract Act, the more usual course would have been to repeal the Carriers Act and to re-enact its provisions, instead of sweeping away the common law by a side wind and leaving the law on the subject to be gathered from two Acts; and (3) that the mere fact that the Contract Act treats of bailments in a separate chapter, and that the definition of bailment is wide enough to include bailment for carriage, does not show any intention to abrogate the common law rule, for the Act, as appears from the preamble thereto, does not purport to do more than to define and amend certain parts of the law relating to contracts.[68] The result is that the rights and liabilities of common carriers are outside the Indian Contract Act, and they are governed by the principles of English law as modified by the Carriers Act of 1865.[69] The written law relating to that liability is not touched by the Act; the unwritten law is not within its scope.[70] And therefore an exemption clause cannot be tested with reference to S. 23 of the Contract Act.[71]

Under S. 9 of the Carriers Act, the liability for any short delivery, non-delivery or any damage to the goods carried through a common carrier, is of the common carrier in spite of any terms and conditions in the consignment note to the contrary. The onus of negligence is not on the consignor but on the common carrier has to relent the presumption, it being rebuttable.[72]

Damages.—The defendant a meat haulage company carried under a special contract pork carcases from Ireland to Switzerland. When the goods arrived at the destination they were found to have been damaged and unfit for human consumption. The consignees brought a suit for damages against the haulage company. The trial judge found that there were some steps necessary to be taken, which had not been taken but they could not be specified. The claim was decreed. On appeal it was held that the judge's finding as to cause of the loss could not be challenged and the appeal was dismissed.[73]

Goods lost during carriage in U.K.—The plaintiffs sold whisky to a firm in Iran. The whisky was taken out of the bonded warehouse and carried by road but, due to the negligence of the carrier, was lost in the way. The seller had to pay excise duty as the goods were lost in U.K. It was held that the compensation payable was the price of the whisky in the bonded warehouse plus the excise duty levied paid.[74]

Carriers by sea for hire are not common carriers within the meaning of the Carriers Act III of 1865.[75] There is a conflict of decisions as to the liability of such carriers being governed

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68 *British and Foreign Marine Insurance Co.* v. *India General Navigation and Railway Co.* (1910) 38 Cal. 28; 9 I.C. 364; *Moothoora Kant Shaw* v. *Indian General Steam Navigation Co.*, 10 Cal. 166. As to railways, see paragraph below.

69 *Indian Airlines Corporation* v. *Smt. Madhuri Chaudhari* (1965) A.Cal. 252.

70 *Irrawaddy Flotilla Co.* v. *Bugwandas,* 18 I.A. 121, 129; 18 Cal. 620, 628.

71 *Indian Airlines Corporation* v. *Sm. Madhuri Chaudhari* (1965) A.Cal. 252 (Case of carriers by air).

72 *Road Transport Corporation Ltd.* v. *Kirloskar Brothers Ltd.* (1981) A.B. 299, 304.

73 *Ulster-Swift Ltd.* v. *Taunton Meat Haulage Ltd.* (1977) 3 All E.R. 641, 649, 650 (C.A.); *Smith Hogg & Co.* v. *Sea & Baltic Insurance* (1939) 2 All E.R. at 857, *Riverstone Meat Co. Ltd.* v. *Lancashire Shipping Co. Ltd.* (1961) 1 All E.R. 502; *Hughland* v. *R.R. Low (Luxury Coaches) Ltd.* (1962) 1 All E.R. 623 applied; *James Buchanan & Co. Ltd.* v. *Babco Forwarding & Shipping Co.* (1977) 1 All E.R. 518 folld.

74 *James Buchanan & Co. Ltd.* v. *Babco Forwarding & Shipping (UK) Ltd.* (1977) 1 All E.R. 518, 523, 524 appld. by H.L. for other reasons (1977) 3 All E.R. 1048.

75 *Kumber* v. *The B.I.S.N. Co.* (1913) 38 Mad. 941; 20 I.C. 549; *Boggiano & Co.* v. *The Arab Steamers Co. Ltd.* (1916) 40 Bom. 529, 535-536; 33 I.C. 536. See Carriers Act, of 1865, s. 2, which defines a common carrier. But carriers by inland navigation or by river steamers are common carriers; see *India General Steam Navigation Co.* v. *Bhagwan Chandra Pal* (1913) 40 Cal. 716, 718; *Dekhari Tea Co.* v. *Assam Bengal Railway Co.* (1920) 47 Cal. 6; 57 I.C. 406; *India General Navigation and Railway Company* v. *Eastern Assam Railway Co.* (1920) 47 Cal. 1027; 61 I.C. 14.

by the Common Law of England or the provisions of ss. 151 and 152 of this Act. The High Court of Calcutta has held that a foreign company (which in that case was a French company) are not common carriers in the ordinary English sense of the word, and that if the contract of affreightment is made in British India (as in that Calcutta case), their liability is governed by the provisions of ss. 150 and 151.[76] On the other hand, the High Court of Madras held in a case in which the same company were defendants and the contract of affreightment was also made in Calcutta, that the company were none the less common carriers because they were a foreign company, and that the liability of the company was governed by the common law of England, and not by the provisions of this section.

"The contract," said the Court, "was made at Calcutta, and whatever the nationality of the defendants or their ship, the law applicable to them is the *lex loci contractus. The lex loci* is the law of England; the defendants are therefore in our opinion common carriers, and the English law as to common carriers applies to them".[77]

It is submitted however that the above decisions do not give sufficient weight to the rule which now prevails in the English Courts, that the proper law of a contract of affreightment is the law by which the parties intended that their contract should be governed. This is the general principle, but it admits, as general principles usually do, of more than one exception. It may often be difficult to ascertain what the intention of the parties in fact was; and in that case it was presumed to be the law of the ship's flag. The law of the ship's flag will nevertheless be excluded if there is anything in the terms or purposes of the contract which indicates a contrary intention of the parties; and in any event there may be particular incidents of the contract where the presumption is that the law of a particular country is to apply. This is especially the case where the shipment is made in one country and the goods are to be discharged in another; or where the contract is a through contract, involving the laws of several countries in the course of the ship's voyage. "The rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed, to have bound themselves:" Willes J. delivering the judgment of the Exchequer Chamber in *Lloyd* v. *Guibert*.[78] Where the parties have expressly contracted to be bound by the provisions of the Indian Carriage of Goods Act, 1925, the rights of the parties are governed by the terms of that Act.[79] It may well be that in the absence of any contrary intention, a shipowner carrying goods from Calcutta to Madras can be presumed to contract with reference to the Indian Contract Act; but it by no means follows that the presumption is the same if the goods are to be carried to London or New York. The subject is however too special for detailed consideration in this place and reference should be made to Dicey, Conflict of Laws, Chap. 27 (8th ed.) and Carver, Carriage by Sea (11th ed., 1963), Chap. IX, "Effect of Foreign Laws."

Ship-owner—duty of cargo:—A ship-owner was under a duty and entitled to carry the cargo to the port of destination in order to earn his freight and he was entitled to remain in possession of the cargo himself or through his sub bailee until the voyage was frustrated or abandoned. Accordingly a salvor took possession of the cargo under a salvage agreement was

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76 *Mackillican* v. *Compagnie des Messageries Maritimes de France* (1880) 6 Cal. 227.

77 *Haji Ismail Sait* v. *The Company of the Messageries Maritimes of France* (1905) 28 Mad. 400. The suit was against the company for damage caused to the goods by landing them in rain and it was held that, though the act amounted to negligence on the company's part, they were exempted from liability by a clause in the bill of lading which provided that the company should not be liable for the negligence of its servants. *Kumber* v. *The B.I.S.N. Co.* (1913) 38 Mad. 941; 20 I.C. 546; *Malappa Chettiar* v. *The B.I.S.N. Co.* (1917) 34 Mad. L.J. 553, 557; 45 I.C. 485. See "Law applicable" under s. 1.

78 (1865) L.R. 1 Q.B. 115, at p. 123, where the law of the ship's flag was adopted. Other cases which may usefully be referred to are *Chartered Bank of India* v. *Netherlands S.N. Co.* (1883) 10 Q.B.D. 521; *Jacobs* v. *Credit Lyonnais* (1884) 12 Q.B.D. 589; *In re Missouri S.S. Co.* (1889) 42 Ch.D. 321; *The Industrie* (1894) P. 58; *Standard Oil Co.* v. *Clan Line* (1924) A.C. 100. The subject is often complicated by the provisions contained in laws like the United States Harter Act, 1893, or the English Carriage of Goods by Sea Act, 1924, which put statutory restrictions on shipowners seeking to limit their liability for negligence in their contracts of affreightment. See "Law applicable" under s. 1.

79 *Western India Prospecting Syndicate Ltd.* v. *Bombay Steam Navigation Co. Ltd.*, 1951 A.Sau. 83. See also *Orient Ship Supply Co.* v. *Kalamarsand Co.*, 1951 A.T.C. 1.

to deliver the cargo to the shipowners. His obligation terminated when the cargo or a part thereof was brought to a place of safety. But where there was no evidence of refusal of the shipowner or of a notice to the cargo owners the primary duty for the preservation of the cargo remained of the shipowners (pp. 561-562).[80]

Damages and rejection—right to.—A German Company agreed to supply a Dutch Company a quantity of citrus puffs pellets in a number of consignments. The contract stipulated that shipment was "to be made in good conditon". Part of the consignment was found to be damaged by overheating. The buyer rejected the entire cargo partly as it was not in good condition.

The term in the contract that shipment was "to be made in good condition" was not a condition; any breach of which gave a right to reject the goods, but it was an "intermediate" term which would give a right to reject if it went to the root of the contract.

And secondly as the whole cargo was in the event used by the buyers as cattlefeed (by using small amounts of it mixed with sound pellets) the breach did not go to the root of the contract. The buyers were, though not entitled to reject were entitled to damages—the difference between sound goods and those actually delivered.[81]

Carriage by sea and by land—Analogy—To apply the analogy of carriage of goods by sea to the case of a non-common carrier of goods by land is dangerous as no such duty as in the case of carriage by sea has been imposed in the case of carriage of goods by land.[82] The obligation of a carrier by sea does not cease on the goods being free of ships' tackle and a clause in the bill of lading will not exempt him unless there is custom of the port. This case, it is submitted, must be confined to its own facts.[83]

Carriers by Railway.—The liability of carriers by railway is now governed by the Indian Railways Act, 1890. S . 72 of that Act provides that the responsibility of a railway administration[84] for injury to goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of a bailee under ss. 151, 152, and 161 of the Contract Act,[85] and that it shall not be affected by a special agreement between the parties, provided that it may be limited by a special agreement between the parties, provided that it is in writing by or on behalf of the person sending the goods and is otherwise in a form approved by the Governor-General in Council. Several railway companies, now The Railway Administration, in India have accordingly issued what is called "the risk note" in a form approved by the Governor-General in Council, now The Central Government, which is used when the sender elects to despatch at a "special reduced" or "owner's risk" rate articles for which an alternative "ordinary" or "railway risk" rate is quoted in the tariff. The "risk note" provides that, in consideration of the railway company carrying the goods at a special reduced rate, they shall be exempted by the sender from liability for loss or damage to the goods from any cause whatever

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80 *China Pacific S.A.* v. *Food Corporation of India* (1980) 3 All E.R. 556, 561-2.

81 *Cehave N.V.* v. *Bremer Handelsgesellschaft* (1976) 1 Q.B. 44; (1975) 3 All E.R. 739; (1975) 3 WLR 447; *Hong Kong Fir Shipping Co.* v. *Kawaroki Kisen Keasha* (1962) 2 Q.B. 26 appld. But see *The Mihalis Angelos* (1971) 1 Q.B. 164: Also *Wickan Machine Tools Co.* v. *L. Schulzer* (1974) A.C. 264.

82 *John Carter Ltd.* v. *Hanson Haulage Ltd.* (1965) 2 W.L.R. 553, 572.

83 *Goverdhandas* v. *New Dholera Steamships Ltd.* (1965) A.Ker. 51; (1964) 1 Ker. 607.

84 "Railway administration" in the case of a railway administered by the Government means the manager of the railway, and includes the Government and, in the case of a railway administered by a railway company, means the railway company: s. 3, Cl. 6, of the Indian Railways Act.

85 From the omission of s. 160 of the Contract Act from s. 72, it cannot be inferred that the railway administration is not responsible for non-delivery of goods: the obligation to return or deliver is implied in the contract of carriage: *Babu Lal* v. *Dominion of India,* 1953 A. Punj. 184 (F.B.) In *Secy. of State* v. *Bhagwan Das* (1927) 49 All. 889; 102 I.C. 440; 1927 A.A. 371, the Contract Act appears to have been inadvertently treated as directly applicable, but this did not affect the result. We may mention here that cases turning merely on the construction of risk notes and matters of evidence as applicable thereto are purposely not cited, as not being relevant to the general law of contract; (1960) A.S.C. 233.

before, during, or after transit over the railway or other railways working in connection therewith. Such a note signed by the sender constitutes a special contract within the meaning of s. 72,and a railway company cannot, therefore, be rendered liable on such a note, whatever may be the cause of injury to the goods.[86] The Patna High Court has held however that the booking of goods on railway risk is a special condition of booking; Section 152 is not applicable. Therefore in the absence of unavoidable accident or *vis major* the railway is liable to the bailor for delivery of the articles booked or bailed.[87] Where, however, there was no contract to the contrary, it was held that a passenger whose luggage deposited in the cloak-room was lost was entitled to the entire value of the goods, but not to any consequential damages.[88]

When goods are entrusted to railways for carriage it has to take such care as is provided in s. 151, Contract Act. The onus on the Railway to show that it had taken such care and if that onus is discharged the onus shifts to the plaintiff to show negligence.[89] And the fact that s. 160, Contract Act, is not mentioned in the Railway Receipt (for return of goods) makes no difference to the liability. If there is any discrepancy in documents, the Railways has to explain.[90]

Goods at Railway risk.—Where goods are booked at Railway risk and there is destruction of goods by fire *en route,* it is for the Railways to show reasonable care all through. The principle of *res ipsa loquitar* & s. 114(3) Evidence Act apply.[91]

Railed goods destroyed under Court Orders.—An oil wagon of mustard oil was sent from Kanpur to Calcutta under Risk Note 2. On its arrival at Calcutta the consignee requested the Railway authorities to rebook it to Kanpur but in the meanwhile the oil was seized by lawful authority of the Calcutta Corporation and the oil was destroyed under the orders of the Calcutta High Court as adulterated mustard oil. The tank wagon reached Calcutta with seals in tact and when the request for redispatch of the tank wagon was made no Railway Receipt was presented. The Supreme Court held that the bailee is not responsible to the bailor if the goods are taken from him by authority of law exercised through regular and valid procedure.

Even under the general law the Railway Administration cannot in the circumstances be held liable when there is no misconduct proved and the goods were seized by superior authority.[92]

The Railway was held not guilty of negligence and therefore not liable for damages for loss by fire where the facts were these: The goods—bales of cottonware unloaded from the wagons by the consignee's agents and were stacked outside the Railway sheds as they were stuffed with the consignee's goods. They were guarded by the consignee's watchmen and the Railway Protection staff also were on duty. In spite of demands of the Railways asking the consignees to take delivery, they were left for 13 days on the Railway outside the sheds and were destroyed by fire in spite of the Railway staff's efforts to extinguish the fire.[93]

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86 *Hippanna* v. *Southern Maratha Ry. Co.* (1892) 17 Bom. 417; *Balaram* v. *Southern Maratha Ry. Co.* (1894) 19 Bom. 159; *East India Ry. Co.* v. *Bunyad Ali* (1895) 18 All. 42; *Toonya Ram* v. *East India Ry. Co.* (1902) 30 Cal. 257. See also *Jalim Singh* v. *Secretary of State* (1904) 31 Cal. 951; *Ladhu* v. *S.P. & D. Railway* (1886) Punj. Rec. no. 97; *Arunachellam* v. *Madras Railway Co.* (1909) 33 Mad. 120; *Narain* v. *E.I. Railway Co.* (1912) 34 All. 656; 16 I.C. 369; *East India Ry. Co.* v. *Nilkanta Roy* (1914) 41 Cal. 576; 22 I.C. 679; *East India Railway Co.* v. *Shiv Prosad* (1912) 17 C.W.N. 529; 18 I.C. 216; *Rohilkhand & Kumaun Ry.* v. *Ismail Khan* (1915) 13 All. L.J. 417; 29 I.C. 207; *East Indian Railway Co.* v. *Kanak Behari* (1917-1918) 22 C.W.N. 622; 44 I.C. 691; *Governor-General of India in Council* v. *Jesraj Tilokchand,* 1950 A.Ass. 175.

87 *Union of India* v. *Motilal* (1962) A.P. 384; 41 Pat. 621; *Kush Kanta* v. *Chandra Kanta,* 28 C.W.N. 1041; (1924) A.Cal. 1056; *Barwick* v. *Joint Stock Bank* (1867) 2 Ex. 259 referred to.

88 *H.K. Ray* v. *Governor-General of India in Council* (1949) 53 C.W.N. 406, 1949 A.Cal. 591.

89 *Union of India* v. *Lakshmi Rattan Cotton Mills Ltd.* (1971) A.A. 531, 534.

90 *Jugalkishore Devideen* v. *Murugan Ghee Supply Co.* (1973) A.M. 331.

91 *Union of India* v. *Sri Rajendra Mills Ltd.* (1971) A.M. 53, 55; (1970) 3 Mad. 138; *River Steam Navigation Co.* v. *Choutmull* 26 I.A.I. reld. on.

92 *Juggilal Kamlapat Oil Mills* v. *Union of India* (1976) 26 Knt. 711 at pp. 714, (1976) A.Sc. 227, Corpus Juris Secundum Vol. 8 p. 308 refd. to.

93 *Union of India* v. *United India Fire & General Insurance Ltd.* (1981) A.M. 162.

Delivery to wrong person.—Misdelivery of goods by the Railway in spite of its servants having acted with due care and caution is not negligence within section 151.[94] But where delivery is made without tallying the entries, it is negligence and the Railway will be liable for the loss to the owner.[95] But a bailee's liability does not extend to acts or negligence of third persons which could not by ordinary diligence have been foreseen. Indian Railway Administration is not therefore liable for loss caused by Pakistan Railway Administration or its servants when the wagon was on its journey through Pakistan.[96] Nor when goods are destroyed due to a riot or incendiarism of the populace which could not have been prevented.[97] But the Railway Administration must show that the missing goods were so looted and not lost due to misconduct of the Railway staff.[98]

Consignee's right of suit.—A consignee to whom the goods are sent by rail for sale on commission can maintain a suit in case of loss of goods in transit.[99]

In spite of s. 74-A Railway Act the Railway is bound to disclose how it dealt with a consignment during its tranist. And where the consignment is at Railway risk S.74-C (Railways Act) does not apply and if the consignment is carried by a defective wagon, the Railway will be responsible if the damage is not done during loading and unloading.[1]

Responsibility of Railways and Airways.—The responsibility of the Railway under section 72 of the Railways Act is that of a bailee and now under section 74A of the Railways Act the onus is on the Railways to show want of negligence.[2] In the absence of evidence of the extent of precaution taken by the Police Protection Force, the Railway is liable for loss of goods in transit. If the Protection Force does not move out of the guards' van to keep an eye on the wagons when the train stops at a Railway Station or at any other place, the liability of the Railway for loss arises.[3] This liability for want of care of goods entrusted to it applies also in the case of goods sent in open wagons.[4] When the Railway agrees to give open delivery, it is still liable as bailee for loss due to negligence if in the meantime the goods are destroyed by fire.[5] Failure to put locks on wagons amounts to wilful neglect on the part of the Railway; its liability being that of a bailee.[6] The obligation imposed on a common carrier is a duty cast by reason of his exercising public employment for reward and is not founded on contract and therefore Contract Act does not apply.[7]

The Indian Airlines Corporation is a common carrier as opposed to a private carrier, but it is not a "common carrier" withing the Carriers Act of 1865. The liability of the Corporation is governed by the English common law as administered in India and the Contract Act has no application. The Corporation can, therefore, exempt itself by special agreement of all

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94 *Mohamad Ekram* v. *Union of India* (1959) A.P. 337; 37 Pat. 1355; *Union of India* v. *F. Lakshminarain* (1963) A.Raj. 162; (1963) 13 Raj. 140.

95 *Bhairud Din* v. *Union of India* (1957) A. Cal. 573. (Bailor not required to follow or trace the goods) *Union of India* v. *F. Lakshminarain Harnarain* (1963) A.Raj. 162. (Goods delivered on a forged receipt).

96 *Cooch Behar Commercial Co.* v. *Union of India* (1960) A.Cal. 455.

97 *Union of India* v. *Ranganayakulu* (1964) A.A.P. 477; (1966) Andh. Pra. 431.

98 *Union of India* v. *Natabar Lal* (1963) A.Or. 66; (1962) Cut. 395.

99 *Union of India* v. *Lakshmi Rattan Cotton Mills Ltd.* (1971) A.A. 531; *Dominion of India* v. *Ganga Prasad Gopal Narain* (1956) A.A. 338 (F.B.).

1 *Baburam Kanhaiya Lal* v. *Union of India* (1974) All L.J. 912.

2 *Manickam Chettiar* v. *Union of India* (1960) A.M. 149; (1959) 2 M.L.J. 365; *Union of India* v. *Madho Ram & Sons* (1963) 2 S.C.R. 702; (1963) A.SC. 422; *Union of India* v. *Sri Rajendra Mills* (1971) A.M. 53.

3 *Union of India* v. *Madho Ram & Sons* (1963) 2 S.C.R. 702; (1963) A.S.C. 422.

4 *Kanakaiya Chetty* v. *Union of India* (1963) A.M. 394; (1964) 2 M.L.J. 329 on app. agt. (1961) A.M. 398 revd. (where it had been held that the Railway is not liable for large scale thefts by organised thieves).

5 *Union of India* v. *Subbaiah & Co.* (1963) A.A.P. 415.

6 *Union of India* v. *Bikanir Textiles* (1961) A. Raj. 211; (1960) 10 Raj. 1359.

7 *Indian Airlines Corporation* v. *Sm. Madhuri Chowdhari* (1965) A. Cal. 252; *Irrawaddy Flotilla Co.* v. *Bugwandas,* 18 I.A. 121, 129; 18 Cal. 620. 628.

liabilities including its liability for negligence.[8] This rule is applicable to carriage of goods, as the cases show, and it is also applicable *mutatis mutandis* in the case of carriage of passengers. The carrier is not precluded from making a special contract with passengers.[9] Such a clause does not fall under section 23, Contract Act.[10] In the case of carriage by air the provisions of the Fatal Accidents Act were held not applicable; nor does the Indian Carriage by Air Act, 1934, apply because it applies to international carriage by air; but the Central Government could by notification have applied it, but it had not done so. The Warsaw Convention also did not apply to internal carriage by Air unless applied by the Central Government. Its rules are not applicable on the ground of justice, equity and good conscience.[11]

Carriage by air—damage to baggage.—The plaintiff travelled by air—the carriage being internationaly, governed by the Warsaw & Hague Conventions. The plaintiff's baggage was damaged. The plaintiff's ticket incorporated a baggage check which contained a provision that in case of damage information must be lodged in writing forthwith after discovering the damage and at the latest within seven days from receipt. The plaintiff made a claim in respect of the damage to his suitcase and the articles lost. This was more than seven days later. The Airways admitted liability for the damage to the suitcase but rejected the claim for the articles lost. The Court of Appeal held that although the literal interpretation of the word "loss" was to be differentiated from the word "damage" that was not an appropriate method of interpretation of an international convention because the intention was to give prompt information to the Airlines, so that they could take steps to recover the articles lost. As the plaintiff had only made a complaint about damage to his suitcase in time and not of the loss of articles, the Airline was not responsible for the loss of the articles.[12]

Exemption clauses—A contract of exemption with the Airlines Corporation exempting it from liability for any loss or damage due to company's fault or carelessness or negligence of its staff binds the parties in the case of carriage by air. It gives immunity to the carrier corporation and is not hit by section 23 of the Contract Act.[13] In *Indian Airlines Corporation* v. *Madhuri Chaudhari* the Calcutta High Court held that a clause on an air carriage ticket exempting "any liability under the law ... from any cause whatsoever including negligence or default of pilots..." is good and valid and it legally excludes all liability for negligence and it cannot be held to be bad under section 23 of the Contract Act.[14] If a person by his contract during his lifetime excluded himself from the right to claim damages, his dependants cannot claim it under the Fatal Accidents Act. An exemption clause is therefore not hit by that Act.[15] Such an exemption clause cannot be severed from the rest of the contract.[16] In an earlier

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8 *National Tobacco Co. Ltd.* v. *Indian Airlines Corporation* (1961) A.Cal. 383; *Indian Airlines Corporation* v. *Keshav Lal Gandhi* (1962) A.Cal. 290; 65 C.W.N. 949; *Rukmanand* v. *Airways (India) Ltd.* A.I.R. 1960 A.Ass. 71; (1957) 9 Assam 443; *Air Carrying Corporation* v. *Shibendra* (1964) A.Cal. 396. Case confined to Presidency Towns. *Indian Airlines Corporation* v. *Jothaji Moni Ram* (1959) A.M. 285; All these cases are cases of carriage of goods. (1959) Mad. 439; *Indian Airlines Corporation* v. *Smt. Madhuri* (1965) A.Cal. 252.

9 *Ludditt* v. *Ginger Coote Airways Ltd.* (1947) A.C. 233, 245; (1947) 1 All E.R. 328 *(per* Lord Wright); *Indian Airlines Corporation* v. *Smt. Madhuri Chaudhari* (1965) A. Cal. 252, 261; Lord Haldane's dictum in *Grand Trunk Ry. Co.* v. *Robinson* (1915) A.C. 740, 747; (1915) A.P.C. 53, 55.

10 *Rukmanand Ajitsaria* v. *Airways (India) Ltd.* (1960) A.Assam 71; (1957) 9 Assam, 443; *Air Carrying Corporation* v. *Shibendra* (1964) A.Cal. 396; (A case confined to Presidency Towns): *Indian Airlines Corporation* v. *Smt. Madhuri Chaudhari* (1965) A. Cal. 252, 259-60.

11 *Indian Airlines* v. *Smt. Madhuri Chaudhari* (1965) A.Cal. 252, 264; *Indian Airlines Corporation* v. *Jothaji Maniram* (1959) A.M. 285; (1959) Mad. 439; See also *Indian Airlines Corporation* v. *Keshavlal Gandhi* (1962) A.Cal. 290; *Contra Mukul Dutta* v. *Indian Airlines Corporation* (1962) A.Cal. 311, 324 (section 23 applies and Aircraft Act of 1934 applies).

12 *Fothergill* v. *Monarch Air Lines Limited* (1980) 2 All E.R. 696, 702. Decision in (1979) 3 All E.R. 445 reversed.

13 *Indian Airlines Corporation* v. *Keshavlal Gandhi* (1962) A.Cal. 290, 294; *Indian Airlines Corporation* v. *Jothaii Maniram* (1959) A.M. 285; (1959) Mad. 439; *Indian Airlines Corporation* v. *Smt. Madhuri Chaudhari* (1965) A.Cal. 252, 266; *Contra Mukul Dutta Gupta* v. *Indian Airlines Corporation* (1962) A. Cal. 311; *Aggarwala Air Transport* v. *Mohammad Nasrutullah* (1959) A. Cal. 755.

14 (1965) A.Cal. 252, 261; *Mukul Dutta* v. *Indian Airlines Corporation* (1962) A.Cal. 311 not appd.

15 *Indian Airlines Corporation* v. *Smt. Madhuri Chaudhari* (1965) A. Cal. 259, 263-4.

16 *Indian Airlines Corporation* v. *Keshavlal Gandhi* (1962) A. Cal. 290; 65 C.W.N. 949.

Calcutta case the word "loss" in the exemption clause was interpreted as loss to the carrier and not to the consignor or the consignee as has been interpreted in cases relating to railways. Therefore, in order to claim exemption, the air company has to show of the goods from any cause whatsoever whether as a result of some fault of the pilot or some fault of the ground staff or by an act of nature.[17]

Innkeeper.—It has been held by the High Court of Allahabad that the liability of a *guest* in respect of *goods belonging to a hotel-keeper* and used by the guest is that of a bailee ss. 151 and 152 of this Act, so that the guest is not responsible for the loss, destruction, or deterioration of the furniture in his use if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own.[18] On the other hand, it was held by the Bombay High Court, in a case which arose six years before the date of the Contract Act, that the liability of a *hotel-keeper* in respect of *goods belonging to a guest* was governed by the Common Law of England.[19] According to that law, an innkeeper is liable for loss or damage of goods belonging to the guest, unless the loss or damage arises from the guest's negligence, the act of God or the King's enemies.[20] In the Bombay case, however, the hotel was in Bombay, the hotel-keeper was a Parsi, and the guest was as a European, and the decision was entirely confined to these facts, the Court declining to consider what the liability would have been if either of the parties was a Hindu or a Mahomedan. Again, it is not clear what the decision would have been if the case arose in the *Mufassal,* where the English Common Law had not been introduced. To us it appears that the liability of an innkeeper should be governed by the provisions of ss. 151 and 152. The case of an innkeeper is different from that of a common carrier: there is nothing to show that the Common Law rule as to the liability of an innkeeper has been recognised throughout India, as is the case with common carriers, and there is no Indian enactment relating to innkeepers similar to the Carriers Act, with which the provisions of ss. 151 and 152 if applied to innkeepers, could conflict.[21] This opinion is now supported by a decision of the Allahabad High Court.[22]

Duties of bailees.—Two duties of a bailee for reward to co-exist: to take reasonable care of his bailor's goods and not to convert them even by stealing by a third party[23] or not to intentionally do in relation to the goods, an act inconsistent with the bailor's right of property therein.[24]

Sub-bailee right of the owner, against.—A sub-bailee for reward owes to the owner all the duties of a bailee for reward. And the owner can sue the sub-bailee direct for loss of or damage to the goods unless the latter is protected by an exemption clause.[25]

Owner bound, when, in case of sub-bailment.—An owner is bound by conditions of sub-bailment if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise.[26]

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17 *M/s. Agarwalla Air Transport* v. *Md. Nasratulla,* 1959 A. Cal. 755.
18 *Rampal Singh* v. *Murray & Co.* (1899) 22 All. 164.
19 *Whateley* v. *Palanji* (1866) 3 B.H.C.O.C. 137, 146.
20 *Calye's Case,* 1 Smith's L.C., 13th ed. 120; *Morgan* v. *Ravey* (1861) 6 H. & N. 265.
21 In England the Common Law liability of an innkeeper has been limited by the Innkeeper's Liability Act, 1863. But these statutory limitations are the only permissible ones, and the innkeeper cannot further contract out of his common law liability: *Williams* v. *Linnitt* (1951) 1 K.B. 565, 585 *per* Denning L.J.
22 *Jan and Son* v. *Cameron* (1922) 44 All. 735; 68 I.C. 679.
23 *Morris* v. *Martin & Sons Ltd.* (1965) 3 W.L.R. 276, 288 (C.A.). See *Garnham Harris & Elton* v. *Alfred W. Ellis Ltd.* (1967) 1 W.L.R. 940. *Caxton Publishing Co. Ltd.* v. *Sutherland Publishing Co.* (1939) A.C. 178, 202; *Cheshire* v. *Bailey* (1905) 1 K.B. 237 was held not to be good law. *Coggs* v. *Bernard* (1703) 2 Ld. Ryam 909 (Holt C.J. there discussed the circumstances in which bailees are liable to their bailors for the loss of goods stolen not by servants of the bailee but by a stranger) Exp.
24 *Morris* v. *C.W. Martin & Sons Ltd.* (1965) 3 W.L.R. 276, 288; *Caxton Publishing Co. Ltd.* v. *Sutherland Publishing Co.* (1939) A.C. 178, 202; (1938) 4 All E.R. 389 (H.L.).
25 *Morris* v. *Martin & Sons Ltd.* (1965) 3 W.L.R. 276, 285.
26 *Morris* v. *Martin & Sons Ltd.* (1965) 3 W.L.R. 276, 285; *Tappenden* v. *Artus* (1964) 2 Q.B. 185; (1963) 3 W.L.R. 685.

Burden of proof.—In cases governed by the provisions of ss. 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee. The same rule applies, by reason of s. 72 of the Indian Railway Act, to a railway administration,[27] unless the goods are consigned under a risk-note under which the railway company are absolved from all liability for loss or damage except that due to wilful negligence on the part of their servants, in which case the burden lies in the first instance upon the company to prove that the loss was such as was contemplated by the contract, and when this has been done it shifts to the plaintiff to show that the loss was due to the wilful neglect of the company or its servants.[28] Under s. 74A of the Railways Act the onus is on the Railways to show want of negligence.[29] A railway company receiving goods for carriage is not bound to inquire into the apparent owner's title or to see that the risk-note is read and understood by the person who delivers the goods.[30] As regards goods delivered to a common carrier, he is liable even if there be no negligence on his part except in certain cases mentioned above (see note "common carriers," above). Under s. 6, however, of the Carriers Act he may by special contract limit his liability, but even then the burden lies on him, by reason of s. 9 of the Act, to disprove negligence.[31]

There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company. In *River Steam Navigation Company* v. *Choutmull*.[32] which was a suit against common carriers for loss of goods occasioned by fire which originated from some unknown cause, the Privy Council said:

> "It appears that the defendants have not at all exonerated themselves from the onus cast upon them of showing that the fire originated from causes over which they had no control and could not have been expected to have had any control."

This does not mean that a railway company must be held liable for every accident of which it cannot assign the precise cause; it is enough to satisfy the Court that due care has been used both generally and in respect of the plaintiff's goods.[33] In a case where the suit was one for damages for loss of cargo by fire the Privy Council, after referring to ss. 151 and 152, observed as follows:—

> "The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the

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27 *Nanku Ram* v. *Indian Midland Ry. Co.* (1900) 22 All. 361; *Surendra Lal* v. *Secretary of State* (1917) 25 Cal. L.J. 37, 40, 38 I.C. 702; *Hirji Khetsey & Co.* v. *B.B. & C.I. Ry. Co.* (1915) 39 Bom. 191; 25 I.C. 241; *Gauri Mal-Narain Das* v. *Secy. of State,* 91 I.C. 963; 1926 A.L. 217; *Secretary of State* v. *Kesho Prasad* (1932) All L.J. 788; 139 I.C. 381; 1932 A.A. 584; *Moolji Sicka & Co.* v. *Bengal Nagpur Ry. Co.* A.I.R. 1932 Cal. 257; 35 C.W.N. 1242; 137 I.C. 445; *Governor-General in Council* v. *Kabirram* (1948) 27 Pat. 151; *Shamji Bhanji* v. *N.W.R.* (1947) Bom. 274.

28 *G.I.P. Rly.* v. *Jitan Ram* (1923) 2 Pat. 442; 72 I.C. 440, dissenting from *G.I.P. Rly.* v. *Ramchandra Jagannath* (1921) 45 Bom. 1206; 63 I.C. 234; *Smith, Limited* v. *Great Western Railway Company* (1922) 1 A.C. 178, which *Sheo Narain* v. *East Indian Railway* (1927) 50 All. 246; 108 I.C. 691; 1928 A.A. 103, attempts to distinguish. *Janki Das-Gobind Ram* v. *Secy. of State* (1925) 22 All L.J. 1020; 85 I.C. 114; 1925 A.A. 10, in on the construction of the risk-note. *Sheobarut Ram* v. *The Bengal N.W. Ry. Co.* (1912) 16 C.W.N. 766.

29 *Manickam Chettiar* v. *Union of India* (1960) A.M. 149; (1959) 2 M.L.J. 365; *Union of India* v. *Madho Ram & Sons* (1963) 2 S.C.R. 702; (1963) A.SC. 422.

30 *G.I.P. Railway Co.* v. *Chakravarti Sons & Co.* (1927) 55 Cal. 142; 106 I.C. 247; 1928 A.Cal. 170. See further. *G.I.P. Railway Co.* v. *Jes Raj Patwari* (1927) 55 Cal. 132; 106 I.C. 252; 1928 A.Cal. 65.

31 *River Steam Navigation Co.* v. *Choutmull* (1899) 26 I.A. 1; 26 Cal. 398, affmg. 24 Cal. 786; *Indian General Steam Navigation Co.* v. *Bhagwan Chandra Pal* (1913) 40 Cal. 716. See also *India General Steam Navigation Co. Ltd.* v. *Gopal Chandra* (1914) 41 Cal. 80, 87-88; 19 I.C. 756.

32 (1899) 26 I.A. 1; 26 Cal. 398, affmg. 24 Cal. 786.

33 *Lakhi Chand* v. *G.I.P. Ry. Co.* (1913) 37 Bom. 1, 16-18; *Kirji Khetsey & Co.* v. *B.B. & C.I. Ry. Co.* (1915) 39 Bom. 191, 209-210; 25 I.C. 241. We cannot, of course pursue in this work the distinctions to be made in applying the principle independently of contract, commonly referred to by the catchword *res ipsa loquitur.*

wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordship's view, is not a correct statement of the law. It is true that under the Law of Evidence Act of 1872, s. 106, 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him'; and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company. It may be for the company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve".[34]

Proof of Private Stealth.—The proof of loss by private stealth committed by a third party is not sufficient to rebut the presumption of negligence of the bailee.[35]

As regards bailments for hire, the rule has thus been stated by Strachey C.J.:

"If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence; otherwise I think the owner must give some evidence of negligence.[36]

Thus where a person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own.[37] Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part.[38] But where hotel furniture used by a guest while suffering from an infectious disease is destroyed by the hotel-keeper to prevent infection, it lies on the hotel-keeper, if he claims damages for the loss thereof, to prove that the guest did not take as much care of the goods as a person of ordinary prudence would have taken of his own goods under similar circumstances.[39]

Compare the Transfer of Property Act, 1882, s. 76, cl. (a), as to care required of a mortgagee in possession.

Right of bailee to insure.—A bailee can insure upto the full value of the goods bailed to him and he can recover the full value but in that case he will have to account to the owner of the goods and will be a trustee for the owner, retaining so much as covers his own interest and trustee for the balance.[40] It has been held that the consignor can also sue[41] but this is not in accord with the decision in *Beswick* v. *Beswick*[42].

Gratuitous Bailment.—In gratuitous bailment the standard of care according to English law is that of reasonable man. Therefore, leaving valuables locked in a room to the tender mercies of 80 or so displaced persons, all rowdies, would amount to negligence.[43] In the Contract Act the duty of care in the case of a bailee is uniform whether it is gratuitous or for hire or for gain. The distinction between gross and simple negligence has also disappeared.[44]

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34 *Dwarkanath* v. *The Rivers Steam Navigation Co. Ltd.* (1918) 27 Cal. L.J. 615; 20 Bom. L.R. 725; 46 I.C. 319 (P.C.).
35 *Narasimha Swami (Rangaraju)* v. *Muthukrishna* (1962) A.M. 244.
36 *Rampal Singh* v. *Murray & Co.* (1899) 22 All. 164. 167.
37 *Shields* v. *Wilkinson* (1887) 9 All. 398, 406. See Evidence Act, s. 106.
38 *Trustees of the Harbour Madras* v. *Best & Co.* (1899) 22 Mad. 524.
39 *Rampal Singh* v. *Murray & Co.* (1899) 22 All. 164.
40 *Hepburn* v. *Tomlinson (Hauliers Ltd.)* (1966) A.C. 451; (1966) 2 W.L.R. 453, 457 (Carriers' case). *Waters* v. *Monarch Fire and Life Assurance Co.* (1856) 5 E. & B. 870; (1843-60) All E.R. Rep. 654 appd. (Warehouseman case). Dicta of Bowen L.J. in *Castellain* v. *Preston* (1883) Q.B.D. 380, 397-9; (1881-5) All E.R. Rep. 493 dist (Vendor's case).
41 *Snow White Food Products (Pvt.) Ltd.* v. *Sohanlal Bagla* (1964) A.Cal. 209 (Transport Co's. case).
42 (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932. See S. 2 Third Party Consideration.
43 *Blount* v. *War Office* (1953) 1 All E.R. 1071, 1074.
44 *Bilaspur Central Co-operative Bank* v. *State of M.P.* (1959) A.M.P. 71; *Narasimhaswami Narmagiri Temples* v. *Muthukrishna Iyangar* (1962) A.M. 244.

Therefore, where the Inspector-General of Police allowed a Co-operative Bank to deposit its cash box in the *malkhanna* every evening and the box was found missing from the *malkhanna,* the Government was held liable for negligence in carrying out the bailment.[45]

Contract by bailee exempting himself from liability for negligence.—The learned authors considered that a contract by a bailee purporting to exempt himself wholly from liability for negligence was not valid, relying on the judgment of Sankaran Nair J. in *Sheik Mohamad* v. *The British Indian Steam Navigation Co.*[46] This opinion is based on the express provision for contracting out in s. 152, and in fact throughout the Chapter on Bailments wherever a rule of law is to operate only in the absence of a contract to the contrary, it is expressly so stated in the section (see sections 163, 165, 170, 171 and 174). This *obiter dictum* is, however, contrary to the *dicta* of the other two judges in the case, White C.J. and Wallis J., and the view of the latter has been preferred in Rangoon,[47] in Bombay[48] and in Madras.[49]

Where the plaintiff sent his car for repairs to the defendant garage and he was orally informed that it would be repaired in due course and he had previously dealt with the defendant in three or four transactions in five years and had then signed an invoice presented to him by the defendant containing an exemption clause at the bottom under the signatures of the customer to the effect that the garage was not responsible for damage to the customer's car by fire and the plaintiff's car was considerably damaged by fire due to defendant's negligence and the plaintiff claimed damages, the Court of Appeal held that—

(1) three or four transactions in the course of five years were not sufficient to incorporate the clause in the oral agreement; and

(2) even if it was incorporated, the words of the clause were not sufficiently plain to exclude liability of the defendant.[50]

Bailee's liability for negligence of servants.—A bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed;[51] but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented, nor to unauthorised acts of his servants outside the scope of their employment.

In English law, if a chauffeur, without authority from his master, takes our his master's car on a frolic of his own, and negligently injures a third person say a pedestrian, the master is not liable to the pedestrian. A servant is considered to be on a frolic of his own if he takes out his master's vehicle from the garage or stable without authority.[52] or if instead of putting away the vehicle in the garage or stable, he takes it for his own affairs,[53] or if he not merely goes *extra viam* for his own purposes on an authorised journey from *A* to *B,* but proceeds in a different direction.[54]

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45 *Bilaspur Central Co-operative Bank Ltd.* v. *State of M.P.* (1959) A.M.P. 77; See also *Mitchell* v. *London Borough of Ealing* (1978) 2 All E.R. 779. For discussion see (1980) 54 ALJ 30 (by N.E. Palmer).

46 (1908) 32 Mad. 95, 120.

47 *Fut Chong* v. *Maung Po Cho* (1929) 2 Rang. 339, 120 I.C. 899, also following a full bench of the Chief Court of Burma in *B.I.S.N. Co.* v. *Ali Bhai Mahomed,* 62 I.C. 378.

48 *Bombay Steam Navigation Co.* v. *Vasudeo Baburao* (1927) 52 Bom. 37, 106 I.C. 470, 1928 A.B. 5, a bench decision; *Lakhaji Dollaji & Co.* v. *Boorugu,* (1939) A.B. 101, 41 Bom. L.R. 6, 181 I.C. 334.

49 *Karidan Kumber* v. *B.I.S.N. Co.* (1913) 38 Mad. 941, I.C. 549; *Home Insurance Co.* v. *Ramnath & Co.,* 1955 A.M. 602, 603.

50 *Hollier* v. *Rambler Motors (AMC) Ltd.* (1972) 1 All E.R. 399, 402, 409; *Melluchen* v. *David MacBryne Ltd.* (1964) 1 All E.R. 430 applied. See under s. 139 "Bailee losing pledged goods."

51 *Hastmal* v. *Raffi Uddin,* 1953 A.Bho. 5.

52 *Rayner* v. *Mitchell* (1877) 2 C.P.D. 357.

53 *Mitchell* v. *Crassweller* (1853) 13 C.B. 237.

54 *Joel* v. *Morrison* (1834) 6 C. & P. 502.

But if the servant by his negligence damages a chattel bailed to his master by a third party, somewhat different considerations apply. Then if the servant has been given custody of the chattel, the master is liable even if the servant takes it from the garage or stable without authority: *Central Motors* v. *Cessnock,*[55] or if instead of putting it away in the garage he takes it out for his own affairs,[56] or if he not merely goes *extra viam* for his own purposes on an authorised journey, but goes in a different direction.[57] But if the servant has not been entrusted with the custody of the bailed chattel, the master is not liable if the servant takes it from the garage without authority. In *Sanderson* v. *Collins,*[58] the servant is question was a coachman not entrusted with the carriage. In *Darling Ladies' Wear* v. *Hickey,*[59] he was a garage hand, who had been polishing the car and changing a tyre. In neither case was there liability of the master, whereas in the *Cessnock* case, the servant was a night watchman, whose duty it was to guard the plaintiff's car, and when he damaged it on a frolic he rendered his master liable.

Paddy was to be purchased for the Government by the owner of a rice mill. He was to mill it and supply a specified quantity of a particular quality to the Government at a fixed rate. Due to unprecedented floods termed *"vis major"* the paddy was damaged and the rice milled was of an inferior quality and less in quantity.

The miller was held entitled to recover the loss from the Government.[60] A liability arising under a contract of bailment or a pledge is not a debt within section 2(6) of Displaced Persons (Debt Adjustment) Act, 1951.[61]

Liability of bailee in tort.—The goods of the plaintiff were stored in a cold storage of a Cold Storage Company—GM Ltd.—of which the defendant was the Managing Director and he wrote to the plaintiff confirming the arrangement of storage and also sent an invoice for hire. The defendant occasionally visited the storage chamber and found nothing ostensibly wrong. As a result of damage to a fan, the goods stored were damaged and the plaintiff sued the defendant for damages. It was held that although no action lay in contract, the liability of the defendant was not necessarily excluded as a matter of law even in the absence of sufficient evidence and he was not a bailee having the right to legal possession during the relevant time. But GM Ltd. could only act through its Directors, the defendant owed a duty to take care of the goods and was therefore liable.[62]

Bailee when not liable for loss, etc., of thing bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Note that by English law,

"in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed."

His right is the general right of a lawful possessor against a wrongdoer, and does not at this day depend on his liability to the bailor, whatever may be the true historical view of the mediaeval law.[63] The bailee's rights against strangers are naturally not specified in the present

55 (1925) S.C. 796 (Scottish Court of Session).
56 *Coupé Co.* v. *Maddick* (1891) Q.B. 413.
57 *Aitchison* v. *Page Motors* (1935) 154 L.T. 128.
58 (1904) 1 K.B. 628.
59 (1950) 1 D.L.R. 720 (Ontario Court of Appeal); 27 Can. Bar. Rev.
60 *Baldeo Narain* v. *State of Bihar* (1959) A.P. 442, 38 Pat. 788.
61 *Ram Lal Jain* v. *Central Bank of India Ltd.* (1961) A.Punj. 340 (F.B.); (1961) 2 Punj. 219.
62 *Faireline Shipping Corporation* v. *Adamson* (1974) 2 All E.R. 967, 975.
63 *The "Winkfield"* (1902) P. 42, C.A., overruling *Claridge* v. *South Staffordshire Tramway Co.* (1892) 1 Q.B. 42, 54, 59. Both the arguments and the judgment of Collins M.R. contain much valuable historical discussion, which, however, we must not dwell upon here.

Act, as they do not diff m the rights of any other lawful possessor, and arise not from the contract of bailment, om the fact of possession.

Care to be taken by bailee.—Since the standard of diligence required of a bailee is that of the average prudent man, a bailee of goods is not liable for loss of the goods by theft in his shop, if it is shown that he took as much care of the articles bailed as an ordinary prudent man would, under similar circumstances, take of his own goods of the same quality and value.[64] For the same reason if *A* sends jewels to *B* for repairs, asking *B* to return them after repair as a value payable parcel, and *B* does so, *B* is not liable for the loss of the jewels merely because he failed to insure the parcel. Failure to insure the jewels is not evidence of want of such care as a man of ordinary prudence would, under similar circumstances, take of his own goods, especially when the owner himself does not insure them when sending them out for repair.[65] But it is negligence on the part of a carrier of goods to send jute in a boat with twenty or thirty leaks on its side, one or one and a half inches in length, and keep the goods in the hold of the boat for thirty hours.[66]

The bailee's duty does not necessarily come to an end when the goods are lost or stolen. In England a bailee for reward ought to take such steps, if any, as are reasonable and usual with a view to recovering the goods. If he fails to do so, the burden of proof is on him to show that reasonable efforts would not have been successful.[67] Where goods are delivered to a wrong person on producing a forged Railway Receipt, the law does not require the bailor to follow or trace and recover the goods. It is for the bailee—the Railway to do so, as the responsibility is of the Railway—the bailee.[68]

Special degree of care, when required.—Special degree of care is required from carriers, motor cab drivers and the like.[69] A motor-car repairer is required to possess skill and machinery and tools for the purpose.[70] If a garage owner receives a motor car for repairs and his garage building is partitioned by wooden partitions and he allows one of his employees to do cooking there, he would be guilty of want of care and of negligence and liable as a bailee for damage to a motor car sent for repairs.[69]

Railway—Special Goods of Value.—Where goods of special value are consigned by rail the consignor has to make a declaration of the identity of the goods and their value and also to pay a special percentage for the carriage, where the percentage is not paid as required in the note to the forwarding note the Railway Administration is not responsible in the case of loss, damage or destruction under section 75 Railways Act. This would be so was where the loss is due to the theft, misconduct or any malfeasance of the servant to whom the goods are entrusted.[71]

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64 *Lakshmi Das* v. *Babu Megh* (1900) Punj. Rec. no. 90. It does not suffice that a bailee has shown the care he bestows upon his own goods; *Rampal* v. *Gourishankar* (1952) Nag. 49, 1952 A.N. 8.

65 *Boseck & Co.* v. *Maudlestan* (1906) Punj. Rec. no. 70; *Shanti Lal* v. *Tara Chand,* 1933 A.A. 158; 142 I.C. 691 (damage done by unexpected and unprecedented flood); *Moolji Sicka & Co.* v. *Bengal Nagpur Rly. Co.,* 1932 A.Cal. 257; 33 C.W.N. 1242; 137 I.C. 445 (fire caused by cigarette thrown near goods stored in usual and proper place).

66 *Lakshmi Narain* v. *The Secretary of State for India* (1923) 27 C.W.N. 1017; 80 I.C. 279; 1924 A.Cal. 92; *Lakhaji Dollaji & Co.* v. *Boorugu,* 1939 A.B. 101; 41 Bom. L.R. 6; 181 I.C. 334 (silver bars left unattended in shop); *Secretary of State* v. *Ramdhan Das,* 1934 A.Cal. 151; 37 C.W.N. 1109; 150 I.C. 189; *Uma Parshad* v. *Secretary of State* (1937) 18 Lah. 380; 172 I.C. 567; 1937 A.L. 572.

67 *Coldman* v. *Hill* (1919) 1 K.B. 443.

68 *Bhairud Din* v. *Union of India* (1957) A.Cal. 573; *Union of India* v. *F. Laxminarain Harnarain* (1963) A.Raj. 162; (1963) 13 Raj. 140.

69 *Calcutta Credit Corporation* v. *Prince Peter of Greece* (1964) A.Cal. 374; 68 C.W.N. 554.

70 *Brabant & Co.* v. *King* (1895) A.C. 632; *Calcutta Credit Corpn.* v. *Prince Peter* (1964) A.Cal. 374; 68 C.W.N. 554.

71 *Uttam Singh Kala Singh* v. *Union of India* (1971) A.D. 79, 85; *Balaram Harichand* v. *Southern Maratha Ry.,* 19 Bom. 159; *Changamal* v. *B.N.W. Ry.* (1897) P.R. 61; *Governor General* v. *Mohammad Badr-i-Alam* (1949) A.A. 223 not folld.: *Benarsi Stores* v. *President of India* (1953) A.A. 318: *Maratap Ali* v. *Union of India* (1954) A.B. 297 folld.

Custodian appointed by Courts.—An undertaking by a bailee to the Court to produce the goods whenever, wherever and to whomsoever ordered by the Court is a special contract within section 152 and not under section 151.[72] But the Assam High Court[73] has held that

A Sapurddar, a custodian, is a bailee and his possession is regulated by the Contract Act. A bond executed by him is not special contract within section 152 of Contract Act; his undertaking being to return the goods bailed failing which to pay the price.

It is submitted that the contract is a special contract and the custodian is bound by the terms of his contract.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

It is well settled law that a wrongful use or disposal of the goods by the bailee determines the bailment and remits the bailor to the rights and remedies of a person entitled to possession; a wrongful act means, for this purpose, a dealing wholly inconsistent with the terms of the bailment. The English authorities go into refinements as to the precise kind of wrong committed and the precise form of action available which are almost as subtle as anything in either European or Hindu philosophy; but, as these are intimately connected with the old Common Law system of pleading, we have no occasion to consider them here.[74] Merely irregular exercise of a right, such as a sub-pledge to a third person by a pledgee, or a premature sale by a pledgee with power of sale, has not the same effect.[75] The present section has the merit of simplicity, and does not appear to have given rise to any litigation.

Liability of bailee making unauthorised use of goods bailed.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

(By the Common Law this is not only a breach of the contract, but an independent wrong, so that a person who could not be sued on the contract, such as an infant, may be liable: *Burnard* v. *Haggis* (1863) 14 C.B.N.S. 45.)

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72 *Ambady (K.P.)* v. *Balan (K.M.)* (1959) A.Ker. 273. But see *Bachraj Dugar* v. *Lal Chand* (1962) A.Asm. 23.

73 *Bachhrai Dugar* v. *Lalchand* (1962) A.Asm. 23; *Kush Kanta* v. *Chandra Kanta,* 28 C.W.N. 1041; (1924) A.Cal. 1056 refd. to.

74 *Cooper* v. *Willomatt* (1845) 1 C.B. 72; 68 R.R. 798; *Fenn* v. *Bittleston* (1851) 7 Ex. 152; 86 R.R. 593; *Donald* v. *Suckling* (1866) L.R. 1 Q.B. 585; *Nyberg* v. *Handlelaar* (1892) 2 Q.B. 202, C.A., may be commended to the learned reader desirous of pursuing the subject. And see Pollock on Torts, 15th ed., pp. 269-277.

75 *Donald* v. *Suckling,* last note; *Halliday* v. *Holgate* (1868) Ex. Ch. L.R. 3 Ex. 299, 302.

Illustration (b) is apparently suggested by the case put in old English books of a man borrowing a horse to ride to York and riding to Carlisle. (See 1 C.B. 681; 68 R.R. 805). Discussion of the old forms of action being here superfluous, no comment is required.

Effect of mixture, with bailor's consent, of his goods with bailee's.

155. If the bailee. with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest in proportion to their respective shares, in the mixture thus produced.

This and the two following sections are clear enough. In England there is hardly any modern authority. In a case before the Court of Common Pleas in 1868[76] a ship laden with cotton was wrecked, and part of the cargo lost, and the marks on a large proportion of the bales that were saved were so much obliterated by sea water that no bale could be identified as belonging to any particular consignee. The Court held that all the owners became tenants in common of the cotton which arrived at its destination in the proportion which the quantities respectively shipped by them bore to the whole quantity shipped. It will be observed that there was no question of bailment, nor did the case otherwise resemble any of those dealt with in the present group of sections, which do not mention accidental mixture at all. The Court added, however:—"It has been long settled in our law, that, where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion or any part of the property from the other owner." This severe rule, which the Contract Act has not adopted (s. 157 below), is advocated on moral grounds. Blackstone says: "Our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavoured to be rendered uncertain without his own consent".[77] Similarly, Kent, adding, however, the qualification, which corresponds to s. 156 (below), that "this rule is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity and not the whole. This is Lord Eldon's construction of the old law.[78]

The Contract Act is in substantial agreement with the Roman law.[79]

Effect of mixture, without bailor's consent, when the goods can be separated.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bags of cotton marked with a particular mark to *B*. *B* without *A*'s consent, mixes the 100 bales with other bales of his own bearing a different mark. *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales and any other incidental damage.

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76 *Spence* v. *Union Marine Insurance Co.* (1868) L.R. 3 C.P. 427, 437, 438.

77 Comm. ii. 405. The clumsy locution "endeavoured to be rendered" is a strange exception to the usual elegance of Blackstone's style. Lord Moulton in *Sandeman & Sons* v. *Tyzack Steamship Co. Ltd.* (1913) A.C. 680, 694-5, doubts whether the severe rule would be applied in a case where it would lead to substantial injustice.

78 Commentaries on American Law, ii. 365; Lord Eldon's dictum is in *Lupton* v. *White* (1808) 15 Ves. 432, at p. 442; 10 R.R. at pp. 101, 102. A later reference to this by Stuart V.C., in *Cook* v. *Addison* (1896) L.R. 7 Eq. 466, 470, seems to add a new kind of "confusion" to the subject by assuming that goods and money are under identical rules. Mixture of funds, as it is called, is a wholly different thing from the *confusio* of corporeal goods. Specifically deposited hoards of coin might, of course, get mixed, but such are not the cases that come before modern Courts of Equity. *Cp.* the note on s. 160 below.

79 I. ii. 1, 27.

See on s. 155. The proposition is almost too obvious to need stating. Not only this, but any other difficulty caused by unauthorised acts of the bailee which may attend the return of the bailor's goods according to the contract must be at the bailee's risk and expense.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods; in such a manner that it is impossible to separate the goods, bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour, worth Rs. 45, to *B*. *B* without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

See on s. 155. By the Indian Trusts Act, 1882, s. 66, "where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

Repayment by bailor of necessary expense.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

This and the next two sections represent Story's opinion partly of what the law is and partly of what it should be. The latter part of s. 159 is in substantial accordance with an opinion of Paulus in the Digest (13, 6, 17 s. 3). One does not quite see why in our law the bailee's promise may not be limited to returning the goods at a certain date or on demand after a certain date, if such is the agreement of the parties. The bailor may intend to accept a promise so qualified as the consideration for parting with the possession of the goods, and there is no known rule of law to prevent effect from being given to that intention. Why not let the parties make their own terms instead of borrowing a fixed rule from a system which has no doctrine of consideration? But the truth is that gratuitous bailments, though very common in private life, are not matters of business and therefore do not come into court.

Restoration of goods lent gratuitously.

159. The lender of a thing for use may at time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefits so derived.

No authority has been found for Story's view,[80] which appears, as above stated, to be needlessly complicated. On principal the question is what the terms of the contract were. *Quare* whether an express contract not to recall a thing gratuitously lent before the expiration of a certain time would not be good in India notwithstanding this section. There is no difficulty about the consideration.

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80 See Story, Bailments s. 258.

Return of goods bailed on expiration of time or accomplishment of purpose.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. He can have an action for damages against the bailee,[81] but also he has further equitable rights. "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished either being actually kept separate, or being mixed up with other moneys".[82]

"It has been established for a very long period...that the principles relating to the following of trust property (compare the Indian Trusts Act, ss. 63-65) are equally applicable to the case of a trustee...and to the case of factors, bailees, or other kinds of agents...wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel; then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material".[83] The development of this doctrine in cases of trust is not within our scope; it is connected with the special application and limitation of the rules as to appropriation of payments (s. 61, above).

It is obvious that in a case where the goods are found unfit for the purpose for which they were hired the purpose for which they were bailed is not accomplished; but the consequences are not here declared. It seems that all the bailee is bound to do is to give notice to the bailor of the default.[84]

Bailment—Consignor's right to sue.—Ordinarily, it is the consignor, who can sue the Railway for loss of goods sent by rail, because the contract is between them, but where property in the goods has passed to the consignee the latter may be able to sue.[85] Without such interest his only right is to receive delivery of the goods.[86] Also a consignee, who is not the owner of the goods, but merely a consignee for sale on commission, can sue for loss or damage to the goods sent through the Railway.[87] Where the consignor, who was also the consignee, had endorsed the Railway Receipt to a Bank for consideration and that Bank had given notice to the Station Master of the destination station of its holding the receipt, the delivery of the goods to consignor against an indemnity bond will not discharge the Railway of its liability and it will be liable to the holder Bank.[88] Where a consignor, who is also the consignee, endorses the railway receipt to another to take delivery, such other cannot have the goods rebooked under the Railway rules.[89]

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81 See *Reemah Ezekiel* v. *Province of Bengal* (1939) 2 Cal. 52; 185 I.C. 214; 1939 A.Cal. 746.
82 Jessel M.R., *Re Hallett's Estate* (1879) 13 Ch.D. 696, at p. 710.
83 Thesiger L.J., *ibid,* at p. 723.
84 *Usufalli Hassanally* v. *Ibrahim Dajibhoy* (1921) 45 Bom. 1017; 61 I.C. 57. The English case there relied on, *Chew* v. *Jones* (1847) 10 L.T.O.S. 231; 89 R.R. 770, does not really lay down any general rule.
85 *Union of India* v. *Western Punjab Factories* (1966) 1 S.C.R. 580; (1966) A.S.C. 395.
86 *Commissioner of Port Trust of Calcutta* v. *General Trading Corporation* (1964) A.Cal. 290; 68 C.W.N. 410.
87 *Union of India* v. *Gaya Prasad* (1956) A.A. 338; (F.B.) (1956) 1 All. 526; *Sheo Prasad* v. *Dominion of India* (1954) A.A. 747 overd.
88 *Gopalam* v. *Union of India* (1959) A.A.P.331.
89 *Mohammad Ibrahim* v. *Union of India* (1959) A.P. 337.

Bailee's responsibility when goods are not duly returned.

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.[90]

Unexplained failure to return the thing bailed is presumed to be by the bailee's default.[91] A consignment of jute booked on railway risk was damaged by fire. The defendant pleaded accident but did not produce all the evidence which it should have done and the wagon was taken by a longer route. The Court must draw the presumption of negligence.[92] A misdelivery is a loss and the Railway is liable when the clerk makes the delivery without comparing the entries in the Railway Receipt and in the Delivery Books.[93] A bailee who refuses to give delivery except upon some unjust or unreasonable condition is in default.[94]

Conversely, if a bailor or consignee omits or refuses to take his goods at the proper time from a carrier (or, it would seem, any other kind of bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody.[95] But the goods are not at the risk of the bailor, and the bailee will be liable for any breach of duty under s. 151.[96]

Bailor's right to elect trover or detenue.—A bailor, in the event of non-delivery of the goods, by the bailee is entitled at his election to sue the bailee for wrongful conversion or wrongful detention of the goods, i.e. in trover or in detenue. It will in the latter case be no answer for the bailee to say that he was guilty of conversion of which the plaintiff was aware or ought to have been aware. The option is of the bailor and the bailee cannot be heard to say anything to the contrary because he cannot take advantage of his own wrong and cannot ask the plaintiff to choose one remedy or the other or which may be less beneficial to him.[97] The plaintiff should not, however, be allowed to delay his action in order to get the advantage of a rising market.[98] A simple guide suggested by Paton is: "if the market is falling sue in conversion, if it is rising sue in detenue.[99] The measure of damages in the case of conversion is far

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90 As to railway contracts, see the Indian Railways Act, 1890, s. 72. *Arjundas-Hariram* v. *Secy. of State,* 1925 A.Cal. 737; 85 I.C. 786; *H.K. Ray* v. *Governor-General in Council* (1949) 53 C.W.N. 406, 1949 A.Cal. 591.

91 *Kush Kanta Barkakati* v. *Chandra Kanta Kakati* (1923) 28 C.W.N. 1041; 83, I.C. 151, where the English authorities on which this section is founded are cited at some length (hire of elephant, some complication as to the parties to the contract); *Annamalai Timber Trust* v. *Trippunithura Devasivam,* 1954 A.T.C. 305, 311.

92 *Indian Trade & General Insurance Co. Ltd.* v. *Union of India* (1957) A.Cal. 190; (1957) 2 Cal. 649; *B.N. Rly.* v. *Haji Latif* (1937) A.Cal. 410 reld. on.

93 *Mohammad Ekram* v. *Union of India* (1959) A.P. 337; 37 Pat. 1355.

94 *G.I.P. Ry.* v. *Manikchand Premji,* A.I.R. 1931 Nag. 29; 130 I.C. 82.

95 *G.N.R. Co.* v. *Swaffield* (1874) L.R. 9 Ex. 132, following and extending to carriers by land the decision of the Privy Council as to the rights of the master of a ship where a cargo is left on his hands at the port of arrival: *Cargo ex "Argos"* (1872) L.R. 5 P.C. 134; *Jusaf & Ismail Co.* v. *Governor-General in Council* (1947) Nag. 335, 231 I.C. 185, 1948 A.N. 65. The liability to pay demurrage to the bailee may arise even where the goods have been tendered by the bailee in a damaged condition; in such a case the bailor should normally accept the goods, subject to his claim for compensation: *Dominion of India* v. *Adam Haji,* 1953 A.M. 217; *Secretary of State* v. *Har Kishan Das* (1926) 7 Lah. 370, 1926 A. Lah. 575. Customs authorities who had sold goods on which all customs duties had already been paid were held liable for damages: *A.B. Moola & Sons* v. *Commissioner for the Port of Rangoon,* 1931 A.R. 95; 132 I.C. 545.

96 *Chhatumull* v. *Union of India,* 1955 A.Cal. 264; *Jusaf & Ismail Co.* v. *Governor-General in Council* (1947) Nag. 335 (*obiter*).

97 *Dhian Singh* v. *Union of India* (1958) S.C.R. 781; (1958) A.S.C. 274, 280; *Wilkinson* v. *Verity* (1871) 6 C.P. 206; *Rosenthal* v. *Alderton & Sons Ltd.* (1946) 1 K.B. 374; (1946) 1 All E.R. 583; *John F. Goulding Property Ltd.* v. *The Victorian Railway Commissioner,* 48 C.L.R. 157, 167.

98 *Dhian Singh* v. *Union of India* (1958) S.C.R. 781; (1958) A.S.C. 274, 280.

99 Paton Bailment (1952 Edn.) 404 quoted in *Dhian Singh* v. *Union of India* (1958) S.C.R. 781; (1958) A.S.C. 274, 279.

from clear but in the case of detenue it is the value at the date of the verdict and also damages for its detention;[1] but what its measure should be has not yet been settled.[2]

Negatives of films—failure to return:

In *Sama's case,* negatives of a picture were pledged for their cost of production. The pledgee recovered the amount advanced by him but failed to return the negatives. They were then found to be useless and had lost their earning capacity.

The pledgor was held not entitled to recover any amount as value of the negatives or of the cost of production as the value of the negatives was nil. The picture was a total failure, had been fully exploited and was not capable of yielding any further income. The decision, it is submitted, must be confined to its peculiar facts.[3]

Warehouseman's liability.—A receipt of the warehouse keeper was endorsed in favour of a bank for getting a loan. The Bank can sue the warehouse for the debt due from the depositor and can recover it by virtue of being the transferee. It is submitted that it is not clear from the facts set out whether the liability of the warehousemen was to pay the debt or to have the goods sold and thus meet the debt due from the depositor. The duty of the bailee is to return the goods bailed. The judgment is not clear on this point.[4]

Motor Vehicle Workshop.—The position of a workshop inviting vehicles for repairs is that of a bailee and he is liable for any damage done to a vehicle sent for repairs if it is caused by his servant; it being material whether the servant acted negligently, fraudulently or dishonestly.[5]

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

The executors of persons who have borrowed things, especially books, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*. The problems hence arising, if any, seem to be rather ethical than legal, save so far as the law of limitation cures this amongst other irregularities. The present section does not, of course, exempt the bailee's estate from liability for any default in his lifetime.[6]

Bailor entitled to increase or profit from goods bailed.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*. So also in the case of ewes and lambs.

Good sense, and therefore good law, seemingly without any previous reported authority. New shares allotted in respect of shares that have been pledged are an increase claimable by the pledgor.[7]

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1 *Dhian Singh* v. *Union of India* (1958) S.C.R. 781; (1958) A.S.C. 274, 281.
2 *Strand Electric & Engineering Co. Ltd.* v. *Brisford Entertainments* (1962) 2 Q.B. 246, 253; (1952) 1 All E.R. 796, 798.
3 *S. Sama* v. *Presidency Talkies* (1966) A.M. 184; (1966) 1 M.L.J. 154.
4 *Central Warehousing Co.* v. *Central Bank of India* (1974) A.AP. 8.
5 *Ponnamma* v. *Ramanathan* (1973) A. Ker. 49; *Gopalkrishnan* v. *Krishnakutty* (1967) A. Ker. 19 folld.
6 *Lucknow Municipal Board* v. *Abdul Razzaq* (1929) 5 Luck. 220; 127 I.C. 867; 1931 A.O. 15.
7 *Motilal Hirabai* v. *Bai Mani* (1924) 52 I.A. 137; 49 Bom. 233; 86 I.C. 368; 1925 A.P.C. 86.

Bailor's responsibility to bailee.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

If the terms of the bailment are such that its natural determination as between the parties is delivery over to a third person, and there is a paramount title elsewhere, the bailee may be in difficulties, which, however, are mitigated by s. 166.

Bailment by several joint owners.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

"May," not "must" [8] Even if there is an agreement to the contrary, one of several joint owners cannot, after having accepted redelivery from the bailee, sue him jointly with the other owners; for "one party to a contract cannot maintain an action for a breach occasioned by his own act, and neither can three parties maintain an action unless each party separately could".[9] Dr. Whitely Stokes charges this section without contradicting all known laws, but *quaere* whether he attended sufficiently to the difference made by the enactment being only permissive:

Bailee not responsible on redelivery to bailor without title.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Return of goods to or to the order of the bailor.—A bailee who in good faith returns the goods bailed to the bailor or his order is not liable to the true owner of goods. *N* entrusted certain bales of cotton to *L*, a *muccadam* (warehouseman). *L* pledged the cotton with *B* (with whom he had dealings for several years) to secure advances made by *B* to *L*. Subsequently *L* redeemed the pledge, and the cotton was returned by *B* to or to the order of *L*, *N* sued *B* and *L* claiming delivery of the goods or their value. The Privy Council held that whether the pledge by *L* to *B* was or was not valid under s. 178, the return of the goods by *B* in good faith to *L* was a complete defence to the suit.[10] The section really applicable was the present section, but the case was wrongly argued as under s. 178, which it was held unnecessary to consider.

Estoppel of bailee.—*Cp.* the Evidence Act, 1872, s. 117.—"... Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license ... *Expl.* (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor."

The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is not justified in refusing to deliver to the bailor unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming. There must be something equivalent to an eviction by a paramount

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8 *May* v. *Harvey* (1811) 13 East. 197; 12 R.R. 322. In *Broadbent* v. *Ledward* (1839) 11 A. & E. 209; 52 R.R. 321, it does not appear what was the character of the defendant's possession.

9 *Brandon* v. *Scott* (1857) 7 E. & B. 334; 110 R.R. 574.

10 *Bank of Bombay* v. *Nandlal Thackerseydass* (1912) 40 I.A. 1; 37 Bom. 122, 17 I.C. 663.

title, which if it actually took place would of course determine the bailment.[11] But if the bailor has by his own act, as by mortgaging the thing bailed, made it impossible for the bailee to redeliver to him wihout being exposed to an action at the suit of a third person, then the bailee is excused.[12]

But if a man accepts a bailment with notice at the time of an adverse claim, he must stand by the election he has made, and cannot afterwards rely on the adverse title against his bailor.[13]

A common carrier's position is not quite the same, as he must in any case accept goods offered him for carriage and cannot make inquiries as to the ownership. He may safely deliver in pursuance of his employment until he has notice of an adverse claim, but after notice he would so deliver at his peril, and therefore is justified in delivering to the real owner.[14]

If a warehouseman, or other such like person having the custody of goods, acknowledges that he holds them at the order of a certain person, he thereby makes himself that person's bailee, and is estopped from denying his title to the same extent as if he had actually accepted delivery from him.[15]

Right of third person claiming goods bailed.

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

The bailee's protection against conflicting claims appears to be left to the general directions of the Code of Civil Procedure. In England the bailee can take refuge with the Court by interpleading.[16]

Right of finder of goods; may sue for specific reward offered.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost the finder may sue for such reward, and may retain the goods until he receives it.

But the Common Law a person who finds lost goods and holds them with the intention of saving them for the true owner is certainly not a trespasser, and has no higher duties than a bailee;[17] but, the service being rendered without request from the owner, he does not seem en-

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11 *Biddle* v. *Bond* (1865) 6 B. & S. 225, approved by C.A. in *Rogers, Sons & Co.* v. *Lambert & Co.* (1891) 1 Q.B. 318, 325. This doctrine does not extend to a change of title, in other kinds of transactions, by assignment or operation of law: *Kingsman* v. *Kingsman* (1880) 6 Q.B.D. 122.

12 *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (1861) 30 L.J.C.P. 247. This is really the application of a wider principal. See ss. 53 and 67, above.

13 *Ex parte Davies* (1881) 19 Ch. D. 86.

14 *Sheridan* v. *New Quay Co.* (1858) 4 C.B.N.S. 618; 114 R.R. 873, followed in *Eagleton* v. *E.I.R. Co.* (1872) 8 B.L.R. 581, 606. The Court of Common Pleas preferred Story's earlier to his later opinion.

15 *Henderson & Co.* v. *Williams* (1895) 1 Q.B. 521, C.A.

16 It is sufficient to refer to the judgment of Lindley L.J. in *Rogers, Sons & Co.* v. *Lambert & Co.* (1891) 1 Q.D. 318 p. 327.

17 *Isaack* v. *Clark* (1615) 2 Bulstr. 306, at p. 312, fully cited by Sir R.S. Wright in Pollock and Wright on Possession at p. 177.

titled to any remuneration,[18] unless a specific reward has been offered for the return of the goods, and the offer has come to his knowledge (see on s. 8, "General Offers", above); and if he cannot claim compensation there is no ground on which he can retain the goods. But it seems the Court would be astute to lay hold of any evidence which might constitute a cause of action for a meritorious finder who had been at substantial pains, and it is possible that in some cases he might have rights analogous to a salvor's.[19] It appears to have been a current opinion as late as the seventeenth century that a finder could abandon the goods with impunity.[20]

The rule of the present section appears to be intended to satisfy natural justice. Presumably the compensation, if no specific reward has been offered and the parties cannot agree, is to be what the Court considers reasonable. If the parties do agree, the owner's promise of reward may be binding under s. 25, sub s.2 (*ante*) See Story, Bailments, s. 121A.

When finder of thing commonly on sale may sell it.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) When the thing is in danger of perishing or of losing the greater part of its value, or,

(2) When the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

This section is taken from the New York Draft Civil Code, s. 943, where it is stated to be a new provision. It does not appear to have come before the Indian Courts. At Common Law sale by the finder would be a conversion.

Bailee's particular lien.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give *A* three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

Principle of bailee's lien.—This section expresses the "Common Law principle that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid".[21]

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18 *Binstead* v. *Buck* (1777) 2 W.Bl. 1117. The finder of a dog, who had fed it for twenty weeks, claimed the cost from the owner when he appeared, before delivering the dog. Held he had no claim.

19 *Nicholson* v. *Chapman* (1793) 2 H.Bl. 254, 3 R.R. 374. For a contrary view, see Paton, Bailment, 122-123—Eyre C.J., though anxious to give a remedy, could not find a principle to support one.

20 *Isaack* v. *Clark supra,* note 12.

21 Best C.J. in *Bevan* v. *Waters* (1828) 3 Car. & P. 520; 33 R.R. 692. Not if he has kept the thing beyond the agreed time, or a reasonable time, for the completion of the work and has failed to complete it: *Judah* v. *Emperor* (1925) 53 Cal. 174; 90 I.C. 289; 1926 A.Cal. 464 (in such case bailor does not commit theft by retaining the goods).

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges".[22] An agister, who merely takes in an animal to feed it, is not entitled to a lien, as not coming within this principle, for he does not confer any additional value on the thing entrusted to him.[23] A garage owner is not entitled to a lien merely for maintaining a motor car.[24]

A bailee's lien is lost if he surrenders possession of the goods, even though he subsequently regains possession.[25] The lien never arises unless the bailee has a right to continuing possession of the goods, so that if the bailor has the right to remove the goods from time to time,[26] there is no lien, in the absence of an express agreement that the goods shall remain "in pawn" despite temporary removal by the bailor.[27]

Further, where a person does work on goods delivered to him under an entire contract, the fact the deliveries are at different times does not affect his right to a lien on all goods dealt with under that contract.[28] Accordingly, where jute was delivered to a pressing company from time to time to be baled, but all under one contract, the lien was held to attach to all such goods.[29]

A bailee for reward cannot transfer his lien to a sub-contractor without the bailor's authority.[30] But such authority may be implied. If *H*, who has hired a car from owner *O*, under a hire-purchase agreement, by the terms of which *H* has undertaken to keep the car in repair, delivers the car to a garage proprietor *G* for repair, *G* has a lien not only against *H*,but also against *O*: the express duty to repair leads to an implied authority to create a lien for repair.[31] This implied authority is not removed by the fact that *H* is in arrear with the payments of the hire-purchase instalments at the time the vehicle is delivered to *G* for repair,[32] unless *O* has already terminated the agreement for such default before the car is left with *G*.[33] In the case of a motor vehicle, the giving of possession to an artificer for repairs necessary to make it roadworthy is an act reasonably incidental to bailee's use of the vehicle. If the bailor desires to exclude the bailees authority it must be done expressly.[34]

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22 Parke B., in *Scarfe* v. *Morgan* (1838) 4 M. & W. 270, 283; 51 R.R. 568, 578.

23 *Jackson* v. *Cummins* (1839) 5 M. & W. 342; 52 R .R. 737; *Chanda Mal* v. *Gonda Singh* (1885) Punj. rec. no. 60. *A fortiori,* he has no right to sell: *Vithoba* v. *Maroti,* 1940 A.N. 273. In England an innkeeper has a lien on goods brought into the inn by a guest; this is on the distinct ground that he is bound by law to accept them. See 1 Sm. L.C., 13th ed. 131. As to the peculiar position of a distrainer at common law, who does not acquire possession at all, see *Turner* v. *Ford* (1846) 15 M. & W. 212; 71 R.R. 624; Pollock and Wright on Possession, 82, 202.

24 *Hatton* v. *Car Maintenance Co.* (1915) 1 Ch. 621.

25 *Edjuljee* v. *Cafe John Bros.* (1944) Nag. 37—*E,* sold a secondhand refrigerator to *P,* and agreed to put it in order for a further sum. *P* took delivery. Later *E* agreed to make further repairs as an act of grace, and was given possession. *E* claimed a lien, as the original sum fixed for repairs had not been fully paid. Held the lien was lost by the original delivery to *P. Hartley* v. *Hitchock* (1816) 1 Stark. 408, 171, E.R. 512 followed.

26 E.g. a racehorse sent to training stables. The trainer has no lien if the owner has the right to have the horse redelivered to him to run in any race he pleases: *Forth* v. *Simpson* (1849) 13 Q.B. 680, 116 E.R 1423. In English law, in innkeeper exceptionally does not lose his lien by temporary removal: *Allen* v. *Smith* (1862) 12 C.B. (N.S.) 638—there are other respects in which the innkeeper is in a privileged position in the law of lien.

27 *Albemarle Supply Co.* v. *Hind* (1928) 1 K.B. 307, C.A.

28 *Chase* v. *Westmore* (1816) 15 M. & S. 180; 17 R.R. 301.

29 *Miller* v. *Nasmyth's Patent Press Co., Ltd.* (1882) 8 Cal. 312.

30 *Pennington* v. *Reliance Motor Works* (1923) 1 K.B. 127.

31 *Green* v. *All Motors* (1917) 1 K.B. 625, C.A; *Tappenden* v. *Artus* (1963) 3 W.L.R. 685; (1963) 2 All E.R. 213; (1964) 2 Q.B. 185.

32 *Keene* v. *Thomas* (1905) 1 K.B. 136, 74 L.J.K.B. 21.

33 *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* (1946) K.B. 505.

34 *Tappenden* v. *Artus* (1963) 3 W.L.R. 685; (1963) 3 All E.R. 213; (1964) 2 Q.B. 185.

Contract to the contrary.—There is a decision of the English Court of Appeal in *Albemarle Supply Co. Ltd.* v. *Hind*[35] that a lien, good against the owner, arises in favour of a repairer, employed by a hirer, even though the contract of hire-purchase expressly forbids the creation of a lien, if this prohibition is unknown to the repairer. Even in England this decision has been confined to cases of hire-purchase.[36] In Australia the High Court has, in *Fisher* v. *Automobile Finance Co.* [37] restrictively distinguished the Court of Appeal case, as one where the hirer had apparent authority inasmuch as the owner well knew that the hirer garaged the car with the repairer, and the Australian Court held that where the hire-purchase agreement expressly forbade the creation of any such lien, and proivided that only the owner's nominee should execute repairs, a repairer not nominated by the owner had no lien effective against him. S. 170 confers a lien only "in the absence of a contract to the contrary", and the Australian views seem to be more in accord with the wording of the section.

Where there is an express contract to do certain work for a specified sum of money, there is no room for a *quantum meruit* claim. A person, therefore, to whom an organ is delivered for repairs for a certain sum is not entitled to retain it as security for a sum of money claimed not under the contract, but for work done.[38] While the special contract is in force there is no other "due remuneration" than the sum expressly contracted for.

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General as distinct from particular lien: Bankers.—This "general lien," as it is called by way of distinction from the "particular lien" of an artificer for work done by him on the particular goods in question,[39] was originally established in England, as regards bankers and others, as a proved usage of trade; but, once being so established, it became part of the law merchant, and as much to be judicially noticed as any other part of the law.[40] The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for special purpose,[41] and this on the ground that the limited and special purpose must be deemed to imply a contract to the contrary, which seems to account for the absence from the text of any words expressly making an exception in such cases.[42] Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm.[43] Nor does the lien of a banker extend to title deeds casually left at the bank after a refusal by him to advance money to them;[44] and

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35 (1928) 1 K.B. 307.
36 Per Goddard L.C.J. in *Bowmaker's Case (supra)* at p. 655.
37 (1928) 41 C.L.R. 167. See also *Tappenden* v. *Artus* (1963) 3 W.L.R. 685; (1963) 2 All E.R. 213; (1964) 2 Q.B. 185.
38 *Skinner* v. *Jager* (1883) 6 All. 1394.
39 "A *general* lien is the right to retain the property of another for a general balance of accounts; but a *particular* lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained": Kent, Comm. ii. 634.
40 *Brandao* v. *Barnett* (1846) 12 Cl. & F. 787; 69 R.R. 204; 8 E.R. 1622 *per* Lord Campbell and Lord Lyndhurst. *Punjab National Bank Ltd.* v. *Aruramal* (1965) A.Pj. 632, 635 quoting Hart on Banking (3rd Ed.) 10; *Brahmayya* v. *Thangavelu* (1956) A.M. 570; *Punjab National Bank Ltd.* v. *Satyapal Virmani* (1956) A. Pj. 118; (1956) Punj. 291.
41 See *Cuthbert* v. *Robarts Lubbock & Co.* (1909) 2 Ch. 226, C.A.
42 So as to a sum specially ear-marked for remittance abroad: *Mercantile Bank of India* v. *Rochaldas Gidumal,* 95 I.C. 358; 1926 A.S. 225.
43 *Wolstenholm* v. *Sheffield Bank* (1886) 54 L.T. 746.
44 *Lucas* v. *Dorrein* (1817) 7 Taunt. 278; 18 R.R. 480.

where a deed, dealing with two distinct properties, was deposited with a memorandum charging only one of the properties with a specified sum and also the general balance due to the banker, it was held that he had no lien on the other property comprised in the deed.[45]

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circumstances, the agreement must be clearly inconsistent with the existence of such a lien.[46] Accordingly a deposit of valuables with a banker to secure debts of a customer due to him as banker is subject to the bankers' lien for the customer's general debts to him unless the customer can prove an agreement to give up his general lien.[47] Such an agreement may be evidenced, for example, by a memorandum of charge declaring that the deposit is to secure overdrafts not exceeding a named amount. This excludes the banker's lien for any greater amount.[48] As to boxes or sealed parcels deposited with a banker for custody without informing him of their contents or making them accessible to him, he has no lien on them even if the customer is in the habit of leaving other securities with the banker against advances.[49]

A banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities deposited with him, in his character as a banker.[50] Strictly it is confined to securities and property in the custody of a banker.[51] In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title.[52] But there is no lien for advances made after notice of a defect in the customer's title,[53] or after notice of an assignment of the moneys or securities in the banker's hands[54] or after the deposit has been validly assigned to another or in any case after he has been given notice of assignment by the third party. It is not necessary that the assignee should have given notice to the Bank.[55] And in the case of securities which are not negotiable, the lien is confined to the rights of the customer herein, and is subject to all equities affecting them at the time when the lien attaches.[56]

Banker's lien over moneys.—The statutory law in India does not expressly refer to Banker's lien in respect of cash deposits.[57] But money has been held to be a species of goods over which lien may be exercised.[58] A banker's lien can attach to money so long as it remains an earmarked sum of money,[59] but money paid into a bank to be credited to the current account of the person making the payment does not constitute a bailment, so that there is no question of lien.[60] The term lien cannot *properly* be used in reference to the claim of the Bank

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45 *Wylde* v. *Radford* (1864) 33 L.J. Ch. 51.
46 *Brandao* v. *Barnett* (1846) 12 Cl. & F. 787; 69 R.R. 204; *Agra Bank's Claim* (1872) L.R. 8 Ch. 41.
47 *Kunhan* v. *Bank of Madras* (1895) 19 Mad. 234; *Official Assignee of Madras* v. *Ramaswami Chetti* (1920) 43 Mad. 747; 59 I.C. 475.
48 *Re Bowes* (1886) 33 Ch. D. 586.
49 *Lease* v. *Martin* (1873) L.R. 17 Eq. 224.
50 *Misa* v. *Currie* (1876) 1 App. Cas. 554; *London Chartered Bank* v. *White* (1879) 4 App. Cas. 413.
51 *Punjab National Bank Ltd.* v. *Aruramal* (1960) A. Punj. 632; *Mohammad Hussain* v. *Chartered Bank* (1965) A.M. 266; (1964) 1 Mad. 1012; but see *infra*.
52 *Bank of New South Wales* v. *Goulburn Butter Factory* (1902) A.C. 543; *Misa* v. *Currie, supra; Brandao* v. *Barnett* (1846) 12 Cl. & F. 787; 69 R.R. 204; *Jai Kishan Dass* v. *Central Bank of India,* 1955 A. Punj. 250.
53 *Solomons* v. *Bank of England* (1810) 13 East. 135; 12 R.R. 341; *Locke* v. *Prescott* (1863) 32 Beav. 261; 138 R.R. 733.
54 *Jeffreys* v. *Agra Bank* (1866) L.R. 2 Eq. 674.
55 *Brahmayya & Co.* v. *Tangavelu* (1956) A.M. 570; *Woodhams* v. *Anglo-Australian, etc. Assurance Co.* (1861) 66 E.R. 397 reld on; *Subramania Ayyar* v. *Ramasubba Ayyar* (1935) A.M. 1003 (S. 130 T.P. Act case) refd. to.
56 *London and County Bank* v. *Ratcliffe* (1881) 6 App. Cas. 722.
57 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A. Punj. 632, 635; (1960) 2 Punj. 823.
58 *Punjab National Bank Ltd.* v. *Satyapal Virmani* (1956) A. Punj. 118; *Mercantile Bank of India Ltd.* v. *Rochaldas Gidumal & Co.* (1926) A.S. 225; *Union Bank of Australia* v. *Murray, Aynsley* (1898) A.C. 693; *Radha Raman* v. *Chota Nagpur Banking Assn.,* 23 Pat. 501; (1944) A.P. 368.
59 *Radha Raman* v. *Chota Nagpur Banking Association Ltd.* (1944) 23 Pat. 501, 1944 A.P. 368. But does not confer right of sale: *Bank of India* v. *R.F. Cowasjee,* 1955 A.B. 419, 428.
60 *Devendrakumar* v. *Gulabsingh* (1946) Nag. 210, 1946 A.N. 114.

upon a general deposit, for the funds on the general deposit are the property of the bank itself. The term set-off should be applied in such cases.[61] Lien may arise from contract, or from mercantile usage or by operation of law. But practical effect of lien and set-off is the same.[62] But it was pointed out by Patna High Court that "banker's lien" has been used in a wide sense but not where the distinction between the two was material.[63] The rule of English law that the Bank has a lien or more appropriately a right to set-off against all moneys of the customers in his hands has been accepted in India. The banker is at liberty to transfer the deposits of a customer to set-off and liquidate debts due from the customer[64] in whatever account the money may be, current or deposit,[65] whether they are in the same or different branches; but mutuality must exist between the same parties.[66]

Lien over several accounts.—In order to create a Banker's lien over several accounts they must belong to the customer in the same capacity, e.g. not his capacity as a trustee or his account jointly with a third person. Nor is there a lien on the account of a partner for a loan due from a firm.[67] But the right to combine the various accounts of a customer in the same capacity is of the Banker and not of the customer.[68] The banks have no lien on the deposit of a partner on his separate account for a balance due to the Bank from the partnership.[69] A customer having his deposit at Karachi branch of a Bank has no right to insist on its Madras branch to honour its cheques at Madras.[70]

Lien when not applicable.—There may be circumstances inconsistent with the general lien of a banker. The most frequent example of this is a deposit expressed to cover a specified advance. The lien will not extend beyond the agreed overdraft. Where however the customer knowingly permits the bankers to retain the security, a general lien may be implied and its protection may then be claimed in respect of other advances.[71] This was relied on by the Delhi High Court in a case of a guarantee by a bank.

Here a bank gave a guarantee for the payment of a decretal debt and the judgment debtor gave his deposit receipt as security to the bank and signed a general form giving a general lien to the Bank. On the back of the deposit receipt the bank manager endorsed "Lien to BG 11/80" which was interpreted by the Court to mean that the receipts were being held against

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61 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A. Punj. 632, 635 quoting Hart on Banking (3rd ed.) 10; Halsbury's Laws of England (4th Ed.) Vol. 3, page 60, para 78. In re Morris; *Conveys* v. *Morris* (1922) 1 Ir. R. 81; *Brahmayya* v. *Thangavelu* (1956) A.M. 570; *Brandao* v. *Barnett* (1846) 8 E.R. 1622. (Lien is to be judicially noticed). *Punjab National Bank Ltd.* v. *Satypal Virmani* (1956) A. Punj. 118; (1956) Punj. 291; *See Radha Raman* v. *Chota Nagpur Banking Assn.;* 23 Pat. 501; (1944) A.P. 368; *Mohammad Hussain* v. *Chartered Bank* (1965) A.M. 266 (1964) 1 Mad. 1012.

62 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A. Punj. 632; *Mohammad Hussain* v. *Chartered Bank* (1965) A.M. 266; (1964) 1 Mad. 1012.

63 *Radha Raman* v. *Chota Nagpur Banking Assn.;* 23 Pat. 501; (1944) A.P. 368; 370; *Roxburgh* v. *Cox* (1881) 17 Ch. D. 520 refd. to.

64 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A. Punj. 632, 635; *Garnett* v. *M'Kewan* (1872) 8 Ex. 10 reld. on; *Lloyds Bank Ltd.* v. *Administrator-General,* 12 Rang. 25; (1934) A.R. 25; *Devendrakumar Lalchandji* v. *Gulab Singh* (1946) Nag. 210; (1946) A.N. 114; See *Union Bank of Australia* v. *Murray-Aynsley* (1898) A.C. 693.

65 *Lloyds Bank Ltd.* v. *Administrator-General,* 12 Rang. 25; (1934) A.R. 25; *Garnett* v. *M'Kewan* (1872) 8 Ex. 10; *Devender Kumar* v. *Gulab Singh* (1946) A.N. 114; (1946) Nag. 210.

66 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A. Punj. 632; 636; *Garnett* v. *M'Kewan* (1872) 8 Ex. 10 reld. on.

67 *Punjab National Bank* v. *Arura Mal* (1960) A. Punj. 632; *Punjab National Bank* v. *Satyapal Virmani* (1956) A.Punj. 118; (1956) Punj. 291; *Radha Raman* v. *Chota Nagpur Banking Assn.,* (1944) A.P. 368.

68 *Mohammad Hussain* v. *Chartered Bank Ltd.* (1965) A.M. 266; (1964) 1 Mad. 1012; *Garnett* v. *M'Kewan* (1872) 8 Ex. 10; *Muttan* v. *Peat* (1900) 2 Ch. 79.

69 *Punjab National Bank Ltd.* v. *Arura Mal* (1960) A.Punj. 632, 636; *Wolstenholm* v. *Sheffield Union Banking Co. Ltd.* (1886) 54 L.T. 746; *Radha Raman* v. *Nagpur Banking Assn. Ltd.,* 23 Pat. 501; (1944) A.P. 368.

70 *Mohammad Hussain* v. *Chartered Bank* (1965) A.M. 266; (1964) 1 Mad. 1012.

71 *Re Bowes* (1886) 33 Ch. D. 586; *Wilkinson* v. *London & Canty Banking Co* (1884) 1 T.L.R. 63; *Re London & Globe Finance Corporation* (1902) 2 Ch. 416. Chitty: On Contracts (24th ed.) para 2643.

the guarantee furnished by the Bank. The Court held that by this endorsement the banker's lien was to be read as a contract to the contrary. Hence the decree holder was entitled to the deposits as belonging to the customer.[72]

But where there is a special contract between a banker and a customer of guarantee providing a method of reimbursement, the statutory lien under S. 171 will be excluded. But where a customer has two accounts a cash credit account and another account and all fixed deposits are to be duly credited to cash credit account, the balance can be adjusted by appropriating amounts in other account in exercise of lien under S. 171.[73]

Lien, when debt barred.—When a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt even though an action thereon would be time-barred.[74]

Factor.—A factor "is an agent entrusted with the possession of goods for the purpose of sale".[75] He may buy and sell either in his own name or in that of the principal, though "he usually sell in his own name, without disclosing that of his principal." The factor is said to have a "special property" in the goods consigned to him.[76] Private instructions to sell only in the principal's name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien.[77] The secretaries and treasurers of a company, who have made advances to the company and incurred expenses and made disbursements on behalf of the company in the conduct of its business, are not factors, and are not entitled to any lien on the property of the company in their possession.[78] Similarly a *banian* in Calcutta has no lien for a general balance of account in the absence of an express contract to that effect.[79] Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell *invito domino*. To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment.[80]

Conformably to the principle governing all general liens, a factor's lien, where it exists, applies only to debts due to the factor in that character; it does not extend to "debts which arise prior to the time at which his character of factor commences".[81] But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for losses or liabilities incurred in the course of his employment in respect of which he is entitled to be indemnified.[82]

In order that the lien may attach, the goods must come into the possession, actual or constructive,[83] of the factor. If, for instance, a factor accepts bills on the faith of a consignment of

72 *Vijay Kumar* v. *Jullundur Body Builders* (1981) A.D. 126; *Brandao* v. *Barnett* (1846) 12 Cl. & F. 787; 136 ER 207.
73 *Krishna Kishore Kar* v. *United Commercial Bank* (1982) A. Cal. 62.
74 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1135; (1958) A.SC. 328; *Narendra Lal Khan* v. *Tarubala Dassi*, 48 Cal. 817, 823; *Carter* v. *White* (1883) 25 Ch.D. 666, 672 (Lindley L.J.). *Curwen* v. *Milburn* (1889) 42 Ch.D. 424, 434; *Devender Kumar* v. *Gulab Singh* (1946) Nag. 210; (1946) A.N. 114.
75 Cotton L.J. in *Stevens* v. *Biller* (1883) 25 Ch. D. 31, 37; *Emperor* v. *Parakh* (1925) 1 Luck. 133; 92 I.C. 744; A.I.R. 1926 Oudh 202 (motor-car dealer entrusted with car for sale committed no offence by refusing to return the car to the Court of Wards, under whose management the client's estate had come, without payment of his account).
76 *Baring* v. *Corrie* (1818) 2 B. & Ald. 137, *per* Abbott C.J. at p. 143, Holroyd J. at p. 148; 20 R.R. 383.
77 *Stevens* v. *Biller* (1883) 25 Ch. D. 31, 37.
78 *In re Bombay Saw Mills Co.* (1889) 13 Bom. 314, 320.
79 *Peacock* v. *Baijnath* (1891) 18 I.A. 78; 18 Cal. 573.
80 *Jafferbhoy* v. *Charlesworth* (1893) 17 Bom. 520, 542,
81 *Houghton* v. *Mathews* (1803) 3 B. & P. 485, at p. 488; 7 R.R. 815, at p. 861.
82 *Hammonds* v. *Barclay* (1802) 2 East, 227, where the principal died during the currency of certain bills accepted by the factor on the faith of a consignment of goods; *Drinkwater* v. *Goodwin* (1775) Cowp. 251 (liability incurred by the factor as surety for the principal).
83 *Bryans* v. *Nix* (1839) 4 M. & W. 775; 51 R.R. 829. And see *Lutscher* v. *Comptoir d'Escompte* (1876) 1 Q.B.D. 709.

goods which, by reason of the bankruptcy of the principal, are never received by him, he has no lien on the goods as against the principal's trustee in bankruptcy.[84] Nor does the lien extend to goods acquired otherwise than in his character of a factor,[85] or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien.[86] Instructions to provide, out of the proceeds of a consignment, for a bill of exchange drawn by the principal on the factor in favour of a third person will exclude the factor's general lien unless he pays the bill of exchange.[87]

Wharfingers.—The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods. He has no lien as against a buyer for charges becoming due from the seller after he has had notice of the sale,[88] and where it was agreed between a buyer and seller, before the goods sold came to the hands of the wharfinger, that the contract of sale should be rescinded, it was held that he had no lien as against the seller for a general balance due to him from the buyer.[89]

Owners of a screwhouse who have a wharf as an accessory are not wharfingers.[90]

Accountants Lien.—An accountant has lien on books and documents for unpaid fees on books and documents delivered to him in the usual course of business and also on books and documents coming into his possession, and also over any documents which had in ordinary professional work come into his possession.[91]

Carriers Lien.—Under a contract with a meat importing company the plaintiff company—a Transport Haulage Company—had a lien for carriage charges or any sum due therefrom on the goods imported and collected by them from the London Docks and delivered to the consignees at Gravesend. The meat company created mortgage debentures creating a floating charge in favour of a bank who had a receiver appointed. Before the appointment, about 600 cartons were received at the Docks half of which the plaintiffs collected and delivered to the consignees. After the appointment of the Receiver the plaintiffs collected the other half. And after they learnt of the appointment of the receiver, the plaintiffs claimed a lien over these latter cartons for their charges due from the meat company and brought an action for the same. The Court of Appeal held that the plaintiff's contractual rights came into existence when the original contract was entered into and not when they took possession of the cartons after the appointment of the receiver. The rights of the debenture holders were therefore subject to the plaintiffs right and hence the plaintiffs were entitled to the sum claimed in preference to the receiver.[92]

Attorneys.—In England a solicitor has a lien on his client's documents (not only deeds and law papers)[93] entrusted to him as solicitor[94] "for all taxable costs, charges, and expenses

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84 *Kinloch* v. *Craig* (1790) 3 T.R. 119, 783; 1 R.R. 664.

85 *Dixon* v. *Stansfeld* (1850) 10 C.B. 398; 84 R.R. 631 (where a factor insured a ship on the principal s behalf, it was held that his general lien did not extend to the policy of insurance).

86 *Spalding* v. *Ruding* (1843) 6 Beav. 376; 63 R.R. 120 (bill of lading pledged to factor for specific amount); *Burn* v. *Brown* (1817) 2 Stark. 272; 19 R.R. 719 (certificate of ship's registry's entrusted to factor for the purpose of paying duties at custom-house).

87 *Frith* v. *Forbes* (1862) 4 De G. F. & J. 409; 135 R.R. 217; *Colvin* v. *Hartwell* (1837) 5 Cl. & F. 484

88 *Barry* v. *Longmore* (1840) 12 A. & E. 639; 54 R.R. 654.

89 *Richardson* v. *Goss* (1802) 2 B. & P. 119; 6 R.R. 727.

90 *Miller* v. *Nasmyth's Patent Press Co.* (1882) 8 Cal. 312.

91 *Woodworth* v. *Conroy* (1976) 1 All E.R. 107, 111, 112.

92 *George Baker (Transport) Ltd.* v. *Eynon* (1974) 1 All E.R. 900, 905-6, (1973) 3 All E.R. 374 (revd); *Parsons* v. *Sovereign Bank of Canada* (1913) A.C. 160; and *Rother Iron Works Ltd.* v. *Canterbury Precision Engineers Ltd.* (1973) 1 All ER 394 applied.

93 *E.g.*, cheques: *General Share Trust Co.* v. *Chapman* (1876) 1 C.P.D. 771.

94 *Sheffield* v. *Eden* (1878) 10 Ch. D. 291, C.A. (solicitor mortgagee has no lien on mortgage deed for costs of mortgage, let alone for general costs in other respects; here the deed is not the client's property at all); approved and followed by the C.A. in *Barratt* v. *Gough-Thomas* (1951) Ch. 242; *Champernown* v. *Scott* (1821) 6 Mad. 92; 22 R.R. 248; 13 Enc Laws of England, 2nd Ed., 494. *s.v. Solicitor,* which see for details of English practice on the subject.

incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fees".[95] Taking a special security from the client is not necessarily an abandonment of the general lien, but it will be so if the circumstances are inconsistent with the continuance of the lien, and if the solicitor does not expressly reserve his lien, an intention to waive it will generally be inferred, having regard to the solicitor's duty to give his client full information.[96]

A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs; and the lien extends also to translations of documents made by the Court's translator at his expense.[97] If, however, a solicitor discharges himself,[98] he is not, according to English law, entitled to a lien, and the same law applies in India. S. 1 saves usages and customs of trade not inconsistent with the provisions of this Act, and the usage of trade of attorneys sanctioned by English law is not inconsistent with this section. Applying this reasoning, it was held by the Calcutta High Court that a dissolution of a firm of solicitors operates as a discharge of the client who employs them, and the attorneys are not entitled to retain the papers until their costs are paid,[99] but lien does not extend, to advocates given documents for filing pleadings.[1] For Indian decisions on solicitor's lien, see Mulla's Code of Civil Procedure, 13th ed., pp. 780-782.

A solicitor does not lose his lien on the documents of his client by parting with physical possession of those documents if the circumstances show that lien was expressly or impliedly preserved. The circumstances and evidence showed that the solicitor when sending the documents to another solicitor at the instructions of the client did not intend to part with their legal possession of the documents and thus did not lose their lien.[2]

The Bombay High Court held in *Narayandas's case* that an attorney has lien over his client's papers but when he discharges himself he is bound to give inspection and even production to the new solicitor engaged by the client. He has also to give delivery without prejudice to the lien held by himself but this does not apply when the client discharges him. (2) But where a solicitor takes a case he is bound to prosecute or defend the claim whether his client is rich or poor. He could before his accepting his client's case have protected himself by getting his client to deposit sufficient funds for the prosecution of his client's matter. He cannot in such a case refuse to handover papers to a new Solicitor.[3]

The kinds of lien dealt with in this Act are as follows:

(1) Lien of finder of goods (s. 168, above);

(2) Particular lien of bailees (s. 170, above);

(3) General lien of bankers, factors, wharfingers, High Court attorneys and policy-brokers (s. 171, above);

(4) Lien of pawnees (ss. 173, 174, below); and

(5) Lien of agents (s. 221, below);

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95 Lindley L.J. *Re Taylor, Stileman, and Underwood* (1891) 1 Ch. 590; 596; "all such claims against the client as the taxing master has to consider," *per* Kay L.J., at p. 599.

96 *Ibid.*, at pp. 597, 601; *Re Douglas Norman & Co.*, (1898) 1 Ch. 199. The leading earlier authorities are *Cowell* v. *Simpson* (1809) 16 Ves. 275; 10 R.R. 181, and *Stevenson* v. *Blakelock* (1813) 1 M. & S. 535; 14 R.R. 525.

97 *Bai Kesserbai* v. *Narranji* (1880) 4 Bom. 353; *Caldwell* v. *Sumpter*, (1972) 1 All E.R. 567. (Solicitor handing over papers but reserving lien.).

98 An attorney who declines to act further for a client unless costs already incurred are paid discharges himself: *Basanta Kumar* v. *Kusum Kumar* (1902) 4 C.W.N. 767; *Atool Chandra Mukerjee* v. *Shoshee Bhusan* (1904) 6 C.W.N. 215.

99 *Re McCorkindale* (1880) 6 Cal. 1, following *Re Moss* (1866) L.R. 2 Eq. 345.

1 *Lalchand Ramchand* v. *Pyare* (1971) A.MP. 245.

2 *Caldwell* v. *Sumpter* (1972) 1 All E.R. 567, 570 (C.A.).

3 *Narayandas Sundarlal* v. *Narayandas Harbhagat* (1932) A.B. 363, 365, 366.

Some further comments with regard to liens, general and particular, of agents and sub-agents, and to the modes in which such liens may be extinguished or lost, will be found in notes on s. 221, *post*.

As to lien of railway administration, see Railways Act 1890 s. 55.

The sections of the Indian Contract Act relating to lien are not exhaustive, and do not negative the existence of lien in cases not specified therein. On general principles, and in the absence of any direct provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges.[4]

In a Madhya Pradesh case an Advocate engaged to prosecute a claim on promissory note claimed a lien on it for his unpaid fees and refused to hand it over to another advocate engaged by the client for the purpose of being produced in Court in support of and as foundation of his claim. The Court refused to allow that lien over the document of title even if an Advocate could be said to be included in the term attorney. It is submitted that unless the Rules of Court have otherwise provided an Advocate has no such lien.[5]

Bailments of Pledges

"Pledge," "pawnor," and "pawnee" defined.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the "pawnee."

(Bankers, by agreement with a customer who has purchased goods to be paid for by drafts in the usual manner, honour the drafts and receive and store the goods, the customer taking delivery and paying for the goods taken from time to time. As to any goods remaining in the bank's custody unpaid for, the bank is a pawnee and not a mere bailee, and has the right of sale given by s. 176).[6]

The section affirms the Common Law. There is no difference between the Common Law of England and the law with regard to pledge as contained in sections 172 to 176 of the Contract Act.[7] Under the English Common Law, a pawn or a pledge is a bailment of personal property as a security for some debt or engagement. The two ingredients of a pawn are—

(1) the property pledged should be actually or constructively delivered to the pawnee;
(2) a pawnee has only a special property in the pledge, the general property remains in the pawnor and wholly reverts to him on discharge of the debt.[7]

According to the Andhra Pradesh High Court the three essential conditions of a pledge are:

(1) bailment of goods pledged; (2) bailment by way of security and (3) security for payment of a debt.

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4 *In re Cyril Kirkpatrick* (1897) Punj. Rec. no. 22. The analogy between a seller of goods and an arbitrator suggested by Roe C.J., to bring the arbitrator's case within s. 95 of the Act, (see now ss. 46, 47 of the Indian Sale of Goods Act, 1930) seems to be farfetched. See *Devendrakumar* v. *Gulabsingh* (1946) Nag. 210, 1946 A.N. 114, a case of banker's lien on money.

5 *Lalchand Ramchand* v. *Pyare Dasrath* (1971) A.MP. 245, 247; *Narayandas Sundarlal* v. *Narayandas Har Bhagat* (1932) A.B. 363, 365, 366 appld.

6 *Alliance Bank of Simla* v. *Ghamandi Lal-Jaini Lal* (1927) 8 Lah. 373; 101 I.C. 725; 1927 A.L. 408. The right must, of course, be exercised regularly with proper demand and notice, as mentioned below under that section.

7 *Lallan Parshad* v. *Rahmat Ali* (1967) A.S.C. 1322; (1967) 2 S.C.R. 233.

A pledgee has the right of a pledgor's possession but not of enjoyment, but his right of disposition is governed by the terms of the pledge and for the purpose of recovery of his debt.[8]

The bailee under a contract of pledge does not become owner, but, as having possession and right to possess, he is said to have a special property.[9] A pawn is a security whereby a deposit of goods is made by contract as security for a debt. The right to property vests the pledgee so far as is necessary to secure the debt. In this sense a pawn or a pledge is intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed.[10] A pledge is complete when the money is advanced to the pawnor against delivery of goods to the pawnee. Thereafter, the rights are governed by sections 172 to 181 of the Contract Act.[11] A bank advancing money against the delivery of a Railway Receipt is a pledgee and has the same remedies as the owner of the goods. It can maintain a suit against the Railway for full price of the goods even though it has advanced a lesser amount e.g. 20,000/-against goods worth 35,000/-.[12] Any kind of goods, documents, or valuable things of a personal nature may be pledged.[13] Delivery is necessary to complete a pledge; it may be actual or constructive.[14] *Reeves* v. *Capper*[15] is a case of constructive delivery. There the captain of a vessel pledged his chronometer with his employer, the shipowner, under an agreement whereby the captain was to be allowed to retain the use of the chattel during a voyage. It was held that the shipowner had possession of the chattel, just as a houseowner has possession of his plate even when it is under the control of his butler,[16] so that when the captain subsequently pledged the chattel with *R* without disclosing the pledge in favour of the shipowner the latter had a prior claim. It is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made.[17] *Blundell-Leigh* v. *Attenborough*[18] is an English case where the delivery preceded the pledge. *B* handed her jewels to *M* to value, and tel her what advance he could make on them, it being agreed that *M* was to retain the jewels as security if he did make any advance. The same day *M* pledged the jewels with *A*, a pawnbroker, who advanced £1,000/- in good faith. Two days later, *M* agreed to lend *B* £500/- on the security of the jewels. Salter J., the trial judge, held that there was no valid pledge between *B* and *M*, seeing that neither at the time of the contract to pledge, nor subsequently, were the jewels ever in *M*'s possession. *B* could, therefore, recover the jewels from *A* without any tender of the amount still due to *M*[19]. The Court of Appeal reversed this decision, holding that the original delivery, though it accompanied a gratuitous bailment, was also to constitute a good delivery to create a pledge should *M* find he could advance a sum which *B* was willing to accept. It seems that this reasoning does not surmount the difficulty that the agreement between *M* and *B* was reached only after *M* had parted with possession. There can of course be *traditio brevi manu*, by mere agreement that the character of *M*'s possession shall be changed from that the character of *M*'s possession shall be changed from that of gratuitous bailee to that of pledgee, but it is difficult to see how this form of *traditio* can operate where *M* has in the meantime relinquished possession.[20]

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8 *Shutzadi Begum* v. *Girdharilal* (1976) A. AP. 273, 279.
9 See *per* Bowen, L.J., *Ex parte Hubbard* (1886) 17 Q.B.D. at p. 698.
10 *Lallan Parshad* v. *Rehmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322; *Halliday* v. *Holgate* (1868) 3 Ex. 299.
11 *Jodhai Ramdayal* v. *Bharat Sukhdi* (1959) A.M.P. 97; *Mohammad Latif* v. *Smt. Amritkala* (1959) A.M.P. 309.
12 *Morvi Mercantile Bank Ltd.* v. *Union Bank of India* (1965) 3 S.C.R. 254; (1965) A.SC. 1954. See *infra*.
13 10 Enc. Laws of England, 2nd ed., 642, citing Story.
14 *Lallan Prasad* v. *Rahmat Ali* (1967) 2 S.C.R. 233; (1967) A.SC. 1322.
15 (1838) 5 Bing. N.C. 136, 132 E.R. 1057.
16 See notes under s. 6, Specific Relief Act of 1963.
17 *Hilton* v. *Tucker* (1888) 39 Ch.D. 669; *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297. If the goods are not delivered, the transaction may be a mortgage: *Jagannath* v. *Fatechand* (1949) Nag. 243, 1949 A.N. 368; *Kesrimal* v. *Bansilal*, 1952 A.M.B. 196, 198.
18 (1921) 3 K.B. 235.
19 (1921) 1 K.B. 382.
20 See also 35 Harv. L.R. 318.

The Supreme Court has held that delivery of the Chattel pawned is a necessary element in the making of a pawn but the delivery and advance need not be simultaneous and a pledge may be perfected by delivery subsequent to the advance made. Satisfaction of the debt extinguishes the pawn and the pawnee is bound thereafter to redeliver the goods pawned.[21] The delivery might be actual or constructive. All that is necessary is that dominium over the pledged goods remains with the pledgee. The goods may remain in the pledgor's godown.[22] Both the "open credit" system and the "key loan" system are covered by the word pledge.[23]

"Open Credit" system implies that the pledgor can with the previous consent of the creditor withdraw the goods and sell them provided the advance value of the goods is paid to the creditor or provided the necessary margin is fully maintained.

Under the "key loan" system the borrower has far less freedom, for the borrower even with the permission of the creditor as the keys of the godown are in the physical possession of the creditor.[24]

Government promissory notes may be pledged, but this must be done as required by statute by endorsement and delivery.[25] It seems that in India a valid pledge of shares may be effected by delivery of the share certificate.[26] The rules of delivery and the like which are generally applicable to bailments are applicable here. A pawnee may redeliver the goods to the pawnor for a limited purpose without thereby losing his rights under the contract of pledge, as for the purpose of enabling the pledgor to sell the goods on the pledgee's behalf.[27] It has even been held that there is a valid pledge where the goods remain in the warehouse of the pledgor, as the pledgee has no convenient place to store them.[28] These English authorities have been applied in India to a case where a new motor van pledged by a motor distributor was allowed to remain in his custody for display and demonstration purposes: *Appa Rao* v. *Salem Motors.*[29] This case seems to go further than the English cases in that there was no suggestion that the retention of custody was for the purposes of the pledgee, or even for the common purposes of pledgor and pledgee, and there was no evidence that the pledgee had ever seen and identified the van as his security.[30] If the pawnor abuses his authority in such a case by selling or pledging afresh on his own account to a third person who gives value in good faith, the pawnee is not entitled to the goods as against that person, who has received possesssion from an owner lawfully in possession though using his possession fraudulently: *Babcock* v. *Lawson.*[31] This case can be distinguished from *Reeves* v. *Capper (supra),* as in the *Babcock Case* the Court of Appeal held that the pawnee had intentionally surrendered his special property in the goods, and that although he was induced to do so by the fraud of the pawnor, the latter acquired at any rate a voidable title, which against a *bona fide* purchaser from the pawnor was indefeasible.[32]

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21 Halsbury's Laws of England, Vol. 29, page 221 (3rd Edn.). This statement of the law was accepted by the Supreme Court in *Lallan Parshad* v. *Rahmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322.

22 *Nadar Bank Ltd.* v. *Canara Bank Ltd.* (1961) A.M. 326; (1960) 2 M.L.J. 489; *Martin* v. *Reed* (1862) 142 E.R. 982; *North Western Bank Ltd.* v. *John Poynter & Son* (1895) A.C. 56.

23 *Nadar Bank Ltd.* v. *Canara Bank Ltd.* (1961) A.M. 326.

24 *Ibid.*

25 *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297. See also *Neckram Dobay* v. *Bank of Bengal* (1891) 19 I.A. 60; 19 Cal. 322, a case of pledge of Government securities.

26 *Kanhaiyalal* v. *Pt. Shirali,* 1953 A. Cal. 526, 527. See also note unders s. 178 sub-head 'Documents of title to goods'.

27 *North-Western Bank* v. *Poynter, Son & Macdonalds* (1895) A.C. 56.

28 *Martin* v. *Reid* (1862) 11 C.B. (N.S.) 730; 142 E.R. 982.

29 1955 A.M. 505.

30 See p. 511. Other motor vehicles were pledged at the same time, identified by engine numbers in the letter of pledge and delivered into the actual possession of the pledgee, but this particular van was not identified by any engine number in the letter of pledge.

31 (1880) 5 Q.B.D. 284.

32 As to the difference between a void and a voidable title, see notes on sections 17, 19 and 20. See also notes on s. 178A.

According to mercantile usage found to obtain in the city of Amritsar, if a person leaves goods with another and then borrows money from him, the loan is to be understood to be made on the security of the goods, so that if the loan is not repaid the creditor may sell the goods and appropriate the proceeds of the sale towards his debt.[33]

It is clear from the definition of "bailment" (s. 148, above) that there can be no pledge of goods unless there is an actual delivery of the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity; nor can it be said to be prohibited by the Contract Act merely because the Act contains provisions for bailments of pledges and none for hypothecation of goods.[34]

Hypothecation and pledge.—In hypothecation the possession of the property is retained by the owner and certain rights in that movable property are transferred to the person in whose favour the property is hypothecated. But in a pledge the possession of goods also passes to the pledgee by way of security[35] though the possession may be constructive.[36] The true distinction from hypothecation is that the constructive possession of the goods in the case of pledge is specifically secured by the terms of the contract and is continued unabated throughout.[37]

Pledge & Hypothecation: Partition of India—effect of.—In the case of a pledge the goods are in the physical possession of the creditor and they can neither be taken out nor added to without the knowledge and permission of the creditor. In the case of hypothecation the goods hypothecated are in the physical possession of the borrower and in the constructive possession of the creditor. The former, subject to the terms of the deed of hypothecation, is entitled to use them for the purposes of his business but subject to his sending regular reports to the creditor and if the deed so requires to keep goods of a particular value in hypothecation. In the case of the pledge it the duty of the pledgee to take such care of the goods as a prudent person would take and he would be responsible for any loss or damage. But in the case of Partition of India the creditor could not be expected to guard the pledged goods because of the conditions of utter lawlessness prevailing and when the non-moslem population had to run for their lives to places of safety in what became India. Therefore that duty of care which attaches to a pledge was in the circumstances impossible to provide. It is submitted that the contract became frustrated and was impossible of performance.[38]

Pledge and mortgage of shares.—In India there can be a pledge of shares and also mortgage of shares or moveables. Whether it is one or the other would depend on the intention of the parties and circumstances of the case.[39]

"The Indian Contract Act does not state that the whole of the Law of Contract in British India is comprised in the Act. In fact, the preamble of the Act shows clearly that the Act only contains a portion of the Law of Contract applicable in British India and there is nothing to

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33 *Pirthi Mal* v. *Gopi Nath* (1886) Punj. Rec. no. 34.

34 *Shrish Chandra Roy* v. *Mungri Bewa* (1904) 9 C.W.N. 14; *Shivram* v. *Dhau* (1901) 4 Bom. L.R. 577; *Damodar* v. *Atmaram* (1905) 8 Bom., L.R. 344; and *cf., In re A. Sumners* (1896) 23 Cal. 592, and *Puninthavalu* v. *Bhashyam* (1901) 25 Mad. 406; *Haripada* v. *Anath Nath Dey* (1918) 22 C.W.N. 758; 44 I.C. 211. See Ghose, Law of Mortgage in India, 5th ed., i. 115.

35 *Harish Chandra* v. *Punjab National Bank Ltd.* (1958) A.A. 864; *Simla Banking & Industrial Bank in liq.* v. *M/s. Pritams* (1960) A.Punj. 42; (1959) Punj. 1969.

36 *Nadar Bank Ltd.* v. *Canara Bank Ltd.* (1961) A.M. 326, 329; (1960) 2 M.L.J. 489.

37 *Nadar Bank Ltd.* v. *Canara Bank Ltd.* (1961) A.M. 326, 329; *Co-operative Hindustan Bank Ltd.* v. *Surendra Nath,* 59 Cal. 667; (1932) A.Cal. 524 dist.

38 *Gopal Singh Hira Singh* v. *Punjab National Bank* (1976) A.D. 115, 120, 123. See *Ramonand* v. *Gokal Chand* (1951) A. Simla 189. See also under s. 56. *supra.*

39 *Arjun Prasad* v. *Central Bank of India* (1956) A.P.32; 34 Pat. 8; Rash Bihary Ghose; T.L.L. on Law of Mortgages, pages 112-114; 342-344 referred to. *Narasayyamma* v. *Andhra Bank Ltd.* (1960) A.A.P. 273.

prevent a person from hypothecating his goods to another person for security. The ordinary principles of equity apply in such cases namely, the question becomes whether there was an intention to create a security and, if there was an intention to create a security, equity gives effect to it. It is quite clear that in a case like this, it is impossible to hold, where a large body of the community is engaged in commercial pursuits, say, where thousand tons of coal or a large parcel of goods is concerned, that the Banker is bound to take actual possession of property.[40]

Mortgagee of shares—can sell them.—A transaction between the owner of shares and the plaintiffs was on the following terms:

(i) The owner was to lodge the shares with the plaintiff for transfer in their names.
(ii) The owner could redeem the shares at any time within two years without payment of interest and within one year further by paying the principal and interest at 9%.
(iii) If the debt is not paid, the plaintiffs were entitled to dispose of these shares at the risk of the owner.

It appears that blank transfer forms were also lodged. The plaintiffs had the shares transferred and got voting rights and also got one of them elected a director of the Company. The debt was not paid as or stipulated and the plaintiffs after giving notice to the owner sold the shares and sued for the balance of their debt. The owner's heirs raised the plea of the transaction being a sale with right of repurchase.

The Andhra High Court held the transaction to be a mortgage and not a conditional sale. It is submitted that the exercise of the right of full ownership in the absence of any contract to that effect is inconsistent both with the principles of a pledge and a mortgage. It is also submitted that mortgage of shares is a misnomer and is not recognised by Indian statute.[41]

Transfer of non-existing property.—A purported transfer of non-existing property can only operate as a contract to be performed in future. Therefore, the grant of distribution rights over a film under production against financial help by a financier is not a mortgage but an agreement, nor is it a pawn or a pledge.[42]

Pledge over assets other than bailed assets.—A bailment relates to specific movable property of which delivery has been given. Therefore when under an agreement the property of a Company movable and immovable was liable for the dues of the other partners and they were in possession under the contract. But where the right of realisation had extended to other assets also, it could not be said that the parties could enforce their right to recovery of dues from any specific movable property as that transaction could not be said to be a bailment much less a pledge.[43]

Pawnee's right of retainer.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

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40 *Haripada* v. *Anath Nath Dey.*
41 *Shatzadi Begum* v. *Girdharilal* (1976) A.AP. 273, 280; *Kunham Elya Nayar* v. *Krishna Pillai* (1963) A.M. 74; *Sultan* v. *Rampratap Kanhiyalal* (1964) A.AP. 201; *Narayanamma* v. *Andhra Bank Ltd.* (1960) A.AP. 201 reld. on, *The Odessa* (1916) A.S. 143 refd. to.
42 *Revenue Authority* v. *Sudarsnam Picture* (1968) 1 Mad. 660; (1968) A.M. 319; (F.B.) relying on *Jugual Kishore* v. *Raw Cotton Co, Ltd.* (1955) S.C.R. 1369; (1955) A.SC. 376; *Raja Sahib Perhlad Sein* v. *Y. Baboo Budhee Singh,* 12 M.I.A. 275; *Ranee Bhobosoondaree* v. *Issur Chandra Dutt,* 18 Suth. W.R. 140 (P.C.); *Revenue Authority* v. *Sudarsanam Picture* (1968) 1 Mad. 660; (1968) A.M. 319 (F.B.); *Jugal Kishore* v. *Raw Cotton Ltd.* (1955) S.C.R. 1369; (1955) A.SC. 376; and *Miran Baksh* v. *Emperor* (1945) A.L. 69 reld. on.
43 *Official Liquidator* v. *Swaroop Cold Stores* (1976) A.A. 88, 91.

The pawnee makes himself a wrongdoer if he persists in holding the goods after tender of all that is due. In that event his "special property" is determined by his wrongful refusal of a tender properly made, and the pawnor can recover the goods.[44] If the pawnee denies the pledge and sues for the debt and the pledge is proved, the pawnee cannot have the payment of the debt and retain the goods. He is only entitled to recover the difference between the debt and the price of the goods if less than the debt.[45]

Factory type loan—Watchman wages.—A bank advanced to a firm a "factory type loan" on the pledge of goods and kept a watchman to guard the goods. The bank was held to be entitled to add the watchman's wages to the debt, the debtor being liable for the wages.[46]

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged: but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

This section does not appear to need any comment, except that the presumption mentioned at the end does not apply to advances made on a new and different security.[47]

Pawnee's right as to extraordinary expenses incurred.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

"Receive."—Note that the word is not "retain," as in the two preceding sections, but "receive." A pawnee has, therefore, no right of lien for "extraordinary" expenses, as he has in the case of "necessary" expenses (s. 173), but has only a right of action in respect of them. As an example of the expenses contemplated by this section, Dr. Whitley Stokes (in "The Anglo-Indian Codes") suggests "the cost of curing a pawned horse which meets with an injury by accident." There does not appear to be any distinct English authority. See, however, Kent's Commentaries, ii. 579.

Pawnee's right where pawnor makes default.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

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44 Settled law. See the Privy Council *per* Lord Macnaghten, *Bank of New South Wales* v. *O'Connor* (1880) 14 App. Ca. 273, at p. 282.
45 *Lallan Parshad* v. *Rahmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322.
46 *K. Venkata Satyanarayana* v. *State Bank of India* (1975) A.AP. 113, 115.
47 *Cowasji* v. *Official Assignee* (1928) 30 Bom. L.R. 1310; 115 I.C. 389; A.I.R. 1928 Bom. 545.

Pawnee's rights.—The substance of this section is familiar and well settled English law. It is sufficient to cite one or two modern *dicta*. "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only to sell on default in payment and after notice to the pledgor) although the pledgor may redeem at any moment up to sale".[48] Once the pawnee, after reasonable notice to the pawnor of his intention to sell the goods pawned, sells them under section 176 of Contract Act, the pawnor's right of redelivery is extinguished, but his right to redeem continues upto the sale,[49] i.e. at any moment upto the time of exercise by the pawnee of his power of sale by entering into a valid contract of sale.[50] After sale it is the pawnee's ordinary right "to recover the balance of the loan unsatisfied on the sale of the pledge".[51]

A pawnee has three rights in case of default by a pawnor—(i) he may bring a suit upon the debt; and (ii) he may retain the pawn as a collateral security; or (iii) he may sell it giving the pawnor reasonable notice of sale. The right to retain or sell the pawn are not concurrent but the right to sue and to sell are concurrent rights, i.e. he may sue and retain the goods as concurrent security or sell them after giving notice.[52] The use of the word "or" in relation to two or more alternatives does not necessarily imply mutual exclusion. It depends upon the intention ascertainable from the provision as a whole.[53]

Goods seized by State lawfully.—Goods pledged with the plaintiff bank as security for a debt under a cash credit system were seized by the State lawfully and sold and the proceeds were used to pay dues to the Cane Commissioner and other creditors. The Bank brought a suit for recovery of the debt due to it on the pledge. The Supreme Court held that the claim of the Bank on the pledge could not be defeated even by the lawful seizure of the goods under pledge and the Bank was entitled to be reimbursed by the State for the debt owed to it. A passage from Halsbury's Laws of England Vol. 29 P.211 (3rd Ed.) was quoted and it was observed that the law of pawn in England and in India is the same.[54]

Where the goods in pledge with a bank were sold in execution of a decree of some other creditor the pledgee is entitled to the sale proceeds and after satisfaction of his claim the surplus will be available for distribution to other creditors.[55]

The pawnee can sue on the pledge retaining the pledged goods as collateral security. If the debt is paid, the goods have to be delivered and if sold, the pawnee can appropriate the sale proceeds towards the debt.[56] But he cannot, under section 176 of the Contract Act, retain the goods pledged and also sue for his debt.[57] The power of sale is conferred for the benefit of the pawnee and is to be exercised at his discretion.[58] The pledger has no right to call upon the pledgee to sell the goods pledged except as provided in sections 161 and 176 of the Act.[59]

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48 Cotton L.J. in *Re Morrit* (1886) 18 Q.B.D. 222, at p. 232.
49 *Lallan Parsad* v. *Rehmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322.
50 Halsbury's Laws of England (3rd Edn.) Vol. 29, p. 220; *The Ningehow* (1916) P. 221, 224.
51 *Jones* v. *Marshall* (1889) 24 Q.B.D. 269, at p. 271.
52 *Haridas Mundra* v. *National & Grindlays Bank Ltd.* (1963) A. Cal. 132, 134.
53 *Haridas Mundra* v. *National & Grindlays Bank Ltd.* (1963) A.Cal. 132, 134; *Horsey* v. *Caldwell* (1946) 73 C.L.R. 304, 313-14.
54 *Bank of Bihar* v. *State of Bihar* (1971) A.SC. 1210, 1213; (1963) A.P. 344 revd. *Rogers* v. *Kennay* (1846) 9 Q.B. 592; *Halsbury's Laws of England* Vol. 29 p. 211 (3rd Ed.) quoted; *State Bank of Hyderabad* v. *Susheela* (1980) A.AP (F.B.).
55 *Bank of Hyderabad* v. *Susheela* (1980) A.AP. 1. 12 (F.B.).
56 *Lallan Parshad* v. *Rahmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322.
57 *Lallan Parshad* v. *Rahmat Ali* (1967) 2 S.C.R. 233; (1967) A.S.C. 1322; *Trustees of the Property of Ellis & Co.* v. *Dixon* (1925) A.C. 489; (1925) All E.R. Rep. 715. (A case of bankruptcy of a Stockbroker who had shares of a customer and his trustee claimed amount due after sale of the shares by the Stockbroker without authority).
58 *Bharat Bank Ltd.* v. *Bodhraj* (1956) A. Punj. 155; *Kesarimal* v. *Suryanarayana* (1928) A.M. 1022; *Cooverji* v. *Mawji* (1937) A.B. 26; *F. Nanakchand* v. *Lalchand Ganeshilal* (1958) A. Punj. 222; (1958) Punj. 1178.
59 *Aziz-ur-Rahman* v. *Bahawalnagar Co-operative Commn. Shop Ltd.*, Pak L.D. (1962) 5 B.J. 20.

Where no time is originally stipulated for payment, it seems that "the debtor is not in default until notice is given by the creditor that he requires payment on a certain day, and that day is past. The debtor is then in default, and is in the same position as if a day for repayment had been fixed in the original contract."[60]

It must be observed that the contract of pledge differs essentially from that of mortgage. A mortgagee does acquire general property in the thing mortgaged, subject to the mortgagor's right to redeem. By a mortgage a legal interest in chattels is assigned; by a pledge or pawn only a special property is transferred having the general property as a legal interest in the pledgor or pawnor. Willes J. speaks of the property vesting in the pledgee so far as is necessary to secure the debt instead of special property.[61] Foreclosure is a judicial determination of a defaulting mortgagor's right, whereby the mortgagee's property becomes absolute. A pawnee, not being the legal owner, is not entitled to foreclose, but has only power to sell;[62] and authorities on mortgage transactions are to be applied to cases of pledge, if at all, only with great caution.

"May sell the thing pledged."—The power conferred on the pledgee under this section to sell the property without reference to the Court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him.[63] There is nothing in the Act to forbid the pawnee from buying the thing pledged at the sale, though he cannot sell to himself. But it has been held by the Privy Council that a sale by the pawnee to himself, though unauthorised, does not put an end to the contract of pledge, so as to entitle the pawnor to have back the thing pledged without payment of the debt secured by it.[64] From this point of view it would seem that a sale by a pawnee to himself is not an act "inconsistent with the conditions of the bailment" within the meaning of s. 153 (*ante*), so as to entitle the pawnor to avoid the contract of pledge at his option, but is on the same footing as a premature sale (see the commentary on that section).

The plaintiff purchased goods for the defendant, paid the price and the goods were pledged with the plaintiff. As the goods were not sold by defendant in spite of notice, the plaintiff sold them in exercise of powers as a pledgee.

The sale was held justified under section 176 of Contract Act.[65]

A contract between the appellant and the respondent was in two parts. The respondent purchased ex. wharf 500 tons of certain sizes of newsprint in reels from the appellant at Re. 0-9-0 per lb. In the second part of the contract, the respondent sold to the appellant 415 tons of newsprint in sheets at Re. 0-9-6 per lb. The respondent was to keep stock of sheets in its godown on account of the appellant free of cost, and agreed to advance to the appellant "moneys against this newsprint @ Re. 0-8-0 per lb. This advance will carry interest at 5 per cent per annum". Insurance was to be debited to the appellant. A part of the purchase price was paid by the respondent.

The Supreme Court held that the contract did not envisage a loan by the respondent to the appellant on the security of newsprint in sheets and the payment of money by the respondent was towards part discharge of its liability for the price of the newsprint in reels and the clause as to advance of money did not convert the transaction into a pledge giving a right under section 176 to the respondent to sell the newsprint in sheets.[66]

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60 Note to Law Journal report of *Pigot* v. *Cubley* (1864) 15 C.B.N.S. 702; 33 L.J.C.P. 134, 136; 137 R.R. 725.

61 *Halliday* v. *Holgate* (1868) 3 Ex. 299, 302; *Lallan Prasad* v. *Rehmat Ali* (1967) 2 S.C.R. 233; (1967) A.SC. 1322. Halsbury's Laws of England; *Bank of Bihar* v. *State of Bihar* (1971) A.S.C. 1210 (Pawnee's special property and right to recover debt against lawful seizure by Government.).

62 *Carter* v. *Wake* (1877) 4 Ch.D. 605; *Official Assignee* v. *Sariu Prasad* (1945) All. 373.

63 *Mahalinga Nadar* v. *Ganapathi Subbien* (1902) 27 Mad. 528; *Nim Chand* v. *Jagabundhu* (1894) 22 Cal. 21; *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297; 33 I.C. 891; *Debidin* v. *Gaya Pershad,* note 54. *infra; Official Assignee* v. *Sarju Prasad* (1945) All. 373. A.I.R. 1945 All. 299. *Sankaranarayana* v. *Kottayam Bank,* A.I.R. 1950 T.C. 66; *Bank of Chittoor* v. *Narasimhhulu Naidu* (1966) A.A.P. 163.

64 *Neckram* v. *Bank of Bengal* (1891) 19 I.A. 69, at p. 67; 19 Cal. 322; *Dhani Ram* v. *Frontier Bank Ltd.* (1962) A. Punj. 321.

65 *Santi Sahu* v. *Sheogulam Sahu* (1958) A.P. 174.

66 *Ambalavana Chettiar & Co. Ltd.* v. *Express Newspapers Ltd.* (1968) 2 S.C.R. 239; (1968) A.SC. 741.

Reasonable notice of sale.—The section is mandatory and the required notice must be given notwithstanding any contract to the contrary.[67] Provision as to notice is mandatory and cannot be waived at the time of making the contract of a pledge and supersedes any contract to the contrary.[68] An agreement authorising the pawnee to sell the goods pawned without notice is void under section 23 of Contract Act.[69] A sale without notice would amount to conversion giving rise to damages to be assessed at the market rate on the date of conversion, i.e the date of sale.[70] The word 'sale' in section 176 means intended sale and not a sale actually arranged on a particular date. Reasonable notice therefore does not require specification of the date, time and place.[71] Unless there is reasonable notice, the pawnee cannot sell the thing pledged; but it is not necessary that the notice under this section should state the date, time or place of the intended sale. A notice by the pledgee to the pawnor that unless the latter redeems the articles pledged within a fortnight, the pledgee will sell them is good notice, though the pledgee may not sell the goods until some days after the expiration of the fortnight.[72]

Notice not vague.—A notice under section 176 mentioned two debts; one due from the pledgor and the other from a firm which only two of the pledgor firm were partners. It is not vague and ineffective nor is it unreasonable because it gave 6 days' period in which to pay when repeated demands had previously been made and the sale was 7 months later.[73] Reasonable notice was held to have been given where on August 11, 1947, notice was given for payment of money by August 18, 1947, failing which the pledged shares would be sold without further reference to the debtor and shares were sold on August 20, 1947. Perhaps in the circumstances of that case—the partition—the notice was not reasonable. But it does not seem to have been argued.[74]

Pawnbroker.—The right of a pledgee with respect to the goods pledged is very like an ordinary lien. The pawnbroker incurs a liability to the party pledging and he is bound to have the goods ready to be reclaimed and to take a reasonable care of them.[75]

Wrongful conversion & wrongful detention.—The difference between an action for wrongful conversion and wrongful detention is that in the former case the plaintiff abandons his title to the goods and claims damages; in the latter case the plaintiff claims on the basis of his title the specific return or redelivery of goods bailed. His claim for redelivery of goods is based on his title not only at the time when a suit is brought but right upto the time it is redelivered. Thus the wrongful act of detention continues till the time of decree or judgment

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67 *Co-operative Hindustan Bank* v. *Surendranath De* (1931) 59 Cal. 667; 138 I.C. 852; A.I.R. 1932 Cal. 524; *Bharat Bank Ltd.* v. *Sheoji Prasad,* A.I.R. 1955 Pat. 288.

68 *Narasayyamma* v. *Andhra Bank* (1960) A.A.P. 272; *Hulas Kunwar* v. *Allahabad Bank Ltd.* (1958) A. Cal. 644; *Co-operative Hindustan Bank* v. *Sunendra,* 59 Cal. 662; (1932) A. Cal. 524.

69 *Prabhat Bank* v. *Babu Ram* (1966) A.A. 134.

70 *F. Nanak Chand* v. *Lal Chand Ganeshi Lal* (1958) A. Punj. 222, 227; (1958) Punj. 1178; *Dhani Ram* v. *Frontier Bank Ltd.* (1962) A. Punj. 321; (1962) 1 Punj. 79; *Johnson* v. *Stear,* 15 C.B. (N.S.) 330; 143 E.R. 812.

71 *Hulas Kanwar* v. *Allahabad Bank Ltd.* (1958) A. Cal. 644; *Kunji Bihari Lal* v. *Bhargava Commercial Bank Ltd.* 40 All 522; (1918) A.A. 363; *Alliance Bank of India Ltd.* v. *Ghamandi Lal,* 8 Lah. 373, 379; (1927) A.L. 408; 410; *Cooverji* v. *Mawji* (1937) A.B. 26; *Bharat Bank* v. *Bodh Raj* (1956) A. Punj. 155. *Cf. Co-operative Hindustan Bank Ltd.* v. *Surendra,* 59 Cal. 667; (1932) A. Cal. 524. Contra *Grison Knitting Works* v. *Laxmi Commercial Bank Ltd.* (1960) A. Punj. 98, 107; (1959) Punj. 1990.

72 *Kunj Behari Lal* v. *Bhargava Commercial Bank* (1918) 40 All. 522; 45 I.C. 462, 1918 A.A. 363. A pledgee entitled to sell is not bound to sell within any particular time: *Kesarimal* v. *Gundabathula Suryanarayanamurthy;* 114 I.C. 820; 1928 A.M. 1022; *Surajmal* v. *Fulchand,* 1951 A.N. 264; *Sankaranarayana* v. *Kottayam Bank,* 1950 A.T.C. 66. A suit for tne debt due can be brought though notice is not given: *Makhan Lal* v. *Ghulam Hussain,* 1933 A.L. 536; 146 I.C. 194. Where the pledgee has consented to the sale, no further intimation to him is required: *Madholal* v. *Official Assignee* (1949) F.C.R. 441, 51 Bom. L.R. 906, 1950 A.F.C. 21.

73 *Grison Knitting Works* v. *Laxmi Commercial Bank* (1960) A. Punj. 98; (1959) Punj. 1990.

74 *Bharat Bank Ltd.* v. *Bodh Raj* (1956) A. Punj. 155; *Kesharimal* v. *Suryanarayan* (1928) A.M. 1022; and *Cooverji* v. *Mawji* (1937) A.B. 26 reld. on.

75 *Swire* v. *Leach* (1865) 18 C.B. (N.S.) 479; (1861-73) All E.R. Rep. 768 refd. to in *The Winkfield* (1902) P. 42, 60; (1900-3) All E.R. Rep. 346; *Coggs* v. *Bernard,* 92 E.R. 107; (1703) 2 Ld. Ryam 909.

which should be an order to redeliver or pay its value at the time of the verdict (decree) of the Court.[76]

Where jewels pawned with a pawn broker, were held not to have been redelivered to the pawnor during his lifetime and the heir brought a suit for redemption of the jewels, the Court held that in a case of wrongful detention the pawn broker was liable to pay the value of the jewels as at the time of the decree.[77]

Limitation.—The period of limitation for a suit on the loan is that prescribed by the Limitation Act, 1877, Sch. II, art. 57 (see now the Indian Limitation Act, 1963, Sch. I, Art. 19) that is, three years from the date of the loan, whether the suit be to recover the original amount of the loan, or to recover the balance after sale of the thing pledged.[78] And if the suit be in respect of a promise, the period is three years from the breach of the promise under art. 55 of the same Act. And where the suit is for the sale of the property pledged, the period of limitation is six years from the date of the pledge under art. 113 of that Act.[79]

Defaulting pawnor's right to redeem.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay in addition, any expenses which have arisen from his default.

This is supplemental to the foregoing section. In a Rangoon case it was held that an agreement that the pledge should become irredeemable if not redeemed after a certain period was valid.[80] It is submitted that this decision does not correctly interpret the section and that such an agreement should be held to be invalid. The language of sections 176 and 177 suggests that these two sections apply in terms to cases where in the contract time for payment is stipulated. But where no time is specified it can become specified by notice and then the result becomes the same in the two cases.[81]

Limitation.—The period for a suit aganist a pawnee to recover the thing pledged is thirty years from the date of the pawn. See Limitation Act, 1963, Sch. I., Art. 70.

Pledge by mercantile agent.

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.

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76 *Dhiansingh Sobha Singh* v. *Union of India* (1958) A.SC. 274, 286. followed in *Rani Leela Kumari* v. *J. Zamberlal* (1981) A.M. 29, 32.

77 *Rani Leela Kumari* v. *J. Zamberlal* (1981) A.M. 29, 32. *Dhiansingh Sobhasingh* v. *Union of India* (1958) A.SC. 274 folld.

78 *Saiyid Ali Khan* v. *Debi Prasad* (1901) 24 All. 251; *Yellappa* v. *Desayappa* (1906) 30 Bom. 218; *Dawlat Ram* v. *Jiwan Mal* (1881) Punj. Rec. no. 116; *Debidin* v. *Gaya Pershad,* 104 I.C. 640; 1927 A.N. 346

79 *Mahalinga Nadar* v. *Ganapathi Subbien* (1902) 27 Mad. 528, *per* Subrahmania Ayyar and Benson JJ. Davies J. dissented, holding that art. 57 applied, on the ground that the right to proceed against the property pledged was merely auxiliary to the right to proceed against the debtor personally. *Fisher* v. *Ardeshir,* 1935 A.B. 213; 37 Bom. L.R. 165; 156 I.C. 531.

80 *Dwarika* v. *Bagwati,* 1939 A.R. 413.

81 *Hulas Kanwar* v. *Allahabad Bank Ltd.* (1958) A. Cal. 644, 648.

Explanation.—In this section the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

This section is the counterpart of the second paragraph of s. 27 of the Indian Sale of Goods Act, 1930, which relates to sales.

Original s. 178.—S. 108 of the Contract Act, now superseded by ss. 27-30 of the Indian Sale of Goods Act, 1930, related to the sale of goods by a person other than the owner thereof. The original s. 178 of the Contract Act dealt with the pledge of goods by a person other than the owner thereof. That section has been repealed and the subject-matter of the section is now spread over the present s.178 and s. 178A of the Contract Act and s. 30 of the Indian Sale of Goods Act. The present s. 178 and s. 178A were inserted by the Indian Contract (Amendment) Act, 1930, which came into force on the 1st July, 1030.

The original s. 178 read as follows:—

"A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

"Provided also that such goods or documents have not been obtained from the lawful owner, or from any person in lawful custody of them, by means of an offence or fraud."

Indian Factors Acts.—The law in force in British India before 1872 was contained in the Indian Factors Acts of 1840 and 1844, the first of which extended to British India the provisions of 4 Geo. IV, c. 83, as amended by 6 Geo. IV, c. 94, and the second those of 5 and 6 Vict. c. 39. The Indian Factors Acts were repealed by the Contract Act. As to the old ss. 108 and 178 the Privy Council said: "Ss. 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844".[82]

Pledge by mercantile agent.—By s. 2, sub-s. (9), of the Indian Sale of Goods Act, "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale or to buy goods, or to raise money on the security of goods. This definition has been taken from the English Factors Act, 1889, s. 1. Under the English Act, the question has arisen whether a general occupation as agent is required or whether it suffices that he has on one particular occasion been entrusted with goods for sale. In *Weiner* v. *Harris,*[83] the Court of Appeal held that a man may be a mercantile agent although he acts for only one principal. In *Lowther* v. *Harris,*[84] Wright J., as Lord Wright then was, held that a man may be a mercantile agent although acting only for one principal in a single transaction, following the decision of Willes J. in *Heyman* v. *Flewker*[85] on the meaning of the word 'agent' in an earlier Factors Act of 1842. In *Budberg* v. *Jerwood,* Mecnaghten J. accepted this proposition *obiter,* but held that a man could not be a mercantile agent if he was to receive no remuneration.[86]

Under the old s. 178 an owner of goods though not in physical possession of the goods could obtain a loan on the security of a pledge of the goods by a pledge of the documents of

82 *Ramdas* v. *S. Amerchand & Co.* (1916) 43 I.A. 164, at pp. 168-169; 40 Bom. 630, at p. 634 ; 35 I.C. 954.
83 (1910) 1 K.B. 285.
84 (1927) 1 K.B. 393.
85 (1863) 13 C.B. (N.S.) 519.
86 (1934) 51 T.L.R. 99. See also 15 Mod. L.R. 503. But in *Heap* v. *Motorists' Agency* (1923) 1 K.B. 577, 588, Lush J. based his decision in part on the need of a course of conduct to satisfy the definition in s. 1 of the English Act.

title.[87] By the present section the statutory power to pledge goods or documents of title is confined to mercantile agents, being such as in the customary course of their business have authority to deal with goods. In view of the judgment of the Supreme Court in the *Morvi Mercantile Bank* v. *the Union of India*[88] that an owner can make a valid pledge of his goods by a pledge of documents of title the following opinion expressed by the learned editors of the seventh and eighth editions it is submitted requires to be revised.[89]

After referring to the observations of the Privy Council as to effect of the amendment of s. 178 in 1930 in *The Madras Official Assignee* v. *The Mercantile Bank Ltd.*[90] and to the fact that ss. 30(2) and 53(1) of the Sale of Goods Act had not been noticed by the Privy Council, the Supreme Court observed that the Judicial Committee did not express any final opinion on the construction of the amended section 178 as the question before it related to the unamended section. The Supreme Court referred with approval to the judgment of Bachawat J. in *Commissioners of the Port Trust* v. *General Trading Corporation Ltd.*[91] and held that under the Indian Law, a Railway Receipt is a document of title and is equated with the goods it covers for constituting delivery of goods for the purposes of a pledge. Hence an owner by endorsing Railway Receipts against consideration creates a pledge of the goods; the pledge of the documents amounts to pledge of the goods.[92]

Subba Rao J. in *Morvi Mercantile Bank Ltd.* v. *Union of India*[93] said:

"The law on the subject, as we conceive it, may be stated thus: An owner of goods can make a valid pledge of them by transferring the railway receipt representing the said goods. The general rule is expressed by the maxim *nemo dat quod non habet,* i.e., no one can convey a better title than what he had. To this maxim, to facilitate mercantile transactions, the Indian law has grafted some exceptions, in favour of *bona fide* pledges by transfer of documents of title from persons, whether owners of goods or their mercantile agents who do not possess the full bundle of rights of ownership at the time the pledges are made. To confer a right to effect a valid pledge by transfer of documents of title relating to goods on owners of the goods with defects in title and mercantile agents and to deny it to the full owners thereof is to introduce an incongruity into the Act by construction. On the other hand, the real intention of the Legislature will be carried out if the said right is conceded to the full owner of goods and extended by construction to owners with defects in title or their mercantile agents."

In *The Madras Official Assignee's case*[94] the Privy Council held that the third party—warehouseman—must attorn to the pledgee for the possession to pass to the pledgee, i.e.

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87 *Official Assignee of Madras* v. *Mercantile Bank* (1934) 61 I.A. 416; 58 Mad. 181; 152 I.C. 730; 1934 A.P.C. 246.

88 (1965) 3 S.C.R. 254; (1965) A.SC. 1954.

89 There the learned authors said:
"This establishes, as the Privy Council in the case last cited observed, the curious and anomalous position that the mercantile agent can do what the owner cannot do, that is, make a pledge of goods by a pledge of the documents of title without the attornment of the warehouseman or other custodian. Other cases in which a person other than the owner of the goods may make a valid pledge are dealt with in s. 178A below in s. 30 of the Indian Sale of Goods Act. The result is that a valid pledge can no longer be made by any person "in possession" of goods. It can only be made by a mercantile agent as provided in s. 178, or by a person who has obtained possession of the goods under a contract voidable under s. 19 or s. 19A of the Act as provided in s. 178A, or by a seller or by a buyer in possession of goods after sale as provided in s. 30 of the Indian Sale of Goods Act."

90 61 I.A. 416, 423; (1934) A.PC. 246, 250.

91 (1964) A. Cal. 290; 68 C.W.N. 410.

92 *Morvi Mercantile Bank* v. *Union of India* (1965) 3 S.C.R. 254; (1965) A.S.C. 1954 (by majority); *Ramdass Vithaldass* v. *Amerchand & Co.,* 43 I.A. 164; 40 Bom. 630; (1916) A.P.C. 7 and *Official Assignee* v. *Mercantile Bank Ltd.,* 61 I.A. 416; (1934) A.P.C. 246, refd. to and explained. *Commissioners of Port Trust of Calcutta* v. *General Trading Corporation Ltd.* 1964 A. Cal. 290 appd.

93 (1965) A.SC. 1954, 1960; (1963) 3 S.C.R. 254. (Following cases dealing with the right of an endorsee of a railway receipt for consideration being able to maintain an action on the basis of the contract therein contained were referred to but no opinion was expressed thereon: *Daulatram Dwarkadas* v. *B. B. & C. I. Ry,* 38 Bom. 659; *Shah Mulji Deoji* v. *Union of India* (1957) A.N. 31; *Union of India* v. *Taherali* (1956) Bom. 600; 58 Bom.L.R. 650.)

94 *Madras Official Assignee* v. *Mercantile Bank Ltd.* (1935) A.C. 53, 58-59; 61 I.A. 416; (1934) A.P.C. 246, 249, relied upon in Chitty: on Contracts, Vol. II, para 232 (23rd Ed.); Vol. II, para 2279 (24th Ed.). See *Aziz-ur-Rahman* v. *Bahawalnagar Co-operative* P.L.D. (1962) 5 B.J. 20 quoting Chitty on Contracts, paras 134, 136 (Ed. not mentioned) of Vol. II and Restatement of Law of Security Art. 8.

by acknowledging that he held for him. The High Court of West Pakistan[95] in a case from Bahawalpur has held that when a chattel is in possession of a third person a pledge may be created by assent of the pledgor and notification by either the pledgor or the pledgee to the third person that the chattel has been pledged to the pledgee.

The word "possession" in the old s. 178 was held to mean juridical possession. At the same time there were cases in which it was said that there was nothing in the language of the section to warrant such a limitation. Decisions under the old section may be divided into five groups according to the character of the pledgor's possession, namely:—

(1) Pledge by a commission agent employed to sell goods,[96] or by a broker employed to sell goods on *jangad* terms.[97]

(2) Pledge by a seller who has been left in possession of the goods sold.[98]

(3) Pledge by a person in bare custody of goods, *e.g.*, by a servant,[99] or by a wife,[1] or by a hirer of goods,[2] or by gratuitous bailee.[3]

(4) Pledge by a person who has agreed to buy goods under a hire-purchase agreement and who has not made default in payment of the instalments.[4]

(5) Pledge by a person entrusted with goods for a specific purpose.[5]

The changes caused by the amendment of the section may be illustrated by the following examples:—

(1) A commission agent or broker may make a valid pledge of the goods under the old as well as the present section.

(2) A seller left in possession of goods may make a valid pledge under the old section as well as under s. 30 of the Indian Sale of Goods Act.

(3) A person in bare custody of goods may not make a valid pledge either under the old or the present section.[6]

(4) A hirer under a hire-purchase agreement who has entered into a binding agreement to buy goods may make a valid pledge under the old as well as the present section. See notes below, "Seller or buyer in possesion after sale."

(5) A person entrusted with goods for a specific purpose may not make a valid pledge either under the old or the present section.

(6) Under the old law, both the owner and the mercantile agent could create a pledge by delivering documents of title. Even after the amendment of the section, both the owner and the mercantile agent can create a pledge of documents of title.[7]

Acting in the ordinary course of business as a mercantile agent.—S.2(1) of the English Factors Act, 1889, which is worded in exactly the same way as s. 178, except that it extends not

95 Restatement of the Law of Security Art. 8 Chitty: on Contracts paras 134, 136 (Ed. is not mentioned) quoted in *Aziz-ur-Rahman* v. *Bahawalnagar Co-operative Commission Shop Ltd.*, P.L.D. (1962) 5 B.J. 20; But see *Official Assignee, Madras* v. *Mercantile Bank Ltd.* (1935) A.C. 53, 58-59; 61 I.A 416; (1934) A.P.C. 246.

96 *Seshappier* v. *Subramania* (1916) 40 Mad. 678; 34 I.C. 751. See also *Profulla Kumar Bose* v. *Nabo Kishore Rai* (1918-19) 23 C.W.N. 907; 54 I.C. 224; *King Emperor* v. *Nga Po Chit* (1923) 1 Rang. 199; 74 I.C. 1050; 1923 A.R. 227.

97 *Durgabai* v. *Sarasvatibai* (1925) 31 Bom. L.R. 414; 118 I.C. 796.

98 *Haji Rahimbux* v. *Central Bank of India, Ltd.* (1928) 56 Cal. 367; 119 I.C. 23.

99 *Biddomoye Dabee* v. *Sittaram* (1878) 4 Cal. 497; *Sharaf Din* v. *Gokal Chand* (1931) 12 Lah. 304; 132 I.C. 835; 1931 A.L. 526.

1 *Seager* v. *Hukma Kessa* (1900) 24 Bom. 458.

2 *Naganada* v. *Bappu* (1903) 27 Mad. 424.

3 *Ramasami Gupta* v. *Kamalammal* (1921) 45 Mad. 173; 70 I.C. 448; 1922 A.M. 44.

4 *Abdul Hassan Khan* v. *Rangi Lal* (1902) Punj. Rec. no. 34. But see *Leon Saubolle* v. *K.V. Seyne & Bros.* (1918) 23 C.W.N. 352; 50 I.C. 476.

5 *Ramasami Gupta* v. *Kamalammal* (1921) 45 Mad. 173; 70 I.C. 448; 1922 A.M. 44.

6 *Visalakshi* v. *Janopakara* (1942) 1 M.L.J. 44; 1942 A.M. 299.

7 *Supra* (1965) 3 S.C.R. 254; (1965) A.SC. 1954, n. 64; *Bhagwandas* v. *State of Madhya Pradesh*, (1972) A.M.P. 40 (Pledge by a mercantile agent).

merely to pledges, but also to sales and other dispositions, has been construed as if the words "as a mercantile agent" were inserted after the words "in possession": *Staffordshire Motor Guarantee Limited* v. *British Wagon Co. Ltd.*[8] This was also the interpretation placed upon the earlier English Acts in *Monk* v. *Whittenbury*,[9] and *Cole* v. *N.W. Bank*,[10] where Blackburn J. observed that if a house were let furnished to a man who happened to be an auctioneer, the latter could not give a good title if he sold the furniture without authority to an innocent buyer.[11] If the owner consents to the mercantile agent having the goods for repair, but not for sale,[12] or if the mercantile agent is in possession as a bailee under a hire-purchase agreement conferring a mere option to buy,[13] s. 2(1) of the Factors Act does not apply, and the mercantile agent cannot pass a good title to an innocent buyer.

Under the earlier English Act of 1842 it was further held that even if the owner entrusted the goods to a mercantile agent for purposes connected with sale, the agent could not pass a good title to an innocent buyer if the owner merely asked him to report offers, or if he was forbidden to sell without further instructions.[14] In the 1889 Act the wording is changed. For the section to operate it suffices that the agent is in possession with the owner's consent, whereas formerly he had to be entrusted with possession. There has been a clear decision under the 1889 Act that even where a mercantile agent is employed only to procure offers, he can pass a good title to an innocent buyer,[15] at all events if the agent carries on a business in which there is, in the customary course, authority to sell.[16] While customary authority may thus protect an innocent purchaser by investing an agent with ostensible authority, the authority of a mercantile agent cannot be limited by a particular trade custom, unless the existence of the custom is so notorious that one who acquired from the agent would be fixed with notice of it: *Oppenheimer* v. *Attenborough*.[17] There *O* entrusted diamonds to *S*, a diamond broker, on *S*'s representation that two specified firms would probably buy them. *S* did not show the jewels to either firm, but pledged them with *A*, who advanced money in good faith. *O* produced evidence that in the diamond trade a broker employed to sell has no authority to pledge, but the Court held for *A*, while conceding that had the custom been notorious the pledgee would not have been protected *e.g.*, if an auctioneer pledged goods. A daughter kept her shares scrips with blank transfer forms with her father with authority to deal with them as he liked and he sold them. The daughter was held bound by the sale.[18]

For the pledgee to obtain a good title, the pledge must have been made in the ordinary course of business by the mercantile agent himself, or by a clerk who usually did this business, not *e.g.*, by a friend as in *De Gorter* v. *Attenborough*,[19] or by "various women of his acquaintance" as in *London Jewellers* v. *Attenborough*.[20]

In *Pearson* v. *Rose and Young Limited*,[21] the Court of Appeal held that a sale of a motor

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8 (1934) 2 K.B. 305. Mackinnon J.
9 (1831) 2 B. & Ad. 484 (wharfinger).
10 (1875) L.R. 10 C.P. 354 (warehouseman).
11 At p. 369 Approved *per* Channell J. in *Oppenheimer* v. *Frazer* (1907) 1 K.B. 519, 524; and *per* Mackinnon J. in (1934) 2 K.B. 305 313.
12 *Pearson* v. *Rose & Young Ltd.* (1951) 1 K.B. 275, 288, *per* Denning L.J.
13 The facts of (1934) 2 K.B. 305 itself.
14 *Brown & Co.* v. *Bedford Pantechnicon Co. Ltd.* (1889) 25 T.L.R. 449, C.A.; *Biggs* v. *Evans* (1894) 1 Q.B. 88. *Contra per* Willes J. in *Fuentes* v. *Montis* (1868) L.R. 3 C.P. 268, 282.
15 *Turner* v. *Sampson* (1911) 27 T.L.R. 200. See also *per* Denning L.J. in *Pearson* v. *Rose & Young Ltd.* (1951) 1 K.B. 275, 288. *Contra per* Rajagopala Ayyangar J. in *Appa Rao* v. *Salem Motors* 1955 A.M. 505, 509 (*obiter*).
16 It has even been held that the change of language in s. 2(1) operates to alter the old rule that the mercantile agent cannot pass a good title where he has been entrusted with goods in some other capacity: *Moody* v. *Pall Mall Deposit* (1917) 38 T.L.R. 306. (Pictures entrusted to agent for exhibition. Pledged without authority. Held by Coleridge J. that pledgee had good title. This is contrary to *Staffordshire Motor Guarantee* v. *British Wagon Co. Ltd. supra.)*
17 (1908) 1 K.B. 221, C.A.
18 *Sumitra Devi* v. *Satya Narayan* (1965) A.Cal. 355.
19 (1904) 21 T.L.R. 19.
20 (1934) 2 K.B. 206, C.A.
21 (1951) 1 K.B. 275; (1950) 2 All E.R. 1027 (C.A.).

car without the registration-book was not a sale in the ordinary course of business. Retention of the registration-book by the owner would thus prevent the Factors Act from operating. Therefore where a mercantile agent obtained the car from the owner with his consent, but acquired possession of the registration-book only by theft, he could not make title to an innocent third party.

A right to pledge goods purchased for another for purchase of further goods is inconsistent with the rights as a financier and are only consistent with the rights as a mercantile agent.[22]

Antecedent debt.—Under the English Factors Act of 1842, a pledge by an agent entrusted with the possession of goods to secure an "antecedent debt" did not come within the protection of the Act; and the same law was extended to this country by the Indian Factors Act, 1844. The present section seems to protect a pledge for an antecedent debt as well as a pledge for an advance made specifically upon it. See English Factors Act, 1889, s. 4.

Good faith.—To validate a pledge by a mercantile agent the pledgee must have acted in good faith and must not have at the time of the pledge notice that the pawnor had no authority to pledge the goods. The onus of proving both these facts rests upon the person disputing the validity of the pledge.[23] Under s. 3, cl. 20, of the General Clauses Act, 1897, a thing is to be deemed done in good faith where it is in fact done honestly whether it is done negligently or not. Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequence.[24]

In *Folkes* v. *King*[25] Scrutton L.J. remarked that a buyer's failure to ask for the car registration-book might be evidence of lack of good faith. This *dictum* was used by the Court of Appeal in *Pearson* v. *Rose and Young Ltd.*[26] to support a finding that where the book had been stolen from the owner by the mercantile agent the latter could not pass a good title to an innocent third party. It has been objected that the *dictum* was not applicable in *Pearson's Case* seeing that the innocent purchaser duly received the book, so that there were no suspicious circumstances.[27] There are however two facts that an innocent purchaser or pledgee must establish in such cases:—

(i) Possession by a mercantile agent of goods or documents of title with the consent of the owner.
(ii) Pledge or sale to an innocent transferee.

The Court of Appeal is merely stressing the necessity of the production of the registration-book at stage (ii) to confirm their view that at stage (i) the consent of the owner is required to possession by the agent not merely of the car, but also of the registration-book.

If a pledgee takes goods from a person of whom he knows nothing and if it turns out that that person's pledging of the goods was a criminal offence, the pledge is not valid and the true owner can recover the goods even if the pledgor may in fact have been a mercantile agent within the statutory definition.[28]

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22 *Ramdayal Ghasiram* v. *Government of Andhra Pradesh* (1960) A.A.P. 502.
23 English law places the onus on the pledgee: *Heap* v. *Motorists' Agency* (1922) 1 K.B. 577, 590 *per* Lush J.
24 See *Jones* v. *Gordon* (1877) 2 App. CAs. 616, at p. 629. Cases under the Indian Factors Act, 1842: *Gobind Chunder Sein* v. *Ryan* (1861) 9 M.I.A. 140; 1 W.R. 43. P.C.; *Jonmenjoy* v. *Watson* (1884) 11 I.A. 94; 10 Cal. 910.
25 (1923) 1 K.B. 282, 300.
26 (1951) 1 K.B. 275; (1950) 2 All E.R. 1027.
27 67 L.Q.R. 3. Note by Dr. Goodhart.
28 *Ah Cheung* v. *Ah Wain,* 1938 A.R. 243; 176 I.C. 703.

Where a pawnor, a commission agent, had neither possession nor title to the goods he can confer no better title than he himself possessed. And where a pledgee bank was negligent in not verifying whether the Commission Agent was the owner of the goods or whether he was acting on behalf of the owner, the pledgee is not entitled to the benefit of s. 178 of the Act.[29]

A purchased shares of a Company through *B*, a mercantile agent, and a member of the Stock Exchange. After the shares were transferred in the name of the transferee *A*,the Company returned the shares to the stock broker who pledged them with the plaintiff and obtained a loan. The plaintiff neither acted in good faith nor was he without notice of want of authority of the pledgor. The transaction was held to be invalid and not binding on the true owner.[30]

Notice.—The term "notice" in this section includes both express and constructive notice. A purchaser with notice of a prior interest who purchases from a purchaser without notice will not be bound by the prior interest.[31] This principle seems to have been overlooked in *Appa Rao* v. *Salem Motors*.[32]

There D1, who was in possession of P's motor van as a mercantile agent for sale, fraudulently pledged it with D3, who took in good faith and without notice of P's rights. Later D3 sold the van as an unredeemed pledge to D2 who took in good faith. D1 contested the validity of this sale, and sued D2 and D3. Subsequently, after D2 and D3 had learned of P's claim, this action was compromised on the terms that the sale to D2, be annulled, and the pledge to D3, revived with a further opportunity to D1 to redeem.

In an action for conversion by *P* against *D1, D2* and *D3* the Court held that *D3* was not a *bona fide* purchaser without notice under s. 178, as on the revival of the pledge under the terms of the compromise he *had* notice of *P*'s claim. But with respect, this was immaterial, because *D3* had given value to *D2,* a compromise providing consideration on both sides, and *D2* had no notice of *P*'s claim at the time of his purchase from *D3*. The principle above stated therefore applied. Another way of interpreting the compromise would be to regard it as annulling the sale by *D3* to *D2 ab initio*. In this case also *D3* would be protected, as at the time of the original pledge, which on this view of the matter had never been determined, he had no notice of *P*'s claim.

Priorities between two pledgees and innocent party.—Where possession has not been lost by the pledgee and possession is constructive, a subsequent pledgee even without notice is not preferred under the rule of estoppel.[33] The observation of Ashhurst J. in *Lickborrow* v. *Mason*[34] that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" and applied in *Commonwealth Trust Co.* v. *Akotey,*[35] was considered too wide by Lord Wright in *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*[36] and by Lord Sumner in *Jones Ltd.* v. *Warring & Gillow Ltd.*[37] and by Lord Parmoor in *London Joint Stock Bank* v. *Macmillan.*[38]

With the consent of the owner.—After some difference of opinion it has now been finally decided in England that even if the mercantile agent commits the crime of larceny by a trick

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29 *Indian Bank Ltd.* v. *A. Seshagiri Rao* (1971) A.AP. 287, 292; *Madras Automobiles* v. *Modern Bank* (1938) A.M. 545 disting.

30 *Jute Distributors* v. *Sushil Kumar Gupta* (1974) A. Cal. 386.

31 *Harrison* v. *Forth* (1695) Prec. Ch. 51, 24 E.R. 26; *Barrow's Case* (1880) 14 Ch. D. 432; *Wilkers* v. *Spooner* (1911) 2 K.B. 473, C.A.

32 1955 A.M. 505.

33 *Nadar Bank Ltd.* v. *Canara Bank Ltd.* (1961) A.M. 326, 330; (1960) 2 M.L.J. 89; *Official Assignee, Madras* v. *Mercantile Bank,* 58 Mad. 360; (1934) A.P.C. 246; 61 I.A. 416 and *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.,* 65 I.A. 75; (1938) Mad. 360; (1938) A.P.C. 52 (not putting on the Stamp of the Bank makes no difference).

34 (1787) 100 E.R. 35.

35 (1926) A.C. 72.

36 (1938) Mad. 360; (1938) A.P.C. 52, 56; 65 I.A. 75.

37 (1926) A.C. 670, 693; (1926) All E.R. Rep. 36, 46.

38 (1918) A.C. 777; see also Lord MacNaghten in *Farquharson & Co.* v. *King & Co.* (1902) A.C. 325, 335.

goods or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented. The Railway Receipt in question satisfied this test."

An endorsee of a Railway Receipt for valuable consideration can sue the Railway for the full value of the goods consigned if they are not delivered or are damaged in transit.[54]

In the case of way bills for goods booked by a public carrier, the owner cannot pledge the goods by merely handing over the way bills to a bank against an advance. The bank must give notice to the carrier of the transfer and there must be an agreement by the carrier to hold the goods as a bailee for the pledgee. Time has come when by legislation a Way Bill should be equated with a Railway Receipt.[55] A consignee under a railway receipt or an endorsee of a railway receipt cannot sue the Railway on the contract for non-delivery or loss of goods but if he is the owner he can bring an action. Without such interest he has only the right to receive delivery of the goods.[56]

A motor car registration-book is not a document of title,[57] but according to the English decision in *Pearson* v. *Rose & Young Ltd.*[58] the possession of this book is all important. In that case, a mercantile agent obtained a motor car from the owner by a trick, but acquired the registration-book by naked theft. It was held that the owner could recover the car from an innocent purchaser, seeing that he never consented to pass possession of the registration-book, but only of the car, and, had the agent sold the car without the registration-book, it would not have been a sale in the ordinary course of business. This ruling has been criticised on the ground that the Factors Act operates in favour of an innocent purchaser provided that either the goods or the document of title are delivered to a mercantile agent with the consent of the owner: there is no requirement that both the goods *and* the documents of title be delivered. Moreover a car registration-book is not even a document of title.[59] It is, however, submitted that the decision is a very reasonable one, and the apparent anomaly does not in fact exist. The documents of title enumerated in s. 2(4) of the Indian Sale of Goods Act, which is similar to s. 1(4) of the English Factors Act, 1889, are documents which evidence possession of control when the goods are in the possession of a third party, such as a shipping company, a railway company or a wharfinger, whereas the owner of a motor car is normally expected to be in possession of the registration-book. The Court of Appeal justifies its decision by holding that the book is an integral part of the goods: Vaisey J. indeed likens the position of an agent who obtains possession of a car by consent and the registration-book by theft to one who obtains three wheels of the car by consent and the fourth by stealing.[60]

The pledgee does not lose the right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledgor or his agent for the special purpose of dealing conveniently with the goods, *e.g.*, for collecting them from the Port Trust and putting them into the pledgee's *godown*.[61]

The question whether share certificates are documents of title within the meaning of the section has given rise to a difference of opinion in the Indian High Courts. In Calcutta it was held that they were not,[62] but this was before the enactment of the Indian Sale of Goods Act

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54 *Ganpatrai Sagarmall* v. *Union of India* (1975) A. Cal. 265, 268.
55 *Canara Industrial & Banking Syndicate* v. *Ramachandra* (1968) A. My. 133, 137.
56 *Commissioners of Port Trust* v. *General Trading Corporation* (1964) A. Cal. 290.
57 *Joblin* v. *Watkins* (1949) 1 All E.R. 47, 64 T.L.R. 464; *Bishopsgate Motor Finance Corporation* v. *Transport Brakes* (1949) 1 K.B. 322, 338; *Sajan Singh* v. *Sardara Ali* (A registration book is not a document of title in Malaya or in England) (1960) A.C. 167; (1960) 1 All E.R. 269; (1960) 2 W.L.R. 180 (P.C.).
58 (1951) 1 K.B. 275.
59 67 L.Q.R. 3. Note by Dr. Goodhart.
60 *Ibid.*, at p. 291.
61 *Mercantile Bank of India* v. *Central Bank of India* (1937) 65 I.A. 75; (1938) Mad. 360; 172 I.C. 745; 1938 A.P.C. 52, where the law is fully discussed by Lord Wright.
62 *Lalit Mohan* v. *Haridas* (1916) 24 Cal.L.J. 335; 37 I.C. 707; 1917 A.Cal. 399.

and the amendment of the Contract Act. In Bombay, another view was taken, even before 1930,[63] that "goods" in s. 108 of the Contract Act include share certificates. The Madras High Court in *Elaya Nayar* v. *Krishna Pattar*[64] has expressed the opinion that the Bombay decisions were the more correct, but that since the Indian Sale of Goods Act and the amendment of s. 178 there can no longer be any doubt. The Court saw no reason for giving the word "goods" a meaning in the Contract Act different from that in the Sale of Goods Act, and that a share certificate can therefore be subject of a valid pledge: but they held that unless the pledgor deposited a deed of transfer with the pledgee or obtained one subsequently, recourse will have to be had to the Court if the pledge is to be realized. It is submitted that the view expressed by the High Courts of Bombay and Madras is the right view. Sarkar J. of the Calcutta High Court has taken the same view,[65] though without referring to the previous authorities. English law is different,[66] but that is because in English law shares are not goods but choses in action and therefore the delivery of a share certificate is not the delivery of a document of title to goods. In India goods include stocks and shares.[67]

Revocation of authority of mercantile agent.—A pledge by a mercantile agent, though made after the revocation of his authority, is valid, provided the pledgee has not at the time of the pledge notice of such revocation.[68]

Pledge by person in possession under voidable contract.

178A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

This section is the counterpart of s. 29 of the Indian Sale of Goods Act, 1930. That section is based on s.23 of the English Sale of Goods Act, 1893.

Pledge by person in possession under voidable contract.—A person may obtain possession of goods under a contract which is voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion (s. 19), or on the ground of undue influence (s. 19-A). Possession so obtained is not by free consent as defined in s. 14 of the Act. It is nevertheless possession by consent, and the person in possession may make a valid pledge of the goods, provided the contract has not been rescinded at the time of the pledge. There is in such a case of *de facto* contract, though voidable on the ground of fraud and the like. It is, however, different if there is no real consent, as where goods have been obtained by means of theft as defined in s. 378 of the Indian Penal Code. A thief has no title and can give none.

Where goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction.[69] If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none. Thus if *A* represents to *B* that he is acting as agent for *C*, and *B* relying on that representation delivers goods to *A* as buyer, there is not a voidable contract between *A* and *B*, but no contract at all. No property passes to *A*, and he can neither make a valid sale[70] nor a valid pledge. This is really a case of a fundamental error

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63 *R.D. Sethna* v. *National Bank of India* (1910) 12 Bom.L.R. 870; 8 I.C. 183; *Fazal* v. *Mangaldas* (1922) 46 Bom. 489; 66 I.C. 726; 1922 A.B. 303; *Jamshedji* v. *Maganlal Bankeylal & Co.*, 1925 A.B. 314; 27 Bom.L.R. 514; 92 I.C. 9.

64 1943 A.M. 74; (1942) 2 Mad.L.J. 120.

65 *Kanhaiyalal* v. *Pt. Shirali*, 1953 A.Cal. 526, 527.

66 *Harrold* v. *Plenty* (1901) 2 Ch. 314.

67 s. 2(7), Sale of Goods Act.

68 See English Factors Act, 1889, s. 2(2), and *Moody* v. *Pall Mall* (1917) 33 Times L.R. 306.

69 *Purushottam Das* v. *Union of India* (1967) A.A. 549; (1967) 1 All. 398; *Williams* v. *Barton* (1825) 3 Bing. 139.

70 *Hardman* v. *Booth* (1863) 32 L.J. Ex. 105.

as to the person with whom one is contracting. There is no real consent and no contract; there is only an offer on *B*'s part to the person with whom alone he means to deal and thinks he is dealing: See note under s. 13, above, "Error as to the person of the other party." But if a person buys goods with the intention of not paying for them, there is consent, though not free, and a contract, though voidable,[71] and he may make a valid pledge or sale of the goods while the contract is still subsisting,[72] though the fraud may amount to the offence of cheating, as defined in s. 415 of the Indian Penal Code. This was not so under the old s. 178. Under that section a person who obtained possession of goods "by means of an offence or fraud" could not make a valid pledge. Under the present section a person who obtains possession of the goods under a contract voidable under s. 19 or s. 19A may make a valid pledge though the transaction may amount to an offence or fraud.

Good faith.—See note under s. 178.

Notice.—See note under s. 178.

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

This must be taken as subject to the operation of the foregoing section. In those cases where a pledge which otherwise would not be valid is made valid by s. 178, it does not matter whether the pawnor has any interest of his own or not. The present section applies to other cases where the pawnor has possession and some interest, but not the whole interest; in the goods; and where it applies, it is immaterial that the pawnee had no notice of the pawnor's limited interest.[73] Probably it does not apply to a case in which he is not entitled to possess the thing in his own right, but has obtained or been entrusted with possession for some special and limited purpose, and pledges the thing for his own purposes.[74] In such a case the attempted pledge is, according to English authority, wholly inoperative, and then the pawnee has no defence against an action by the person having the better title to possess. The true scope of the section has been thus defined by Scott C.J., "Section 179 does not limit the scope of section 178, but saves a pledge to the extent of the pledgee's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to s. 178. In other words, whenever he has an interest, the person in possession of the goods or documents has unconditional authority to charge at least that interest.[75]

Sub-pledgee's rights.—A pledgee has only a limited interest in the goods pledged, i.e. the right to possession coupled with power of sale and cannot give a higher title to his sub-pledgee. Therefore on the pledgee's debt being satisfied, the original pledgor becomes entitled to the return of his goods and the sub-pledgee, even if he has advanced a larger sum than the pledgee had advanced, cannot claim a higher sum.[76] Nor can the sub-pledgee in such a case get advan-

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71 *Clough* v. *Lond. & N.W. Ry. Co.* (1871) L.R. 7. Ex. 26.

72 *Croft* v. *Lumley* (1858) 6 H.L.C. 672, 705.

73 Long settled law: *Hoare* v. *Parker* (1788) 2 T.R. 376; 1 R.R. 500. An illustrative case is *Belsize Motor Co.* v. *Cox* (1914) 1 K.B. 244. There the hirer of a taxi under a hire-purchase agreement, which was not an agreement to buy, but a mere option, made default in payment of an instalment, and then pledged the taxi with *D*, in breach of his agreement with the owner *P* not to part with possession without *P*'s consent. *D* took in good faith and without notice of *P*'s rights. The Court held that *D* could retain the taxi, provided he paid to *P* the balance due under the hire-purchase agreement. The *Belsize Case* was distinguished by McNair J. in *United Dominions Trust* v. *Parway Motors* (1955) 2 All E.R. 557, as in the latter case the hirer was prohibited from assigning altogether.

74 *Nyberg* v. *Handelaar* (1892) 2 Q.B. 202.

75 *Lakhamsey Ladha & Co.* v. *Lakmichand* (1918) 42 Bom. 205; 40 I.C. 148, doubted in *Haji Rahimbux* v. *Central Bank of India Ltd.*, (1928) 56 Cal. 367, at pp. 387-388; 119 I.C. 23. We prefer the view taken in *Lakhamsey Ladha & Co.* v. *Lakmichand.*

76 *Firm Thakurdas* v. *Mathura Prasad* (1958) A.A. 66. See also *State of Bihar* v. *Bank of Bihar Ltd.* (1963) A.P. 344; 44 Pat. 341.

tage of section 178-A as the ownership vests in the pledgor and not the first pledgee.[77] And the sub-pledgee will lose his right if the pledgor has no notice of the sub-pledge.[78]

Limited interest of the pledgor.—Section 179 predicates that the pledgor has a limited interest in the goods pledged which he can deal with and his transaction to that extent is valid, e.g. if the pledgor who has pledged his goods against an overdraft draws upon his overdraft account the pledgee gets an interest *pro tanto* in the goods and can pledge or sub-pledge them.[79]

A bank pledged with another bank securities as security for an overdraft which was to be operative on any amount due on the overdraft. In the absence of any withdrawals against the overdraft, the pledgee bank had no right to deal with the securities by way of a pledge, sub-pledge or assignment.[80]

The position of the pledgor and pledgee in the case of a pledge of securities is that the pledgee's interest in the property is the right to enforce his charge for payment of an overdraft and the property continues to be in the pledgor.[81] The pledgor retains his ownership subject to the rights of the pledgee to the extent of the debt. But this right of the pledgee is unexercisable if the possession of the goods is lost except when the deprivation is wrongful.[82]

Suits by Bailees or Bailors against Wrong-doers

Suit by bailor or bailee against wrong-doer.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Under the old Common Law procedure a bailor could not bring an action of trespass, trover, or detinue (these actions being founded either on actual possession or on the immediate right to possess), unless the bailment was revocable at his pleasure either unconditionally or on a condition which he might satisfy at will.[83] An owner not entitled to immediate possession could have only a special action on the case.[84] The bailee could and can always sue a wrong-doer; and his right does not as once supposed by some authorities, depend on his being answerable over to the bailor.[85] The distinctions which turn merely on the form of action available have ceased to be important in English, and were never generally applicable in India.

The section is hardly likely to present any difficulty in practice. *A* leaves an elephant in charge of *B*. *C* wrongfully takes away the elephant from *B*. *B* may sue *C* for possession of the elephant.[86]

The Railway as bailee of goods is entitled to recover them from a person, who takes them from its possession forcibly or fraudulently. If such person pledges them with another, who may have taken in good faith, the Railway would still be entitled to recover from the pledgee.[87] But if the goods pledged—sugar bags—are seized by Government under section 3 of

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77 *Belgaum Pioneer Urban C. Bank Ltd.* v. *S. Swami* (1962) A.My. 48; (1961) Mys. 13.
78 *Ibid.*
79 *Jaswantrai* v. *State of Bombay* (1956) A.S.C. 575, 582; (1956) S.C.R. 483.
80 *Ibid.*
81 *Ibid.*
82 *State of Bihar* v. *Bank of Bihar Ltd.* (1963) A.P. 344.
83 Sir R.S. Wright in Pollock and Wright on Possession, 166.
84 *Mears* v. *L. & S. W.R.* (1862) 11 C.B.N.S. 850; 132 R.R. 778.
85 *The "Winkfield"* (1902) P. 42 C.A.
86 *Ramnath* v. *Pitambar* (1918) 43 Cal. 733, 741-742; 31 I.C. 430.
87 *Purushottam Das* v. *Union of India* (1967) A.A. 549; (1967) 1 All. 398; *Williams* v. *Barton* (1825) 3 Bing. 139.

the Essential Supplies (Temporary Powers) Act, the deprivation by the State is not wrongful.[88] And if the sugar so seized is sold and the sale proceeds are employed to pay off the dues of the cane-growers under a certificate of Cane Commissioner, the remedy under section 180 is not available against the State, the seizure being lawful, but against the Directors of the Sugar Mills they being the debtors.[89] But can the rights of a pledgee to recover money, out of the sale of the goods pledged be defeated in this manner? It is submitted is cannot be, unless there is some special provision in the Act.[90] If a bailee, who is in possession of goods and is responsible for delivery of the goods at his own risk, entrusts the carriage of the goods to a carrier, it may be inferred that the bailee has employed the carrier on his own account. The bailee can sue the carrier on the contract of employment or for conversion.[91]

Apportionment of relief or compensation obtained by such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

In other words, it does not matter which of them recovers first, or whether one sues or both. Of course the defendant cannot be liable in all for more than the value of the goods, and special damages, if any.

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88 *State of Bihar* v. *Bank of Bihar Ltd.* (1963) A.P. 344; 44 Pat. 341; *Bank of Bihar* v. *State of Bihar* (1971) A.SC. 1210 (44 Pat. 341 reversed).

89 *Ibid.*

90 See *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*, 65 I.A. 75; (1938) Mad. 360; (1938) A.P.C. 52.

91 *Sukul Bros.* v. *H.K. Kavarana* (1958) A. Cal. 730; (1958) 376; *Freeman* v. *Birch* (1833) 3 Q.B. 492; 114 E.R. 590.

CHAPTER X

AGENCY

(In the commentary on this chapter "Story on Agency" is referred to as S.A.)

Appointment and Authority of Agents

"Agent" and "principal" defined.

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

Nature of agency in general.—Chapter X of the Act has been stated to be not exhaustive, but to lay down general principles in wide and general terms.[92] The Supreme Court has held that the Contract Act is not exhaustive of the rights of an agent against the principal.[93] The law stated in the introductory group of sections (182-189) under this heading is too elementary to need much exposition. The essential point about an agent's position is his power of making the principal answerable to third persons. A person does not become an agent on behalf of another merely because he gives him advice in matters of business.[94] Nor is a person referred to in a contract as agent an agent if by the terms of the contract the relationship is one of principal and principal.[95] The true nature of the contract has to be gathered from its terms and conditions; the terminology used is not decisive of the legal relationship of the parties.[96] The following cases are illustrative of this proposition:

A clause in a hire purchase agreement relating to a car that the dealer is not the agent of the finance company is not binding, if in fact he is an agent.[97]

The mere fact that the plaintiff used the expression *pacca adatia qua* the defendants is not sufficient to show that the defendant was a principal and not an agent.[98]

If a man signs himself agent, that might merely be a term of description but if he contracts as agent, that rather negatives personal responsibility. Of course, that is subject to the overriding doctrine that although a man purports to contract as agent, if he is, in fact, the real principal he is personally liable.[99]

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92 *Kalyanji* v. *Tirkaram*, 1938 A.N. 254 at p.255; 176 I.C. 675.
93 *Narandas Morardas* v. *S.P.A.M. Papammal* (1961) Supp. S.C.R. 68 (1967) A.S.C. 333; (1967) 2 S.C.-J. 8. 9.
94 *Mohesh Chandra Bosu* v. *Radha Kishore Bhattacharjee* (1908) 12 C.W.N. 28, 32.
95 *Superintendent of Stamps, Bombay* v. *Breul & Co.* (1944) 46 Bom. L.R. 686, 1944 A.B. 325; *Loon Karan* v. *John & Co.* (1967) A.A. 308, affd. on app. (1969) A.SC. 73 but this point not decided.
96 *Sri Tirumala Venkateshwara Timber* v. *Commercial Tax Officer* (1968) A.SC. 784; (1968) 2 S.C.R. 476; *W.T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (1932) K.B. 710; (1931) All E.R. Rep. 314. (Contract for sale for resale); and *Hutton* v. *Limpert* (1883) 8 A.C. 309 refd. to; *Loon Karan Sethya* v. -*John & Co.* (1967) A.A. 308; affd. on app. (1969) A.SC. 73; (but this point was not in controversy). (Use of the words "Agency Agreement" and "Agent").
97 *Financing Ltd.* v. *Stimson* (1962) 1 W.L.R. 1184, 1188 (C.A.).
98 *F. Murlidhar* v. *F. Kishori Lal* (1960) A.Raj. 296; (1960) 10 Raj. 412.
99 *McNally* v. *Jackson* (1938) W.A.L.R. 27, 29.

A, who purchased goods and supplied them to his constituents for which he was paid commission was held to be acting as an agent and not as a principal.[1]

This it is submitted is contrary to the decision of the Supreme Court in the *Mysore Spinning Co. Case*.[2]

An admission that a *pucca adatia* agreed to do business on *adat* and *dalali* indicates relationship of principal and agent.[3]

Agency in law connotes an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.[4]

The test of agency is whether the person is purporting to enter into transaction on behalf of the principal or not.[5] In order to constitute an agency, it is not necessary to have a formal agreement.[6] Mere use of the word "commission" in the contract does not convert a relationship of vendor and purchaser into one of agency.[7] But the fact that a person is paid commission for his work is not by itself enough to constitute agency.[8] The words "the trust shall hold and manage the said Nazul Estate of the Government" could not be construed as conferring ownership but merely constituting agency.[9]

In a Calcutta case[10] the view has been expressed that the definition in s. 182 is wider than that of English law, under which no one can become the agent of another except by the will of that other;[11] and that the Indian definition did not require that the employment should be by the person for whom the agent is employed to act or whom he is employed to represent. The case was one in which a common manager had been appointed by the District Judge under the Bengal Tenancy Act, 1885, s. 95, and the Court was of opinion that the definition in s. 182 applied to him. It is submitted that this is a very doubtful proposition of law, nor does it seem to have been necessary so to hold for the purposes of the case. A statutory manager so appointed occupies a position analogous to a receiver appointed by the Court, who is the agent of the Court alone; and s. 183 of the Contract Act seems clearly to show that this part of the Act is concerned only with agents who become such by the volition of the principal who appoints them.

Agency sometimes has to be distinguished from facts more or less resembling it.[12]

Certain millers were appointed licensees to buy paddy at a fixed price and to sell the same at a price fixed by Government to particular persons and received a commission for their labours. They invested their own moneys and the goods were stored at their risk.

It was held that they were not agents of Government and that the difference between sale price and purchase price was payable to Government under the law and in terms of the licence. It made no difference that the difference in price was termed surcharge.[13]

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1 *Pannalal Babulal* v. *S.T. Commissioners* (1956) A.A. 710; *Cassaboglou* v. *Gibb* (1883) 11 Q.B.D. 797, 806 refd. to,; *Satyanarayana* v. *State of Madras, (A.P.)* (1957) A.A.P. 474.
2 *State of Mysore* v. *Mysore Spinning & Weaving Co. Ltd.* (1958) A.SC. 1002.
3 *Ram Gopal* v. *Firm Radha Krishan* (1956) A.N. 164; (1955) Nag. 1035.
4 *International Harvester Co. Ltd.* v. *Carrigan's Hazeldene Pastoral Co.* (1958) 100 C.L.R. 644, 652-3.
5 *State of Bihar* v. *Dukhulal Das* (1962) A.P. 140.
6 *Babulal Swarupchand Shah* v. *S.S. (Fixed Delivery) Merchants, Assam* (1960) A.B. 548; *Lukshmi Ginning & Oil Mills* v. *Amrit Banaspati Co. Ltd.* (1962) A.Punj. 56.
7 *Ganesh Export & Import Co.* v. *Mahadeo* (1956) A.Cal. 188; 59 C.W.N. 891; *Balthazar & Son* v. *E.M. Abowath* (1919) A.P.C. 166.
8 *State of Madras* v. *Jayalakshmi Rice Mills* (1959) A.A.P. 352; (1958) Andh. Pra. 671; *Balthazar & Son* v. *Abowath* (1919) A.P.C. 166.
9 *Fruit & Vegetable Merchants Union* v. *Delhi Improvement Trust* (1957) A.S.C. 344; (1957) S.C.R. 1.
10 *Sukumari Gupta* v. *Dhirendra Nath,* 1941 A.Cal. 643; 197 I.C. 869.
11 *Pole* v. *Leask* (1863) 33 L.J. Ch. 155; 8 L.T. 645, H.L.
12 It is distinguished from trust in *Travancore Bank* v. *Abraham,* 1955 A.T.C. 139.
13 *State of Andhra Pradesh* v. *Jayalakshmi Rice Mills* (1959) A.A.P. 352; (1958) Andh. Pra. 671; *Reading* v. *Attorney-General* (1951) A.C. 507; (1951) 1 All E.R. 617.

The manufacturers sold to licensed export dealers, who exported the goods to foreign buyers that being the only mode of export allowed under the Cotton Textile (Export Control) Order. Such a transaction would not make the exporters agents of manufacturers because by the very act of purchase, the exporters become principals buying as such.[14]

A retailer running a fair price shop to whom wheat was delivered by Government at wholesale rates against price and who had to sell at a fixed rate and keep accounts showing the price at which, and the persons to whom, the wheat was sold and the stocks left with him, which accounts were to be produced before the Government, is not an agent of or a trustee of Government but a buyer from the Government nor did the consumers have a beneficial interest in the stock. A removal of the stock by him from the godown therefore does not fall under section 409, I.P.C.[15]

A stockist of cement under the West Bengal Cement Control Order (1948) is not an agent of the Government.[16]

But a wholesale dealer for the sale of rice under the Madras Foodgrains Procurement Order, 1947, has been held to be an agent. He was to purchase at a fixed price and sell it at a price fixed by Government. He was also responsible for the safety of the foodgrains.[17]

A was appointed an agent for the Government of India to procure paddy in Nepal, he was to have full responsibility for getting it milled at one of the mills in Bihar specified in the letter of appointment of agency and was to deliver an equivalent amount of rice to such Governments as was directed by Government of India.

He was held to be an agent for procuring of paddy only and not for getting it milled.[18]

At the relevant time, sale and delivery of coal was governed by the Colliery Control Order and no coal could be sold by a colliery except under the order of the Coal Commissioner under that Order. He sanctioned the supply of coal by a colliery to the defendant company by which priority of wagons was also sanctioned. Pursuant to this arrangement the colliery supplied coal at a railway station and despatched it by rail to the defendant company but the defendant company refused to take delivery at the destination and claimed that it was not liable for loss resulting from detention of wagons. The Railway sold the coal by auction and also claimed demurrage and sued the defendant company for demurrage. It pleaded that there was no privity of contract between it and the Railway and no demurrage could be claimed.

The Supreme Court held that the colliery was acting as an agent of the company for transport of coal in which the property had passed to the defendant company under the orders of the Coal Commissioner and was therefore liable for payment of freight and demurrage.[19]

The Government of India opened an account in the name of an Association and replenished the account from time to time. The Association disbursed the money in the account to the Department of the Government of India from time to time and also sent monthly accounts of the moneys disbursed which the Government of India accepted. Besides there was a letter of the Governor General in Council authorising the Association to incur miscellaneous expenditure on its behalf. From these facts the Court held the relationship of principal and agent between the Government of India and the Association. Further the liability to account is a feature of principal and agent and not of principal and principal.[20]

A firm under a scheme attached to an agreement were "entrusted" with goods by an importer firm for distribution but the condition was that the firm was to pay the invoice price

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14 *State of Mysore* v. *Mysore Spinning & Weaving Co. Ltd.* (1958) A.SC. 1002, 1005; *Contra Pannalal Babulal* v. *S.T. Commissioners* (1956) A.A. 710; and *Satyanarayana* v. *State of Madras (Andh. Pra.)* (1957) A.AP. 474 which, unless there in something special in the facts of the cases, are, it is submitted, not correct.

15 *Ghasi Ram Aggarwal* v. *The State* (1967) A.Cal. 568. See also *State of Andhra Pradesh* v. - *Jayalakshmi Rice Mill* (1958) Andh. Pra. 671; (1959) A.A.P. 352; where millers were appointed to buy paddy and sell under the direction and control of Government and were paid commission for doing that work).

16 *S.N. Barick* v. *State of West Bengal* (1963) A.Cal. 79.

17 *G. Alluraiah* v. *State of Andhra Pradesh* (1963) A.A.P. 394.

18 *Government of India* v. *Jamunadhar Rungta* (1960) A.P. 19.

19 *Kutchwar Lime and Stone Co.* v. *Dehri Rohtas Light Railway & Co.* (1969) A.S.C. 193.

20 *Union of India* v. *Kamal Kumar Goswami* (1973) 1 Cal. 421; (1974) A.Cal. 231, 234.

and carry on the business of resale on its own behalf and for itself. By the use of the word "entrustment" in the circumstances of the agreement no agency was intended to be created.[21]

A manufacturer appointed the assessee firm as distributors for the State of Kerala. The contract provided that the distributor will pay the price of the goods ordered and delivery was to be given to the order of the distributor to him or his nominee. There was also a restraint on the distributor as to the price he was to sell the goods at to the parties whose orders he booked. The company took no risk from the moment the goods were appropriated to the order and they were ready for dispatch. The contract was held to be one of purchase and sale and not of agency.[22]

The legal relation between a merchant in one country and a commission agent in another is that of principal and agent, and not seller and buyer, though this is consistent with the agent and principal, when the agent consigns the goods to the principal, being in a relation like that of seller and buyer for some purposes.[23] A merchant, therefore, in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods. And the result is the same if the goods are ordered through a branch in this country of a firm of commission agents in another country.[24] For the same reason, where a commission agent buys goods for a merchant at a price smaller than the limit specified in the indent, he cannot charge any price higher than that actually paid by him,[25] except in the case of a custom to the contrary.[26] See notes to s. 211, below.

Agent's discretion.—An agent may have, and often has, in fact, a large discretion, but he is bound in law to follow the principal's instructions provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant; and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract of hiring and service.[27] A *dewan* of a *zamindar* has been held to be a servant rather than an agent.[28]

Servant and agent—Difference between Servant and Contractor.—A servant is an agent and so also is a contractor. The difference is that the former works under the direction and supervision of the master and the latter can exercise his own discretion as to the time and mode of doing work, e.g. a chauffeur and a taxi driver.[29]

Agent and Servant.—N.H. Bhagwati J's observations in *Dharangdhara Chemical Works Case*[30] Shah J. in *Manmohandas's case*[31] observed that the correct method of approach would

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21 *Daruwala Bros (Pvt.) Ltd.* v. *C.I.T.* (1973) Tax L.R. 1460, 1464; *P.W. Diwacha* v. *Comm. I.T.*, 48 I.T.R. 222 (1964) A.SC. 758; and *Ganesh Export & Import Co.* v. *Mahadeo Lal* (1956) A.Cal. 188 refd. to.

22 *Dy. Commissioner of Agricultural In. Tax.* v. *Alwaye Agencies* (1974) Tax. L.R. 2281.

23 *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395; *Cassaboglou* v. *Gibb* (1883) 11 Q.B.D. 797.

24 *Mahomedally* v. *Schiller* (1889) 13 Bom. 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below"

25 *Shaw* v. *Baij Nath* (1897) Punj. Rec. no. 21.

26 See *Paul Reier* v. *Chotalal Javerdas* (1906) 30 Bom. 1, cited in notes to s. 211, "custom of trade," below.

27 See *Indo Union Assurance Co.* v. *T. Srinivasan* (1947) Mad. 170, 1946 A.M. 530, where the difference between principal and agent and master and servant was considered. See also *Lakshminarayan Ramgopal* v. *Government of Hyderabad,* 1954 A.S.C. 364, 366-7; *Krishna* v. *Ganapathi,* 1955 A. Mad. 648, 651.

28 *Jagannath* v. *Pitambar Mohapatra,* 1954 A.Or. 241.

29 *Union of India* v. *Moti Lal* (1962) A.P. 384; *Govind Prasad* v. *State of Andhra Pradesh* (1965) A.M.P. 66. *Lakshminarayan Ramgopal* v. *Government of Hyderabad* (1955) 1 S.C.R. 393; (1954) A.S.C. 364; (1954) 25 I.T.R. 449; *Kothandaraman* v. *C.I.T.* (1967) A.M. 143; (1967) 2 Mad. 65; *Qamar Shaffi Tyabji* v. *Commission E.P.T.* (1960) A.S.C. 1269; (1960) 3 S.C.R. 546; 1960 39.I.T.R. 611 (Distinction between agent and independent contractor also); *Union of India* v. *Moti Lal Kamaria* (1962) A.P. 384.

30 *Dharangdhara Chemical Works* v. *State of Saurashtra* (1957) S.C.R. 152, 157; (1957) A.SC. 264.

31 *Commissioner of Income Tax* v. *Manmohandas,* 59 I.T.R. 699, 707; (1966) A.SC. 798, 803.

be to consider whether having regard to the nature of the work there was due control and supervision by the employer. The greater the degree of independence the greater the reason for saying that the contract is not one of service. Kapur J. in *Pyarelal's Case*[32] drew a distinction between a servant and a contractor thus: that in the case of master & servant the master can order what is to be done and how it is to be done. But this test does not always apply e.g. a ship's master, a chauffeur or a newspaper reporter.[33]

But this test is not universal in its application and does not determine in every case having regard to the nature of employment that he is a servant. A doctor may be employed as a medical officer and though no control is exercised in respect of the manner of his work or in respect to the day to day work, he may nonetheless be a servant if that relationship is created. Similarly, a chauffeur. He is employed to take his master or anyone else from one place to another but his master does not supervise the manner of his driving. So also a person employed to manage a business, he is a servant or an agent according to the terms of his employment. It may be said that greater the amount of direct control, the stronger the reasons for holding him a servant. Similarly the amount of independence will be a test for agency. An agent as such may not be a servant, a servant is for some purposes his master's implied agent.[34]

Director as agent.—The Madras High Court observed that normally a director is not an agent of the Company but where he acts as a Director-in-Charge and corresponds with another party to bring about a contract he will be acting as an agent. As such the liability is of the Company and not the agent personally.[35]

Director liable for profits.—The Court has power under its equitable jurisdiction to award interest whenever a person in a fiduciary position, such as a Director of Company, misuses money which he controls in his fiduciary capacity. Whenever the transaction in which the money was used was of a commercial nature tne court will presume that it was profitable and the court will give adequate compensation for the profits assumed to have been made.[36]

Director & Managing Director.—The Supreme Court has described the office of Director thus. "The Director of a Company is not a servant but an agent inasmuch as a Company cannot act in its own person but only through its directors, who qua the Company have a relationship of an agent to the principal. A Managing Director may have a dual capacity. He may both be a director and an employee. He has not only the *persona* of a director but also the *persona* of an employee or an agent depending on terms of his employment and the Company's Articles of Association. The term "employee" is facile enough to cover both these relationships.[37]

An agent though bound to exercise his authority in accordance with all lawful instructions given to him is not subject to the direct control or supervision of the principal.[38]

A Managing Director of a Company if he has to act under the directions of the Board of Directors is a servant.[39] A Managing Director has two functions and two capacities. As a Managing Director he is under a contract with the Company and this contract is a contract of employment. More specifically it is a contract of service and not for service.[40] (See commentary under S. 188.)

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32 *Pyarelal Adishwarlal* v. *Commr. of Income Tax*, 40 I.T.R. 17, 24; (1960) A.SC. 997; *Simmons* v. *Heath Laundry Co.* (1910) 1 K.B. 543, 549.

33 For distinction between various persons see Chitty: Law of Contract Vol. II para 2003, 24th Ed.

34 *Ram Prasad* v. *C.I.T.* (1973) A.SC. 637, 639.

35 *Puddukottah Textiles Ltd.* v. *B.R. Adityan* (1975) 88 Mad. L.W. 788, 790.

36 *Wallersteiner* v. *Moir* (1975) 1 All E.R. 849, 865.

37 *Ram Prasad* v. *Commissioner of Income Tax* (1973) A.SC. 637, 640; *Commissioner of Income Tax* v. *Manmohandas* (1966) A.SC. 743; 59 I.T.R. 699.

38 *Lakshminarayan Ramgopal & Son Ltd.* v. *Government of Hyderabad* (1955) 1 S.C.R. 393; (1954) 25 I.T.R. 449; (1954) A.SC. 364; *Qamar Shaffi Tyabji* v. *Commr. of E.P.T.* (1960) 3 S.C.R. 546; (1960) 39 I.T.R. 611, 615; (1960) A.SC. 1269.

39 *Kothandaraman* v. *C.I.T.* (1967) A.M. 143; *Lakshminarayan Ramgopal* v. *Govt. of Hyderabad* (1954) A.SC. 364; (1955) 1 S.C.R. 393; *Qamar Shaffi Tyabji* v. *Commissioner E.P.T.* (1960) A.SC. 1269; (1960) 39 I.T.R. 611; (1960) 3 S.C.R. 546 (Dist. between Agent and contractor also).

40 *Anderson* v. *Jones Sutherland (Peterhead) Ltd.* (1941) A.SC. 203, 218, quoted in *Ram Prasad* v. *Commissioner of Income Tax* (1973) A.SC. 637, 640.

Managing Director benefitting himself.—A Managing Director appointed for ten years resigned his post which the company refused to accept and therefore he was still in service. While being ostensibly in service his placing orders with the company's suppliers and dealing with its customers was breach of his duty and fidelity and good faith as Director not to benefit personally by contracts ostensibly entered into on behalf of the Company.[41] A Secretary of a Society who was its promoter was in the circumstances held to be an agent and not a servant.[42] A master is liable for the torts of his servant committed during the course of his employment irrespective of the master deriving any benefit. But the principal is not liable for the torts of an independent contractor or his servants.[43] An agent's function is to enter into contract relations on behalf of his principal with third persons. He acts at his discretion and judgment but within the limits of his authority.[44]

A Bank employed a treasurer for its branches, sub agencies and pay offices and he had to perform duties, liabilities and responsibilities which by custom or contract devolve on a treasurer as well as those specified in the agreement. He had to provide the staff for handling the bank's cash.... He had the power to dismiss, suspend or transfer his staff or to employ any other person in his place and the responsibility for their acts honestly or dishonestly was his. The responsibility for the receipt and payment of money including taking bad money or base coins was also his. He was also required to transfer moneys, documents and properties of the bank from one place to another under guard provided by the Bank. It was held that his holding office under the agreement was not decisive nor the receipt of remuneration. He was held to be an agent. The remuneration received was not salary. The proper method to determine was the extent of control of the Bank.[45]

Accountant.—An accountant of a company, who received moneys on its behalf and was required to keep accounts is an agent and is liable to render accounts to the Company.[46]

Company Official.—Where the officers of a Corporation commit fraud by misrepresenting facts and representing false facts the corporation is bound by these misrepresented facts and is bound by the fraud.[47]

Fraud by Company Officers.—Where the principal officers of a corporate body were aware of the facts e.g. that the published estimates of the suit contract were 20% below the actual costs they were misrepresenting true facts and the Corporate body will be responsible for misrepresentation.[48]

Contract of Sale and Agency to Sell.—A principal does not sell to his agent.[49] There is a distinction between a contract of sale and contract of agency for sale. The essence of sale is the transfer of title to the goods for a price paid or promised to be paid.[50] The essence of agency to sell is the delivery of the goods to a person who is to sell them not as his own property but as that of the principal who remains the owner of the goods and the agent

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41 *Thomas Marshall (Exports) Ltd.* v. *Guinle* (1978) 3 All E.R. 193, 207 *et seq; Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* (1946) 1 All E.R. 350; *Cook* v. *Deeks* (1916-17) All E.R. Rep. 185 applied

42 *Chandi Prasad Singh* v. *State of U.P.* (1956) A.S.C. 149; (1955) 2 S.C.R. 1049; (1956) All 76.

43 *Union of India* v. *Moti Lal* (1962) A.P. 384.

44 *State of Andhra Pradesh* v. *Jayalakshmi Rice Mills* (1959) A.A.P. 352; (1958) Andh. Pra. 671; *Lakshminarayan Ramgopal* v. *Hyderabad Government* (1954) A.S.C. 364; (1955) 1 S.C.R. 393.

45 *Commissioner of Income Tax* v. *Manmohan Dass* (1966) A.SC. 798; 59 I.T.R. 699; *Dharangdhara Chemical Works* v. *State of Saurashtra* (1957) S.C.R. 152; (1957) A.SC. 264 referred to; *Pyarelal Adishwar Lal* v. *Commissioner of Income Tax* 40 I.T.R. 17, 24; (1960) A.SC. 997.

46 *Harbans Lal Kapoor* v. *Produce Exchange Corporation* (1973) A. Punj. 244.

47 *R.C. Thakkar* v. *Bombay Housing Board* (1973) A. Guj. 34, 51.

48 *R.C. Thakkar* v. *Bombay Housing Board* (1973) A. Guj. 34, 51; *S. Pearson & Son Ltd.* v. *Lord Mayor & Corp. of Dublin* (1907) A.C. 351; (1904-7) All E.R. Rep. 255; *London County Freehold & Leasehold Properties Ltd.* v. *Berkley Property & Investment Co. Ltd.* (1936) 2 All E.R. 1039; reld. on.

49 *State of Mysore* v. *Mysore Spinning & Weaving Co. Ltd.* (1958) A.S.C. 1002, 1005.

50 *Sri Tirumala Venkateshwara Timber* v. *Commercial Tax Officer* (1968) A.SC. 784, 787; (1968) 2 S.C.R. 476; *Gordon Woodroffe & Co.* v. *Shaikh M.A. Majid & Co.* (1967) 2 S.C.J. 387; n. 2 *infra*

is therefore liable to account for the proceeds.[51] In order to constitute selling agency, goods should be sold to the customer introduced by the agent not on behalf of the agent but on behalf of the principal.[52] When a wholesale dealer sells goods of a manufacturer for his own profit, he is not an agent of the manufacturer and the mere insertion that he shall be deemed to be an agent does not make him one.[53] If money is paid to a person for purchase of goods and that persons pays it to others who may be termed sellers, he acts as an agent and not a seller of goods.[54]

The plaintiff delivered his bales of hides and skins bearing his mark to the defendant at his godown, the time for delivery was fixed. The defendant subjected them to trimming and reassortment to conform to London standard. They were repacked and shipped to defendant's London office by the defendant who obtained the shipping documents; all expenses prior to shipping and shortage in weight in London was to be paid by the plaintiff. The price of the goods was calculated at the prevailing London rates obtained by cable and credited or paid to the plaintiff less 2½ per cent (not mentioned as commission) expenses and amounts advanced by the plaintiff and interest thereon up to date of shipment. A statement of accounts was sent to the plaintiff and interest thereon up to date of shipment. A statement of accounts was sent to the plaintiff each time the goods were shipped. One of the terms of the contract was "arbitration according to the custom obtaining in United Kingdom". The contract specifically mentioned that the defendant was buying the goods for resale in United Kingdom. Time was considered as essence of the contract and the sales tax was on the seller's account. The extra price obtained in London for special quality of goods was paid to the defendant but Court held it to be *ex gratia* payment.

The Supreme Court held these transactions as transactions of sale and purchase and not those of agency for sale.[55]

A sold 15,000 tons of lard to *G*. On the same day *G* sold the goods to *F*. *G* was not aware that *F* had agreed to sell back the goods to *A* and *F* did sell back to *A* the same day. *F* assigned his rights to *B*. On January 17, 1964, *G* wrote to *F* and *B* purporting to rescind the contract with *F*. On January 28, 1964, *B* informed *A* by letter that he was issuing a writ claiming damages for breach of contract but the writ was not served until after the date when the goods should and would have been delivered. *A* sought a declaration that the contract had been rescinded on the ground of fraudulent representation of *A* and *F*, that it was a normal bargain; that the transaction was a sham transaction and that *F* was acting as agent of *A*, an undisclosed principal whose fraudulent representation rendered the contract unenforceable by the agent.

The trial judge upheld the second ground but the Court of Appeal held there was no agency. The House of Lords said that *F* acted as principal and not as agent of *A* and the transaction was not a sham or fictitious contract.[56] And the respondent could not be said by his conduct to have elected to treat the contract as at end before the date of performance and therefore could claim damages as on due date.[57] If a debtor gives money to a third party with a direction to pay it to the creditor and the third party informs the creditor of the receipt and assents or promises to pay to the creditor he holds the money as agent of the creditor who has a right to recover it.[58]

Assessee not agent for Sales Tax.—An assessee under the Sales Tax Acts is not an agent of the State for collection of sales tax from the customer.[59]

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quoting with approval *W.T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (1932) 1 K.B. 710, 717, 720; (1931) All E.R. Rep. 314; (selling agency of bricks); *Kennedy* v. *De Trafford* (1897) A.C. 180, 187; *Hutton* v. *Lippert* (1883) 8 A.C. 309 (P.C.).

51 *Gordon Woodroffe & Co.* v. *Shaik M.A. Majid & Co.* (1967) 2 S.C.J. 387, 389; (1966) Supp. S.C.R. 1; (1967) A.SC. 181. See *W.T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (1932) 1 K.B. 710; (1931) All E.R. Rep. 314 (Contract of Sale for resale); *Rohtas Industries Ltd.* v. *State of Bihar* (1958) A.P. 414; 37 Pat. 711; *Sri Tirumala Venkateshwara Timber* v. *Commercial Tax Officer* (1968) A.SC. 784 (1968) 2 S.C.R. 476.

52 *Ganesh Export & Import Co.* v. *Mahadeolal* (1956) A.Cal. 188; 59 C.W.N. 891.

53 *Taddy & Co.*v. *Sterions & Co.* (1904) 1 Ch. 354.

54 *Bhikraj* v. *State of Bihar* (1964) A.P. 555.

55 *Gordon Woodroffe & Co.* v. *Shaik M. A. Majid & Co.* (1967) 2 S.C.J. 387; *W. T. Lamb & Co.* v. *Goring Brick Co. Ltd.* (1932)) 1 K.B. 710; and Blackwood Wright: Principal and Agent (2nd Ed.), p. 5 refd. to.

56 *Garnac Grain Co.* v. *H. M. F. Faure and Fairclough Ltd.* (1967) 3 W.L.R. 143.

57 *Garnac Grain Co. Inc.* v. *H. M. F. Faure and Fairclough Ltd.* (1967) 3 W.L.R. 143, 152; *Hochster* v. *De La Tour* (1853) 2 E. & B. 678, 691, 692; *Frost* v. *Knight* (1872) 7 Ex. 111, 113; *Roper* v. *Johnson* (1873) 8 C.P. 167; *Melachrino* v. *Nickoll & Knight* (1920) 1 K.B. 693.

58 *Dellas* v. *Kourtessis* (1962) V.R. 456.

59 *Sales Tax Commissioner, U.P.* v. *Sada Sukh Vyopar Mandal* (1959) 10 S.T.C. 57 (All.); *Babulal* v. *State of U.P.* (1966) A.A. 204, see *supra*.

Agency in case of company not yet in existence.—Where a person acts as an agent of a company not yet in existence it has been held in some cases that he is intended to be personally liable[60] but there is no general rule.[61] A person who signs his name to be added to a contract with such a company merely to confirm it can neither sue on it nor be liable on it and the contract is unenforceable.[62] A person signing himself merely as an agent cannot be liable on the contract or sue on it.[63]

Other cases of agency.—An Official Receiver is not an agent of the insolvent.[64]

The plaintiff, a common carrier, employed the defendant another common carrier to carry the goods of the owner. The goods were loaded by the servants of the owner from the premises of the owner. The plaintiff was held an agent of the owner. The fact that the freight was promised to be paid by the plaintiff and that he was answerable to the owner would make no difference. Such an agent cannot sue for breach of duty as common carrier to deliver goods entrusted to the defendant for carriage.[65]

A third party is not bound to recognise a lawful agent. It is always free to say that it will not deal with agents, brokers or intermediaries but deal direct with the principal, even though the agent may be an almost complete substitute for the principal. Therefore the Government cannot be compelled to allow an agent to apply for a client's passport.[66] An officer signing "for the Military Secretary" of an ex-ruler merely performs a ministerial act which does not constitute him an agent of the ex-ruler.[67] A consumer with a priority allotment dealt with a colliery through the respondent. The colliery sent the bill for the price to the respondent who sent another bill to the consumer adding his commission. It was held the respondent was acting as an agent for the consumer.[68]

A colliery supplied coal to a company in pursuance of an order of supply of coal by the Coal Commissioner and arranged to transport it to the company in wagons allotted by the Deputy Coal Commissioner. The freight was made payable by the Company.

In the circumstances the colliery was held to be an agent for the company to enter into the contract for consignment and the company was liable for payment of freight and of demurrage.[69] A firm expressly appointed as an agent of a company does not cease to be so, if it also finances purchases for the company within the territory of its agency for which it is paid interest.[70] The word "agent" used in the Sind Co-operative Societies Act of 1925 is not the same as used in s. 182 of the Contract Act.[71] Agent within the election law has much wider connotation than in the Contract Act.[72]

Licence under Export Control Order.—A licence under the Export Control Order is a personal privilege and not property which can be transferred and therefore where a principal allows an agent to sell the licence to third parties by resorting to subterfuge to circumvent the provisions of the Export Control Order, the transaction is illegal. The parties being par-

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60 *Wilson & Co.* v. *Baker Lees & Co.* (1901) 14 T.L.R. 473; *Kelner* v. *Baxter* (1866) 2 CP. 174; *Rita Joan Dairies Ltd.* v. *Thomson* (1974) I N.Z.L.R. 236.

61 *Black* v. *Smallwood* (1966) 117 C.L.R. 52.

62 *Newborne* v. *Sensolid (G.B.) Ltd.* (1954) I.Q.B. 45 (as to breach of warranty of authority see p. 47); *Black* v. *Smallwood* (1966) 117 C.L.R. 52.

63 *Hiallman* v. *Pullin* (1884) Camb. & EL. 254. As far as unincorporated Associations see *Overton* v. *Hewitt* (1886) 3 TLR 246; *Steele* v. *Courley* (1887) 3 T.L.R. 772; *Bradley Egg Farm Ltd.* v. *Clifford* (1943) 2 All ER 378; *Peckam* v. *Moore* (1975) N.S.W. L.R. 353; (1971) 3 Mod. LR. 615.

64 *Ramgopal Naicker* v. *Muthukrishna Ayyar* (1957) Mad. 344; (1957) A.M. 1; *Currimbhai* v. *Ahmadali,* 58 Bom. 505; (1933) A.B. 91 diss.

65 *Sukul Bros.* v. *H.K. Kavarana* (1958) A. Cal. 730; (1958) 1 Cal. 376; *Dunlop* v. *Lambert* (1839) 6 Cl. & Fin. 600 at p. 627; 7 E.R. 824 (promise to pay freight); also *Murphy* v. *M & G. W. Ry.* (1903) 2 Ir.R. 5, 30; *Bramwell* v. *Filler,* 21 L.T. 672 (Responsible to the owner).

66 *Mediator Company* v. *West Bengal* (1958) A. Cal. 634; 62 C.W.N. 682.

67 *Mohan Lal* v. *Sawai Mansinghji* (1962) 1 S.C.R. 702; (1962) A.S.C. 73.

68 *State of Bombay* v. *Ratilal Vadilal* (1961) A.S.C. 1106; (1962) 2 S.C.R. 367.

69 *Kuchwar Lime & Stone Co.* v. *Dehri R.L.R. Co.,* n. 86, p. 708.

70 *Ramdayal Ghasiram* v. *Government of Andhra Pradesh* (1960) A.A.P. 502.

71 *Government of West Pakistan* v. *Wali Muhammad Habib,* P.L.D. (1961) 1 S.C. 215; (1961) 1 Pak. S.C.R. 111.

72 *Navi Gopal Swami* v. *Abdul Hamid Chaudhary* (1959) A.Asm. 200.

ticipants in an illegality the Court will not assist the principal to recover illegal gains made by the agent in such a transaction.[73]

Consignee and Stevedore.—A consignee to whose account 4883 Mega tonnes of sulphur were consigned appointed the plaintiff as charterer's agent to unload the vessel at Madras Port and the charterparty was sent alongwith the letter of appointment. From this letter the Court concluded and held that the relationship of principal and agent was established.

And therefore a mandatory injunction was rightly decreed against the principal to pay the penalty levied on the agent for shortage of sulphur unloaded under s. 116 of Custom Act 1962.[74]

Mortgagor and mortgagee.—Where a mortgagor conferred powers on the mortgagee to sell the mortgaged property without intervention of the Court and the mortgagee sold the property by public auction but before the execution and registration, the mortgagor redeemed the property it was held he could do so and no interest in property passes by a contract of sale unlike in English law. It is erroneous to suggest that the mortgagee was acting as agent of the mortgagor in selling the property. The mortgagee's right is different from that of the mortgagor. The former's right is a superior right which is not under the mortgagor but is against him. In other words the sale is against the mortgagor's wishes. The rights and interests of the mortgagor and the mortgagee in regard to the sale of the mortgaged property are conflicting.[75]

Maharashtra Cooperative Societies Act.—The word "agent" in s. 91(1)(a) of the Maharashtra Cooperative Societies Act is not defined. Therefore it has to be construed taking the objects of the provisions and its scope into consideration. This word it was held was used to indicate the relationship of a person appointed representative of another and is used in a comprehensive sense.[76]

State Corporation of India—not Agent.—The State Corporation of India incorporated under the Companies Act is a separate person having statutory individuality. When it exports sugar with the permission of the Government of India it does not act as its agent but on its own behalf.[77]

House agent and share broker.—House or estate agent is different from a broker at a stock exchange owing to peculiarities of the property with which he is to deal and which does not pass by a short instrument as stock and shares do but has to be transferred after investigation of title.[78] An agent authorised to effect the sale of goods or property is a broker. He may be engaged to merely negotiate a transaction by bringing two parties together, i.e. merely as an intermediary or he may be appointed to buy or sell on behalf of the principal. In the former case he may act for both parties simultaneously. In the latter case he can only so act with the permission of his employer.[79] An estate agent has ordinarily no authority to enter into or sign on behalf of the vendor but there may be circumstances for which this authority may be inferred.[80]

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73 *Nathumal Bhaironbux & Co.* v. *Kashi Ram* (1973) A. Raj. 271, 282; *Kedarnath* v. *Prahlad Rai* (1960) A.SC. 213; (1960) 1 SCR 861; *R.S. Shah* v. *S.S. Merchants Association* (1960) A.B. 548 disting.

74 *State Trading Corporation of India* v. *Shaik Mohammad Rowther & Co.* (1978) A.M. 224, 226.

75 *Naraindas Karsondas* v. *S.A. Kamtam* (1977) A.SC. 774, 780; (1977) 2 SCR 341.

76 *Lakhani Sahakarni* v. *Moreshwar* (1978) A.B. 273, 277. *Ram Prasad* v. *Commissioner of Income tax* (1973) A.SC. 637 (Agent and Servant)

77 *Sakhti Sugars Ltd.* v. *Union of India* (1981) A.D. 212; *State Corporation of India* v. *Sales Tax Officer* (1964) 4 SCR 991 (1963) ASC 1011.

78 *Abdul Ahmad* v. *Animendra* (1950) S.C.R. 30; (1950) A.S.C. 15; *Chandburn* v. *Moore* (1893) L.T. 257.

79 *Laxmi Ginning & Oil Mills* v. *Amrit Banaspati Co. Ltd.* (1962) A. Punj. 56; *Ramamurthi* v. *Ramanujam* (1961) A.A.P. 408 (mere negotiator; and has no personal liability).

80 *Davies* v. *Sweet* (1962) 2 W.L.R. 523; *Abdul Ahmad* v. *Amarendra* (1950) S.C.R. 30; (1950) A.SC. 15.

Estate Agent's agreement conditions on a printed form:

When an estate agent is employed to find a purchaser the ordinary understanding of mankind is that the commission is payable out of purchase price when the matter is concluded. If the agent seeks to depart from that term he must make it perfectly plain to his client. When he produces a printed form for his signature he should explain to him that it goes beyond the usual understanding in these matters. If the client does not read it and the form contains a term which is wholly unreasonable and totally uncertain the estate agent cannot enforce it against the innocent vendor. No person can hold another to a printed form which has been induced by a misrepresentation. If the language is ambiguous it should be interpreted *contra proferentem* as it is likely to trap all except the most wary.[81]

Authority.—Where an agent was held out by the owner as having full authority to enter into a contractual agreement with a prospective tenant, the owner will be bound by whatever agreement the agent makes notwithstanding the agent being expressly denied by the authority to create a tenancy.[82]

An Estate agent has no implied authority to receive a deposit from a proposed purchaser and therefore the vendor is not responsible if the agent vanishes with the deposit and there is a loss.[83]

Interest on deposit.—A prospective purchaser before the terms and conditions of the contract of sale were settled paid a deposit to the Estate Agent. But later the purchaser informed the agent that she was withdrawing from the offer, and the agent returned the deposit. The prospective purchaser claimed interest on the deposit. It was held that the agent was not liable to account to the prospective purchaser for interest on the deposit made by the former.[84]

Commission when payable.—Where an estate agent according to the contract introduced a purchaser ready and willing to purchase for the price named but the transaction proved abortive—the vendor sold to someone else—the agent was entitled to his commission as the vendor had not proceeded with the transaction.[85]

Estate Agent : authority to delegate—Sub-agent.—An Estate agent who claims to be a sole agent does not have an implied authority to appoint a sub-agent since he held a position of discretion and trust, and the functions and duties of an estate agent require personal skill and competence of such a nature that he had no authority to delegate his responsibilities to a sub-agent unless he was expressly authorised to do so. Therefore where the owner of property sold it to a purchaser by private treaty and subsequently discovered that the purchaser had been introduced by a sub-agent, the agent was not entitled to any commission.[86]

Del credere agent.—A *del credere* agent is one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties.[87] A *del credere* agency may be inferred from a course of dealing between the principal and agent showing that extra remuneration was charged for the risk of bad debts.[88] A *del credere* agent incurs only a secondary liability towards the principal; he is in effect a surety for the persons with whom he

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81 *Jacques* v. *Lloyd D. George & Partner Ltd.* (1968) 1 W.L.R. 625; *A.L. Wilkinson Ltd.* v. *Brown* (1966) 1 W.L.R. 194, 197; (1966) 1 All E.R. 509 (C.A.) considered.

82 *Walsh* v. *Griffith-Jones* (1978) 2 All ER 1002, 1007.

83 *Sorrell* v. *Finch* (1976) 2 All E.R. 371; *Barrington* v. *Lee* (1971) 3 All E.R. 1231 expld.; *Ryan* v. *Pilkinton* (1959) 1 All E.R. 689 doubted; *Goding* v. *Frazer* (1966) 3 All E.R. 234 and *Burt* v. *Claude Cousins & Co. Ltd.* (1971) 2 All E.R. 611 overruled.

84 *Potters* v. *Loppert* (1973) 1 All ER 658, 662, 667; *Burt* v. *Claude Cousins & Co. Ltd.* (1971) 2 All ER 611; *Barrington* v. *Lee* (1971) 3 All ER 1231 applied.

85 *Christic Owner & David Ltd.* v. *Rapacioli* (1974) 2 All ER 311.

86 *John McCann & Co.* v. *Pow* (1975) 1 All ER 139.

87 *Morris* v. *Cleasby* (1816) 4 M. & S. 566; 16 R.R. 544; *Hornby* v. *Lacy* (1817) 6 M. & S. 166; 18 R.R. 345; *Thomas Gabriel and Sons* v. *Churchill and Sim* (1914) 3 K.B. 1272. C.A. In England this has not the effect of bringing his contract within the Status of Frauds, as it is essentially different from a guarantee: *Couturier* v. *Hastie* (1852) 8 Ex. 40; 96 R.R. 584; *Sutton* v. *Grey* (1894) 1 Q.B. 285. As to the analogous position of a *pakka adatia,* see s. 211, below. (In *Champa Ram* v. *Tulshi Ram* (1927) 26 All.L.J. 81; 105 I.C. 739; 1927 A.A. 617, a variant spelling, *arahtia,* occurs.)

88 *Ibid.*

deals to the extent of any default by insolvency or something equivalent, but not to the extent of a refusal to pay based on a substantial dispute as to the amount due.[89] A *del credere* agent, who is already responsible to the seller for payment by the buyer, does not become responsible to the buyer for the due performance of the seller's contract.[90] And there is nothing at any time to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as the principal.[91]

It is sometimes difficult to decide whether a consignee of goods for sale is a *del credere* agent or buyer, where he is permitted to sell at such prices and on such terms as he thinks fit, and allowed to retain any profits over and above an agreed price, the payment of which he guarantees to the principal.[92] The transferee of title to goods thereby becomes a debtor for the price and not an agent for the proceeds of the sale.[93]

Partner as agent can give firm guarantee.—A benamidar partner executing a guarantee on behalf of the firm and giving a fixed deposit receipt in the name of the firm as guarantee acts as agent of the firm and not in his personal capacity.[94]

Co-agents.—Two or more persons may be employed to act as agents jointly or severally. In the absence of circumstances indicating an intention to the contrary, an authority given to two or more persons is presumed to be given to them jointly and not severally, and in such case it is necessary that they should all concur in the execution of the authority in order to bind the principal,[95] unless it is provided that a certain number of them shall form a quorum.[96]

There is, however, an exception to this rule where the authority conferred is of a public nature. In such a case, if all the persons in whom the authority is vested meet for the purpose of exercising it, the act of the majority is considered that of the whole body.[97] Where authority is given to co-agents severally, or jointly and severally, any one or more of them may exercise it so as to bind the principal without the concurrence of the other or others.[98]

Joint power of attorney to one agent.—There is nothing in law of agency permitting a joint power of attorney to one agent nor is it, in the absence of anything to the contrary in the power of attorney itself, necessary that such authority must be only in regard to the joint affairs of the co-principals. Therefore where the principals declared in the power of attorney that they were unable to attend and look after their cases and in view of their private needs and were therefore authorising the person named to be their agent to conduct cases, appoint pleaders to sell or purchase lands or to raise money, in short, it was a general power of attorney which was reaffirmed by another later power of attorney.[99]

A power of attorney must be strictly construed but surrounding circumstances have to be taken into consideration. Where the principals and their relations after the Police Action in Hyderabad State found themselves unable to manage money or approach their lands, no

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89 *Churchill* v. *Goddard* (1937) 1 K.B. 92, 101, C.A.
90 *Shaw* v. *Woodcock* (1827) 7 B. & C. 73, 31 R.R. 158.
91 *International Ry. Co.* v. *Niagara Parks Commission* (1941) A.C. 328, at p. 342; 1941 A.P.C. 114.
92 Compare *Ex parte White, In re Nevil* (1870) L.R. 6. Ch. 397, with *Ex parte Bright, In re Smith* (1879) 10 Ch. D. 566. And see *Livingstone* v. *Ross* (1901) A.C. 327.
93 *Gordon Woodroffe & Co.* v. *Shaik M.A. Majid & Co.* (1967) 2 S.C. J. 387; (1967) A.SC. 181; (1966) Supp. S.C.R. 1.
94 *Dwarkadas Nayar* v. *Dwarkadas Sehgal* (1972) 2 Del. 355, 365.
95 *Brown* v. *Andrew* (1849) 18 L.J.Q.B. 153; 83 R.R. 842; *In re Liverpool Household Stores* (1890) 59 L.J. Ch. 616.
96 See *Ridley* v. *Plymouth Grinding Co.* (1848) 2 Ex. 711; 76 R.R. 742; *Kirk* v. *Bell* (1851) 16 Q.B. 290; 83 R.R. 456; *D'Arcy* v. *Tamar Rail, Co.* (1866) L.R. 2 Ex. 158.
97 *Grindley* v. *Barker* (1798) 1 B. & P. 229; 4 R.R. 787.
98 *Guthrie* v. *Armstrong* (1822) 5 B. & Ald. 628.
99 *Syed Abdul Khader* v. *Rami Reddy* (1979) A.SC. 553; 557 and 558; Halsbury's Laws of England 4th ed. Vol. I. Para 726.

doubt separately owned, and they were contemplating migrating to Pakistan and get their money across to that country, showed that it was a general power of attorney.[1]

Post Office and Sender of Cheques and V.P.P.s.—The jural relationship between the Post Office and sender of a V.P.P. is one based on contract. According to the *Winkfield*[2] it is one of a bailee and a bailor and according to the Supreme Court[3] the Post Office is an agent to receive the price from the addressee against delivery of goods despatched and to pay the money so received to the sender. In the *Winkfield*[4] the Postmaster General as a bailee was held entitled to recover the full value of the mails carried on a ship which were lost as a result of a collision on sea although he was not liable to the senders of the letters and parcels for their loss under the British Post Office Act. But the Postmaster General was bound to pay the bailors any excess above his own interest and this "serves to soothe a mind disconcerted by the notion that a person who is not himself the full owner should be entitled to receive back the full value of the chattel converted or destroyed". *The Winkfield*[2] was a case of negligence. In *Commissioner of Income Tax* v. *P.M. Rathod & Co.*[5]

the assessee was a firm of manufacturers of perfumery at Ratlam at Madhya Bharat, and their goods were sold throughout India. The question was whether their income was assessable at the rate applicable to incomes in Madhya Bharat, which was a Part B State, or at the rate under the Indian Income-tax Act. They were sending out goods to various parts of India, *inter alia* by V.P.P. The decision of the question depended upon whether the post office, when it received money in India outside Madhya Bharat, received it as agent of the assessee and therefore the money was received in India or the money was received as agent of the addressee and therefore money was received within Madhya Bharat.

The Supreme Court held the post office to be the agent of the former.

After referring to the rules relating to V.P.P., the Supreme Court observed,

"This shows that whatever be the jural relationship between the seller and the post office in respect of carriage of goods sent by the seller under the V.P.P. system it becomes an agent of the seller for the recovery of the price and if it fails to recover the price and delivers the goods it is liable in damages to the seller: *Mothi Rungaya Chetty* v. *Secretary of State.*[6]

In its latest judgment, the Supreme Court has held that the Post Office being a branch of revenue of the Union of India, constituted under the Post Office Act and is a branch of public service providing postal service and is not an agent of the sender to realise value of the articles sent by V.P.P. not being a common carrier. This was held in a case where an article was sent by V.P.P. to Pakistan and the Pakistan Government withheld the money and did not allow it to be remitted to India.[7] In two previous cases *Union of India* v. *Ogale Glass Works Ltd.*[8] and *Union of India (Commissioner of Income-tax)* v. *P.M. Rathod*[9] the Supreme Court had held the Post Office to be an agent. It is submitted that whatever may be the effect of the action of the Pakistan Government on the performance of the contract of agency that fact does not affect the jural relationship between the sender of a V.P.P. article and the Indian Post Office.

If seals on an insured cover are intact, the Government is not liable if blank papers are found in place of currency notes.[10] In the Madras case[11] above referred to

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1 *Syed Abdul Khader* v. *Rami Reddy* (1979) A.SC. 553; *Powell & Bryant Ltd.* v. *Banquedu Peuple,* 1893 A.C. 170.
2 (1902) P. 60; (1900-03) All E.R. Rep. 346.
3 *Commissioner of Income-tax* v. *P.M. Rathod* (1959) A.S.C. 1394; (1959) I.T.R. 145; (1960) 1 S.C.R. 401.
4 (1902) P. 42, 60; (1900-3) All E.R. Rep. 346. Winfield on Tort (7th Ed.) 546.
5 (1959) A.SC. 1394 at p. 1397; (1959) 37 I.T.R. 145; (1960) 1 S.C.R. 401.
6 28 Mad. 213.
7 *Union of India* v. *Mohammad Nazim* (1980) A.SC. 431, 434: (1980) 1 SCR 968; *Trifus & Co.* v. *Post Office* (1957) 2 Q.B. 352; (1957) 2 All ER 387; *Whitfield* v. *Le Despence* (1778) 2 Corop 754, reld. on.
8 (1955) 1 SCR 185; (1954) A.SC. 429; (1954) 25 I.T.R. 545.
9 (1960) 1 SCR 401; (1959) A.SC 1394 (1959) 37 I.T.R. 145.
10 *Union of India* v. *Lallan Prasad* (1963) A.P. 216.
11 *Mothi Rangaya Chetty* v. *Secretary of State,* 28 Mad. 213. Contra *Union of India* v. *Ramjilal* (1965) A.A. 184 (s. 6 of Post Office Act is a defence).

a V.P.P. sent through post was delivered to the addressee without recovering the price. In a suit by the sender for the price of the goods so delivered the Post Office pleaded section 34 of the Post Office Act excluding liability of the Post Office for non-recovery of the price before delivery of the article.

Section 34 was held not to be an available defence in a case of negligence to recover money. The Post Office, the Court held, is bound by contract to act as their sender's agent to collect money when it delivers the article. If there is neglect to collect the money as agreed to by the Post Office for consideration, it has committed a breach of contract for which it is liable to pay damages.[12] This principle also applies to conversion. See *Swire* v. *Leach*[13] where the facts were these:

The goods pledged with a pawnbroker are privileged from distress for rent due to pawnbroker landlord and if he distrained the pawnbroker is entitled to recover full value from the landlord as the distrainer is a wrong-doer and the pledgee will have to hand over the excess over his claim under the pledge to the owner.

The Post Office is an agent of the sender of articles by V.P.P. for the recovery of the price and it is not the agent or the buyer the addressee. If the Post Office fails to recover the price on delivery to the buyer it would be liable in damages to the sender—the seller.[14] Even if it be granted that the Post Office is a bailee for the seller of articles sent by V.P.P. for the transmission of the articles, he cannot deliver the articles to the buyer without receiving their price on behalf of the bailor.[15] If a payment is by agreement to be made by cheque and the cheque is to be sent by post, the post office is the agent of the creditor to receive the cheque and the creditor receives the cheque as soon as it is posted to him.[16] The Post Office is an agent of the person to whom the cheque is posted (i.e. the creditor) if there is an excess or implied authority to send it by post.[17] But if there is no such request then the delivery of the cheque to the Post Office is delivery to the agent of the sender himself.[18] Post Office is not agent of payee. Therefore decretal amount paid to the Post Office by money order within time specified in the decree but which reaches the Court late is not performing the terms of the decree to pay within appointed time.[19]

Who may employ agent.

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

In English law, the appointment of an agent by an infant has always been held to be void.[20]

Who may be an agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained

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12 *Mothi Rangaya Chetty* v. *Secretary of State*, 28 Mad. 213.
13 (1865) 18 C.B. (N.S.) 479; (1861-73) All E.R. Rep. 768.
14 *Commissioner of I.T.* v. *P.M. Rathod & Co.* (1959) A.S.C. 1394; (1960) 1 S.C.R. 401; (1959) 37 I.T.R. 145; *Union of India* v. *Ram Gopal Hukamchand*, 1960 A.A. 672, see n. 38.
15 *C.I.T.* v. *P.M. Rathod & Co.* (1959) A.S.C. 1394; (1960) 1 S.C.R. 401; (1959) 37 I.T.R. 145. Contra *Union of India* v. *Ramji Lal* (1965) A.A. 184 (s. 6 of Post Office Act applied as goods were not insured).
16 *Indore Malwa United Mills* v. *C.I.T.* (1966) 59 I.T.R. 738; (1966) 2 S.C.R. 651; (1966) A.S.C. 1466; - *Jagdish Mills Ltd.* v. *C.I.T.* (1960) 1 S.C.R. 236; (1959) A.S.C. 1160; (1959) 37 I.T.R. 114.
17 *Commissioner of Income-tax* v. *Ogale Glass Works* (1955) 1 S.C.R. 185; (1954) 25 I.T.R. 529; 545; *C.I.T.* v. *Patney & Co.* (1959) 36 I.T.R. 488; (1959) A.S.C. 1070; *Sri Jagdish Mills Ltd.* v. *C.I.T.* (1959) 37 I.T.R. 114; (1959) A.S.C. 1160 (1960) 1 S.C.R. 236; *Indore Malwa United Mills* v. *C.I.T.* (1966) 59 I.T.R. 738 (1966) 2 S.C.R. 651; (1966) A.SC. 1466.
18 *C.I.T.* v. *Ogale Glass Works* (1955) 1 S.C.R. 185, 204; (1954) 25 I.T.R. 529 (1954) A.SC. 429; *C.I.T.* v. *Patney & Co.* (1959) 36 I.T.R. 488; (1959) A.S.C. 1070; (1959) Supp. 2 S.C.R. 868.
19 *Rajaram* v. *Bisram* (1960) A.A. 747.
20 *Shepard* v. *Cartwright* (1953) Ch. 728, 755. For a criticism of this rule, see 69 L.Q.R. 446.

As between the principal and third persons, the act of an agent is looked upon as the act of the principal who authorised it. Hence the rule that a person who has no capacity, or only a limited capacity, to contract on his own behalf is competent to contract so as to bind his principal. An income-tax notice delivered by a postal peon to the assessee's son who was a minor and possessed of ordinary intelligence has been held to be a good service on the assessee;[21] and the fact of an agent being unable to read or write has been held to constitute no ground for the avoidance by the principal of a written contract made by the agent on his behalf.[22]

Consideration not necessary.

185. No consideration is necessary to create an agency.

By the Common Law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be defined by the terms of a contract, is in its nature independent of contract; but a merely gratuitous employment or authority does not bind the agent to do anything; and if, having neither reward nor promise of reward , he does nothing at all, the principal does not appear to have any remedy. But this distinction is of little practical importance, if any.

Agent's authority may be expressed or implied.

186. The authority of an agent may be expressed or implied.

Express authority.—See particularly the Indian Registration Act, 1908, s. 32 (agent for registration); and the Code of Civil Procedure, 1908, Sch. I. O. 3, r. 4. (Appointment of pleader).

Implied Authority.—Patna High Court has held that where an arbitrator hands over a registered award to a party there is implied authority to the party to file the award in court under S. 186 Contract Act also.[23]

Definitions of express and implied authority.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A's* funds with *A's* knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Agency, how constituted.—Relationship of principal and agent may be constituted by (a) express appointment; (b) by implication of law from the conduct or situation of parties or from the necessity of the case; or (c) by subsequent ratification by the principal.[24] The actual relationship of the parties must be determined from all the circumstances and not merely from the use of the word 'agent'[25] or the expression Agency agreement.[26] The relationship of principal and agent can only be established by the consent of both of them. They will be held to

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21 *In re L.C. DeSouza* (1932) 54 All. 548; 138 I.C. 70; 1932 A.A. 374.
22 *Foreman* v. *Great Western Ry. Co.* (1878) 38 L.T. 851.
23 *Ram Lakhan Mohta* v. *Mahadeo Mahto* (1982) A.P. 19.
24 *S.N. Barick* v. *State of West Bengal* (1963) A. Cal. 79.
25 *Firm Purshottamdas* v. *Gulab Khan* (1963) A.P. 407; *White (ex parte); in re Nevill* (1871) 6 Ch. A. 397: *Supdt. of Stamps, Bombay* v. *Breul & Co.* (1944) A.B. 325.
26 *Loon Karan* v. *John & Co.* (1961) A.A. 308; on app. (1969) A.SC. 73.

have consented if they have agreed to what amounts in law to such relationship even if they do not recognise it themselves and even if they have professed to disclaim it.[27] But the consent must have been given by each of them, either expressly or by implication. Earlier words and conduct may afford evidence of a course of dealing in existence at the time of the alleged creation of agency and may be taken into account as historical background. Later words and conduct may have some bearing though likely to be less important.[28] If a person by words or conduct holds out another as having authority to act on his behalf he is bound as regards third parties by the acts of such other as if he were his agent.[29]

Implied authority.—It is needless to cite authorities to show that the ordinary course of affairs must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. "A person who employs a broker must be supposed to give him authority to act as other brokers do".[30] It might be difficult, but happily there is no need, to draw a clear line between cases falling under the latter part of this section and those falling under the second paragraph of s. 188. As to the saving of usages of trade under this Act, see on s. 1, above.

A power of attorney authorising the holder "to dispose of" certain property in any way he thinks fit does not imply an authority to mortgage the property.[31] An authority given to a military officer to sell goods lying in a particular area does not imply an authority to sell goods in another area.[32] Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes.[33] Authority on dissolution of partnership to settle the partnership affairs does not authorise the drawing, accepting or indorsing of bills of exchange in the name of the firm.[34] Where the principal carries on a general money-lending business, the authority to the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others to customers.[35]

In determining questions involving the relationship of a public servant to the Crown, and the liability of the State for acts of public officers, the principles of the ordinary law of agency cannot be applied except with considerable qualifications.[36] An individual principal is liable to the extent authority is apparently given, but the State is liable only to the extent authority has actually been given.[37] See under s. 188.

Exclusive agency.—Appointment of a "sole agent" does not preclude the principal from

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27 *Ex parte Delhasse* (1878) 7 Ch. D. 511, 526 C.A. *Garnac Grain Co. Inc.* v. *H.M.F. Faure & Fairclough Ltd.* (1967) 3 W.L.R. 143, 149.
28 *Garnac Grain Co.* v. *H.M.F. Faure & Fairclough Ltd.* (1967) 3 W.L.R. 143, 149.
29 *Union of India* v. *Motilal* (1962) A.P. 384; Halsbury's Laws of England, Vol. 1, (3rd Edn.), 208.
30 *Sutton* v. *Tatham* (1839) 10 Ad. & E. 27; 50 R.R. 312; *per* Littledale J.
31 *Malukchand* v. *Sham Moghan* (1890) 14 Bom. 590; *Bank of Bengal* v. *Fagan* (1849) 5 M.I.A. 27, 41.
32 *Bannerjee* v. *Simonds,* 1947 A.Cal. 307.
33 *Pestonji* v. *Gool Mahomed* (1874) 7 M.H.C. 369. See Negotiable Instruments Act, 1881, s. 27.
34 *Abel* v. *Sutton* (1800) 3 Esp. 108; 6 R.R. 818. The following cases may also be referred to as illustration; *Ezekiel* v. *Carew & Co.* (1938) 2 Cal. 190; (1938) A. Cal. 423 (where agent is empowered to surrender shares in company belonging to principal, he is not entitled to renounce newly issued shares); *Paboodan* v. *Miller,* 1938 A.M. 966; (1938) 2 Mad. L.J. 688 (agent appointed to manage joint Hindu family has no implied authority to borrow moneys); *Govardhandas* v. *Friedmans Diamond Trading Co.* 1939 A.M. 543 (An authority to "ask, demand, sue for, recover and receive money debts, etc." does not entitle agent to assign decree passed in favour of principal); *Jaunpur Municipality* v. *Banwari Lal* (1939) All L.J. 897; 184 I.C. 648; 1939 A.A. 623 (authority to receive payment of an amount does not imply an authority to recover it by instituting a legal process); *Ramanathan* v. *Kumarappa,* A.I.R. 1940 Mad. 650 (authority to adjust dispute does not authorise agent to refer matter to arbitration); *Uttar Pradesh Government* v. *Church Missionary Trust Association Ltd.* (1948) 22 Luck. 93, 229 I.C. 421, 1948 A.O. 54.
35 *Bank of Bengal* v. *Ramanathan* (1916) 43 I.A. 48, 54, 43 Cal. 527, 540; 32 I.C. 419.
36 *Afzalur Rahman* v. *Emperor,* 1943 A.F.C. 18.
37 *State* v. *J.C. Gammon Ltd.* 1953 A.T.C. 45, 49. See also *Murugesa* v. *Province of Madras,* A.I.R. 1947 Mad. 74, 231 I.C. 76; *Bannerjee* v. *Simonds,* 1947 A. Cal. 307.

acting himself in the business of the agency without being accountable to the agent. Only an express prohibition would have that effect.[38]

Distributing agent or exclusive agent.—A "distributing agent" or "exclusive agent" in a particular territory for a proprietory commodity does not put a consumer into contractual relations with the manufacturer. The word "agent" is often used in business as meaning one who has no principal but who on his own account offers for sale some particular article having a special name, e.g. *Wheeler & Wilson* v. *Shakespeare*.[39] *W.T. Lamb's case* is an instance of a sole selling agency where the merchant buys bricks from the manufacturers and supplies to the builders. There is a distinction between a buyer and an agent for sale, i.e. persons to whom goods are supplied in return for price.[40]

Husband and wife.—This is a special and important case of implied authority.

"The liability of a husband for a wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done".[41]

"Thus a person dealing with a wife and seeking to charge her husband must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed,[42] or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law would give her an implied authority to bind him for necessaries supplied to her during such separation in the event of his not providing her with maintenance.[43]

Where a European husband and wife, therefore, live together, it was held that the husband was not liable for moneys borrowed by the wife to pay her previous debts, and not for the purpose of any household or necessary expenses.[44] Similarly, a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding school and was in receipt of payments made by the parents of children boarding with her.[45] Much the same principles apply to Hindus. A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation.[46] But when a woman governed by the provisions of the Married Women's Property Act, 1874 has separate property of her own,[47] the presumption would be that she was not pledging her husband's credit. A European wife subject to the last-mentioned Act carried on the business of a milliner, and the husband had no concern in it; it was held that he was not liable for debts contracted by the wife in the management of that business.[48] But, whatever be the law to which the parties are subject, it is clear that there can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead. In such a case the lender must be taken to have dealt with the

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38 *Bentall, Horsley and Baldry* v. *Vicary* (1931) 1 K.B. 253. McCardie J. Approved by the Court of Appeal in *Trollope* v. *Martyn* (1934) 2 K.B. 436, and in *Luxor (Eastbourne) Ltd.* v. *Cooper* (1941) A.C. 108 by two members of the House of Lords, Lord Simon (at p. 117) and Lord Wright (at p. 145). See also *Sadler* v. *Whittaker* (1953) C.P.L. 652, C.A.

39 (1869) 39 L.J. Ch. 36; *International Harvester Co. Ltd.* v. *Carrigans Hazeldene Pastoral Co.* (1958) 100 C.L.R. 644, 652-3.

40 *W.T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (1931) All E.R. Rep. (1932) 1 K.B. 710, 717, 720; *Kennedy* v. *De Trafford* (1897) A.C. 180, 187. *Lamb's case* was quoted with approval in *Gordon Woodroffe & Co.* v. *Shaik Majid & Co.* (1967) 2 S.C. J. 387, 393; (1966) Supp. S.C.R. 1; (1967) A.SC. 181. Blackwood Wright: Principal & Agent (2nd Ed.), p. 5. Also see *infra*.

41 *Girdhari Lal* v. *Crawford* (1885) 9 All. 147, 155.

42 Not conclusively; *Debendham* v. *Mellon* (1880) 6 App. Ca. 24.

43 *Virasvami* v. *Appasvami* (1863) 1 M.H.C. 375. The authority of necessity, where it exists, is altogether independent of contract.

44 See note 67, *supra*.

45 *Mahomed Sultan Sahib* v. *Horace Robinson* (1907) 30 Mad. 543.

46 See note 69, *supra*. See also *Nathubhai* v. *Javher* (1876) 1 Bom. 121, 122. Proposition doubtful.

47 See notes on s. 11, *ante*.

48 *Allumuddy* v. *Braham* (1878) 4 Cal. 140.

woman in her own right, "and not looking in any way to the husand as responsible for the debt".[49] According to the matrimonial law applicable to the Nairs of Soutern India, no agency exists between husband and wife, even when they live together.[50]

It is now settled in England that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances",[51] such as the presumption from a man and his wife living together in the ordinary way "that he entrusts her with such authority as are commonly and ordinarily given by husband to wife",[52] including authority to pledge his credit to a reasonable extent and in a reasonable manner for ordinary household expenses. Where such authority exists, it can be revoked; or its existence may be negatived by the husband supplying the wife with an adequate allowance of ready money.[53] And a person with whom the wife deals is entitled to notice of her authority being revoked only if the husband has in some way, as by paying previous accounts, given him reason to believe that the wife's transactions were authorised.[54] A husband is not liable for his wife's bills with an eye specialist.[55]

A husband has no authority by virtue of marriage to make a contract on behalf of his wife. But a wife during her coverture has implied authority to pledge his (her husband's) credit for necessities but not for luxuries.

An implied agency arises from the act or situation of the parties or from necessity. An agency of necessity arises whenever a duty is cast upon a person to act on behalf of another and in circumstances in order to prevent irreparable injury to the other person or to preserve his property destruction. In a case of a husband acting as the implied agent of his wife, the agency may arise when the husband cannot communicate with his wife and in the circumstances it was the only prudent and necessary act to take and that he acted *bona fide* in the interest of his wife.

Implied agency does not extend to acts outside the ordinary course of business and which are neither necessary nor incidental to his authority.[56]

Extent of agent's authority.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a shipbuilder. *B* may purchase timber and other materials, and hire workmen for the purpose of carrying on the business. (It has been held, but contrary to English authority not cited, that an agent having general authority to carry on the principal's

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49 *Pusi* v. *Mahadeo Prasad* (1880) 3 All. 122.
50 *Kavukutty Amma* v. *Kaliani Amma,* 1952 A.T.C. 255.
51 *Debenham* v. *Mellon* (1880) 6 App. Ca. 24, at p. 31 (Lord Selborne).
52 *Ibid.*: at p. 36 (Lord Blackburn).
53 *Ib.*: *Morel Brothers & Co.* v. *Earl of Westmoreland* (1903) 1 K.B. 64, C.A.
54 *Debenham* v. *Mellon*, note 77, *supra,* where earlier authorities may be found collected; and see the notes to *Manby* v. *Scott* in 2 Sm L.C. 417 and 6 Encycl. Laws of Engl. 2nd ed., 675-679. The later case of *Paquin* v. *Beauclerk* (1906) A.C. 148, proceeds on the special construction of an English statute.
55 *Kanhayalal* v. *Inderchandji* (1947) Nag. 154, 227 I.C. 58, 1947 A.N. 84.
56 *Smt. Phulhari Devi* v. *Mithallal* (1971) A.A. 494, 498.

business and to receive and expend money therein has implied authority to borrow money so far as necessary for carrying on the business.[57]

Extent of authority.—It is well settled that an agent's authority is, in Story's words (S.58), "construed to include all the necessary and usual means of executing it." If its terms are ambiguous, the principal will be held bound by that sense in which the agent reasonably understood and acted upon them.[58] Further, an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates,[59] partly because this may be presumed to have been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have. This last reason has been extended to holding an undisclosed principal liable for a purchase on credit which he had expressly forbidden the agent to make.[60] Ordinary doctrine of principal and agent is that the principal is liable for all acts of the agent which are within the authority usually confided to an agent of that character notwithstanding limitations as between the principal and the agent put upon that authority.[61] As in the case of an undisclosed principal there can be no apparent authority, and in fact there was no real authority, the correctness of this decision is doubtful.[62] It rather seems that the rule applies only where credit is given not to the agent alone, but to the principal or firm which he apparently represents.[63]

The following are illustrations from the English authorities of the rule stated in the first paragraph of the section. An agent employed to get a bill discounted has authority to warrant it a good bill, but not to indorse it in the principal's name.[64] An agent can sign a promissory note on behalf of a firm. This decision, it is submitted, must be confined to the facts of the particular case.[65] If employed to find a purchaser for property, he has authority to describe the property, and state any circumstances which may affect its value, to a proposed purchaser.[66] Authority to sell a horse implied authority to warrant it, if the principal is a horse-dealer,[67] or the sale is at a fair or public market,[68] but not if the principal is unaccustomed to dealing in horses and the sale is a private one.[69]

Where an agent is authorised to receive payment of money on his principal's behalf, the payment, in order to bind the principal, must be in cash,[70] unless it can be shown that, by a

57 *Dhanpat Rae* v. *Allahabad Bank* (1926) 2 Luck. 253; 98 I.C. 783; 1927 A.O. 44; *contra Hawtayne* v. *Bourne,* see notes on s. 189. below.

58 *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395.

59 *E.g., Pole* v. *Leask* (1860) 28 Beav. 562. But an agent entrusted with goods for sale by a person who does not trade in such goods has no implied authority to bind his principal by a warranty: *Brady* v. *Todd* (1861) 9 C.B.N. 592; 127 R.R. 797; *George Pictures Ltd.* v. *N. Gopalkrishnaru,* (1971) A. Ker. 274 (Manager of cinema to carry on business is competent to make contracts with procedures); *Panorma Developments Ltd.* v. *Fidelis Furnishing Co.* (1971) 3 All E.R. 16. (Ostensible authority to company Secretary who fraudulently orders cars for hire for Company, company will be liable).

60 *Watteau* v. *Fenwick* (1891) 1 Q.B. 346.

61 *Watteau* v. *Fenwick* (1893) 1 Q.B. 346.

62 It is not approved by Lord Lindley, Partnership, 11th ed., 184, *note,* and see L.Q.R. ix, 111 ; *Ramchandra Saru* v. *Kasem Khan* (1923) 28 C.W.N. 824, 829; 81 I.C. 513; 1925 A. Cal. 29. Mr. Floyd R. Mechem in Harv. Law R. xxiii, 601, admits that *Watteau* v. *Fenwick* "can clearly not be sustained upon the ordinary principles of estoppel," but supports it on the ground of holding out or "putting forward" an "ostensible principal." But surely an "ostensible principal" is not "put forward" by any one. If there is no estoppel there can be no holding out. The case was followed on similar facts in *Kinahan & Co.* v. *Parry* (1910) 2 K.B. 389 (reversed on the facts without any decision in point of law, (1911) 1 K.B. 459), but only as binding on a court of co-ordinate jurisdiction; and it is still doubtful whether it will ultimately be supported as of general application; the trade there in question has many peculiarities in England. The decision is approved by Professors Goodhart and Hamson as an excellent example of pure estoppel by conduct, in performing the external notorious act of putting the agent in charge of the beer-house: see 4 Camb. L.J. 320, 336.

63 This condition was satisfied in *Edmunds* v. *Bushell* (1865) L.R. 1 Q.B. 97, which *Watteau* v. *Fenwick* professed to follow.

64 *Fenn* v. *Harrison* (1791) 3 T.R. 757.

65 *Meenakshi Achi* v. *Subramanian Chettiar* (1957) A.M. 8.

66 *Mullens* v. *Miller* (1882) 22 Ch. D. 194. For whether the agent is authorised to find a purchaser or to sell the property, see *Appa Rao* v. *Gopal Dass* (1946) Mad. 465, 1946 A.M. 42; *Abdulla Ahmed* v. *Aminendra Kissen Mitter* (1950) S.C.R. 30, 1950 A.S.C. 15.

67 *Howard* v. *Sheward* (1866) L.R. 2 C.P. 148.

68 *Brooks* v. *Hasall* (1883) 49 L.T. 569.

69 *Brady* v. *Todd* (1861) 9 C.B.N.S. 592; 127 R.R. 797.

70 *Pape* v. *Westacott* (1894) 1 Q.B. 272; *Blumberg* v. *Life Interests, etc., Corporation* (1898) 1 Ch. 27:

reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form; as, for instance, by cheque[71] or bill of exchange[72] or by other goods. Nor may he give credit. Therefore, an *havala* enters does not bind the principal unless ratified.[73] It has been held that authority to sell at fifteen shillings a ton net cash authorises a sale at fifteen shillings and six pence a ton, subject to two months' credit.[74] A custom for an agent to receive payment by way of set-off or settlement of accounts between himself and the person making the payment is regarded as unreasonable, and is not binding on the principal unless he was aware of it and agreed to be bound by it at the time when he authorised the agent to receive payment.[75]

Third parties and Limitation of Agent's Authority.—Any limitation on the authority of the agent does not bind a third party unless he is or is made aware of such limitation.[76] Therefore a restriction on booking of goods even if known to the Station Master of a Railway Station is no defence against the claims of a consignor for non-delivery of goods unless the restriction is made known to him.[77] In the case of dormant partners no limitation of authority will avail as between the dormant and active partner, as to things within the ordinary authority of a partner.[78]

Agency of directors of a company by representation:

Under s. 77(I) of the Companies Act in New South Wales, any contract entered into on behalf of the company is provisional, i.e. not binding till the company becomes entitled to commence business. The directors of a company not so entitled were sued for recovery of price of cement supplied to the company, the plaintiff assuming them to be and treating them as agents of the company. The Court found that there was evidence of representation by the directors that they had the authority to make the purchase of the cement and credit was given by the seller on this representation.

They were held liable to the plaintiff[79] on the ground that the contract entered into was collateral to the contract which they assumed to enter into as agents of the company.[80]

Representation made by Chief Secretary to Government within scope of his authority—*Radha Krishna* v. *State of Bikaner.*[81]

Executor's acknowledgment.—Affidavit of an executor made in obtaining probate of a will only is a statement of facts and not acknowledgment to any one.[82]

Inference from correspondence between the parties of their relationship being one of principal and agent is one of fact and cannot be disturbed in second appeal.[83]

Hine v. *S.S. Ins. Syndicate* (1895) 72 L.T. 79 (policy broker has no authority to take bill of exchange in payment). *Bharat Sarvodaya Mills Co. Ltd.* v. *Shri Ram Mills* (1958) Bom. 1122 (1959) A.B. 309.

71 *Bridges* v. *Garrett* (1870) L.R. 5 C.P. 451.

72 *Williams* v. *Evans* (1866) L.R. 1 Q.B. 352 (auctioneer no authority to take bill of exchange in payment of deposit).

73 *Bharat Survodaya Mills Co. Ltd.* v. *Shri Ram Mills* (1959) A.B. 309; (1958) Bom. 1122.

74 *Boden* v. *French* (1851) 10 C.B. 886; followed in *Pazhaniappa* v. *South Indian Planting Co. Ltd.* 1953 A.T.C. 161.

75 *Underwood* v. *Nicholls* (1855) 17 C.B. 329; *Pearson* v. *Scott* (1878) 9 Ch. D. 198; *Sweeting* v. *Pearce* (1859) 7 C.B.N.S. 449; 121 R.R. 584 (custom for policy brokers to receive payment from underwriters by way of set-off).

76 *Union of India* v. *Moti Lal* (1962) A.P. 384; *Page* v. *L.N.W. Ry.Co.* (1868) 16 W.R. 567; *Mohendra Nath* v. *Kali Prasad,* 30 Cal. 265. See also *Watteau* v. *Fenwick* (1893) 1 Q.B. 346.

77 *Union of India* v. *Moti Lal* (1962) A.P. 384.

78 *Watteau* v. *Fenwick* (1893) 1 Q.B. 346; *Edmunds* v. *Bushell,* 1 Q.B. 97.

79 *Brownett* v. *Newton* (1941) 64 C.L.R. 439, 452-3.

80 *Fountaine* v. *Carmarthen Ryco* (1868) 5 Eq. 316, 322 (every one dealing with a company must see that powers of the directors which are limited are not exceeded); and *Irvine* v. *Union Bank of Australia* (1877) 2 App. Cas. 366, 379. [A person dealing with a company would not be justified in assuming that s. 77(1)(c) of the Companies Act had been complied with] dist.

81 (1977) A.SC 649, 651 (Detriment not necessary).

82 *Bowring Hansbury's Trustees* v. *Bowring Hansbury* (1943) Ch. 104. See Chitty on Contracts 1727 (para) 24th ed.

83 *S.S. Dhundshi & Co.* v. *B. Ramcoleya Manjunath Shambhog* (1973) A. Mys. 195.

personal property and my affairs and the conduct and management thereof including power in my name and on my behalf to execute, sign and do all deeds instructions, cheques, acts and things in relation thereto as effectually as I myself could execute, sign and do the same", did not authorise the agent to mortgage or pledge of the shares for his own benefit.[5] Money collected by an agent purporting to be on behalf of the principal would in law be collection of that amount by the principal unless it is shown that the agent was collecting on his own behalf.[6]

Registration & construction of power of attorney.—A general power of attorney does not require registration. The power of attorney as set out above i.e. (i) giving power to purchase and sell, (ii) power to appoint pleader, (iii) power to file a suit or appeal; (iv) power to borrow money or to enter into a compromise do not indicate that the power to sell for the purpose of litigation nor do the terms cut down the amplitude of power. And merely because in one part of the power of attorney the terms are ambiguous the other parts which are clearly set out are not affected. The document will be construed as a whole—each power being an independent power.[7]

A power of attorney has to be fairly construed from the language used. If power is given to do a particular job, then all the powers usually necessary to do that job may be assumed. It is not necessary to set out in details all those powers. The maxim *delegatus non potest delegare* is not of universal application unless a power is given on account of personal skill or personal confidence. Where the nature of the employment is such that it has to be performed by another the rule does not apply. And where by usage such duties are to be performed by a sub-agent the usage will be implied.[8]

Power of Attorney by two coparceners—Death of one.—A power of attorney was executed by a father and son in favour of *A* who filed a suit for specific performance of a contract. Before the suit was brought the father died and the contention of the defendant that the death terminated the authority of the power of attorney holder was rejected.[9]

Joint Power of Attorney.—A joint power of attorney given by the mother and sister continues to be operative after the death of the mother.[10]

Principals rights—agent empowered to sue in Principal's name.—The plaintiff company issued debentures in favour of defendants' Bank. The Bank appointed a Receiver under the debentures which authorised the Receiver to bring an action in the name of the company and also made him an agent of the company. The defendants refused to give any further financial aid. The plaintiffs brought an action for damages for breach of contract in their own name. The defendants pleaded that the company could not bring the action in their own name. It was held that the power given to the receiver was an enabling provision and the company could bring the action in its own name provided it did not interfere with the receiver's functions of getting in the company's assets or prejudicially affecting the debenture holders by imperiling the assets. Furthermore the directors of the company were in duty bound to bring the action for the company's benefit.[11]

No agency to do a wrongful act.—There can be no agency in the matter of commission of a wrong nor can an agent plead in defence the directions of his principal; nor that by not car-

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5 *Ibid.*
6 *Muthupalaniappa* v. *Alagamai Achi* (1961) Mad. 427. See Power of Attorney.
7 *Syed Abul Khader* v. *Rami Reddy* (1979) A.SC. 553. Halsbury's Laws of England (4th Ed.) Vol. I, Para 733 quoted.
8 *Sardar Bir Singh* v. *Noor Ahmed* (1972) A. Gau. 122; *Venkatadin Appa Row* v. *Venkata Narasinha,* 41 I.A. 51 disting.
9 *Sethubai* v. *Hanumantha Rao* (1973) 23 Mys. 781, 786; *Badrinarain Agarawala* v. *Brij Narayan Roy* (1917) A. Cal. 436 and *Garupatti Venkanna* v. *Atchuta Ramanna* (1938) A.M. 542 reld. on.
10 *Sardar Bir Singh* v. *Noor Ahmed* (1972) A. Gau. 122, *Venkatadri Appa Row* v. *Venkata Narasimha* 41 I.A. 51 disting. See S. 182.
11 *Newharts Development Ltd.* v. *Co-operative Commercial Bank Ltd.* (1978) 2 All E.R. 896, 900, 901.

make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper and it was held that the power gave no authority to borrow money, and the principal was therefore not liable in bills of exchange given in respect of a loan.[93] Where power was given to demand and receive all moneys due to the principal on any account whatsoever, to use all means for the recovery thereof, to appoint attorneys to bring actions, and revoke such appointments, and to do all other business, it was held that the words "all other business" must be construed to mean all other business necessary for the recovery of the moneys, and that the agent had no authority to indorse a bill received by him in pursuance of the power.[94] Where an executor gave a power of attorney to transact in his name all the affairs of the testator, it was held that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally.[95] Gauhati High Court has held it to be fairly construed.[96]

A power of attorney is, however, construed as including all incidental powers necessary for carrying out its object effectively.[97] A power to commence and carry on all actions, suits, and other proceedings, touching anything in which the principal might be in anywise concerned was held to authorise the signature by the agent on behalf of the principal of a bankruptcy petition against a debtor of the principal.[98] See Powers-of-Attorney Act, 1882.

Authority to do every lawful thing necessary for the purpose.—The authority conferred by this section to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency. Thus where *A* appointed *B* manager of his silk factory, and executed in his name a power of attorney specifying his powers and authority but the document gave no authority to *B* to borrow, it was held that *A* was not liable for money borrowed by *B* as manager and attorney of *A*.

"Sections 187 and 188... would not doubt authorise a manager to borrow if necessary; but such general provisions are subject to modifications in particular cases, and in this case they were so modified, for the manager had been allowed no power to borrow.[99]

A manager of a cinema appointed to exhibit film has the power to enter into contract with the producers of the films.[1]

Authority—construction of—In favour of Attorney.—Authority however widely expressed should not be construed as authorising the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation.[2] The object of a power of attorney is to enable the attorney to act in the management of his principal's affairs and not in the absence of a clear power to do so, make presents to himself or to others of his principal's property.[3] If it is in the ordinary course of an agent's business to sell in his own name goods entrusted to him by clients then the sale of goods in his possession will bind his principal whether actually authorised or not. But an unauthorised pledge or mortgage by him will not bind his principal unless the pledge or mortgage is also within the ordinary course of his business.[4] A power of attorney given to a stock broker authorising him "to exercise the fullest powers in relation to real and

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93 *Jacobs* v. *Morris* (1902) 1 Ch. 816.
94 *Hogg* v. *Smith* (1808) 1 Taunt. 347; 9 R.R. 788. Similar cases: *Esdaile* v. *La Nauze* (1835) 1 Y & C. 394; 41 R.R. 299; *Hay* v. *Goldsmidt* (1804) 1 Taunt. 349; 9 R.R. 790; *Murray* v. *East India Co.* (1821) 5 B. & Ald. 204; 24 R.R. 325.
95 *Gardner* v. *Baillie* (1796) 6 T.R. 591; 3 R.R. 531, 538.
96 *Sardar Bir Singh* v. *Noor Ahmed* (1972) A. Gau. 122.
97 *Howard* v. *Baillie* (1796) 2 H. Bl. 618; 3 R.R. 531; *Willis* v. *Palmer* (1859) 7 C.B.N.S. 340; 121 R.R. 522; *Routh* v. *Macmillan* (1863) 2 H. & C. 750; 133 R.R. 778; *Ex parte Frampton* (1859) 1 D. F. & J. 263; 125 R.R. 443.
98 *In re Wallace* (1884) 14 Q.B.D. 22.
99 *Ferguson* v. *Um Chand Boid* (1905) 33 Cal. 343.
1 *George Pictures Ltd.* v. *Neelkandara Gopalkrishnaru* (1971) A. Ker. 274.
2 *Tobin* v. *Broadbent* (1947) 75 C.L.R. 378, 401.
3 *Ibid*, 401-2; *Reckitt* v. *Barnett Pembroke & Slater Ltd.* (1928) 2 K.B. 244, 268; appd. in (1929) A.C. 176, 183, 195.
4 *Tobin* v. *Broadbent* (1947) 75 C.L.R. 378. 406.

Commission Agents.—Contracts with commission agents do not follow a single pattern and in each case the express terms of the contract have to be ascertained.[26]

Authority of factor.—A factor to whom goods are entrusted for sale has authority to sell them in his own name,[27] on reasonable credit,[28] at such times and at such prices as in his discretion he thinks best;[29] to receive payment of the price where he sells them in his own name,[30] and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods.[31] But he has no implied authority to barter the goods,[32] nor to delegate his authority, even if acting under a *del credere* commission.[33]

General and Special—Distinction between.—The distinction between a general and special agent is of importance in determining the nature and extent of authority conferred.[34] A general agent has authority to act for his principal in all matters or in all matters concerning a particular trade or business or of a particular nature or to do some act in the ordinary course of his trade, profession or business, an agent on behalf of his principal, e.g. solicitor, factor or broker.[34] A special agent has only authority to do some particular transaction not being in the ordinary course of his trade, profession or business as an agent.[34]

Implied Authority.—Both general and special agents who are authorised to act for the principal have implied authority to do what is incidental to the ordinary conduct of such a trade or business or is within the scope of that class of acts and also whatever is necessary for the proper and effective performance of duties. The general agent has no authority to do anything outside the ordinary scope of his employment and duties.[35] A Tahsildar looking after a landholder's affairs, collecting rents, supervising the cultivation is presumed to have authority to induct *Bhagchasis* on to the land.[36]

Insurance Agency.—The agent of an insurer when he fills up an insurance policy on behalf of the insured acts as the latter's agent and the knowledge or falsity of any statement contained in the proposal is not the knowledge of the principal, i.e. the insurer.[37] If an insurer allows an agent to receive premiums and issue receipts for them, third parties will not be bound by any restrictions which the agency agreements may have imposed.[38]

Authority of broker.—After he brings the two parties together and receives his remuneration for it, a broker has nothing to do with the transaction.[39] A broker authorised to sell goods has implied authority to sell on reasonable credit,[40] to receive payment of the price if he does not disclose his principal,[41] and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable.[42] A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract

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26 *Abdul Ahmad* v. *Animendra* (1950) S.C.R. 30; (1950) A.S.C. 15; *Raja Ram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29.
27 *Baring* v. *Corrie* (1818) 2 B. & Ald. 137; 20 R.R. 383; *Ex parte Dixon* (1876) 4 Ch. D. 133.
28 *Houghton* v. *Matthews* (1803) 3 B. & P. 485; 7 R.R. 815.
29 *Smart* v. *Sandars* (1846) 3 C.B. 380; 71 R.R. 384.
30 *Drinkwater* v. *Goodwin* (1775) Cowp. 251.
31 *Dingale* v. *Hare* (1859) 7 C.B.N.S. 145; 121 R.R. 424.
32 *Guerreiro* v. *Peile* (1820) 3 B. & Ald. 616; 22 R.R. 500.
33 *Cockran* v. *Irlam* (1813) 2 M. & S. 301; 15 R.R. 257.
34 *Amrit Lal Shah* v. *Ram Kumar* (1962) A. Punj. 325; (1962) 2 Punj. 201.
35 *Ibid; Kashinath Das* v. *Nisakar Rout* (1962) A. Or. 164.
36 *Kashinath Das* v. *Nisakar Rout* (1962) A. Or. 164.
37 *Srinivasa Setty* v. *Premier Life & General Insurance Co. Ltd.* (1958) A. My. 53; (1957) Mys. 304.
38 *Hindustan Ideal Insurance Co.* v. *Jayalakshmamma* (1959) A.A.P. 562.
39 *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143.
40 *Boorman* v. *Brown* (1842) 3 Q.B. 511; 61 R.R. 287.
41 *Campbell* v. *Hassel* (1816) 1 Stark. 233.
42 *Cropper* v. *Cook* (1868) L.R. 3 C.P. 194; *Robinson* v. *Mollett* (1874) L.R. 7 H.L. 802; *Sutton* v. *Tatham* (1839) 10 A. & E. 27; 50 R.R. 312.

of agency is regarded as unreasonable.[43] He has no implied authority to cancel,[44] or vary,[45] or substitute[46] contracts made by him; nor to receive payment of the price of goods sold on behalf of a disclosed principal,[47] nor even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale.[48] A broker has no implied power to delegate his authority even if acting under a *del credere* commission.[49] A broker authorised to buy shares, purchase of which requires the previous permission of the Government, has implied authority to obtain such permission.[50]

A broker bringing about a contract for sale and purchase of goods with an arbitration clause has no authority in law to substitute another contract in place of a contract brought about by him.[51]

A policy broker authorised to subscribe policies on behalf of an underwriter has implied authority to adjust a loss arising under a policy[52] and to refer a dispute about such a loss to arbitration.[53] But he has no implied authority to pay total or partial losses on behalf of the underwriter.[54] Nor has a policy broker implied authority to cancel contracts made by him,[55] or to receive payment from underwriters of a sum due under a policy by bill of exchange,[56] or by way of set-off, even if there is a custom by which a set-off is considered equivalent to payment as between brokers and underwriters, unless the principal had notice of the custom and agreed to be bound by it at the time when he authorised the broker to receive payment.[57]

Authority of auctioneer.—An auctioneer has implied authority to sign a contract on behalf of both buyer and seller,[58] an authority which does not, however, extend to his clerk.[59] In *Rickard's case* Pennycuick J. defined the duties of an auctioneer thus:

"The duty of the auctioneer, as I understood it, is put upon two alternative grounds: namely, (a) the implied agency of an auctioneer on behalf of the purchaser which arises on the fall of the hammer; and (b) some form of implied contract between the auctioneer and members of the public who attend the auction. Ground (a) commends itself to the author—of Halsbury's Laws of England, 3rd ed. (1953), Vol. 2, p. 87, but I confess that I find this difficult. An auctioneer is primarily the agent of the vendor. There is no doubt that he becomes, also, the implied agent of a purchaser to sign the memorandum on behalf of the purchaser. But it is not at all clear to me how this implied agency on behalf of the purchaser can make it part of his duty to the purchaser to sign the memorandum on behalf of the vendor. Ground (b) is almost unexplored territory. I have thought it right to state the broad nature of the problem under this head, but as I have decided the case on the second contention anything that I said on this contention would be *obiter*, and I propose to leave it there."[60]

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43 *Robinson* v. *Mollett* (1874) L.R. 7 H.L. 802.
44 *Xenos* v. *Wickham* (1866) L.R. 2 H.L. 296.
45 *Blackburn* v. *Scholes* (1810) 2 Camp. 343; 11 R.R. 723.
46 *Lalchand Dharamchand* v. *Alliance Jute Mills Co. Ltd.* (1973) A. Cal. 243, 246.
47 *Link* v. *Jameson* (1886) 2 T.L.R. 206.
48 *Catterall* v. *Hindle* (1867) L.R. 2 C.P. 368.
49 *Cockran* v. *Irlam* (1813) 2 M. & S. 301; 15 R.R. 257; *Henderson* v. *Barnewell* (1827) 1 Y. & J. 387; 30 R.R. 799.
50 *Commercial Enterprisers* v. *Madan Mohan Singh* (1951) Hyd. 440, 1951 A. Hyd. 47.
51 *Lalchand Dharamchand* v. *Alliance Jute Mills Co. Ltd.* (1973) A.C. 1, 243, 246; *Union of India* v. *Kishorelal* (1960) 1 SCR 493; (1959) A.SC. 1359 disting.
52 *Richardson* v. *Anderson* (1805) 1 Camp. 43 n.; 10 R.R. 628 n.
53 *Goodson* v. *Brooke* (1815) 4 Camp. 163.
54 *Bell* v. *Auldjo* (1784) 4 Doug. 48.
55 *Xenos* v. *Wickham, supra,* note 54.
56 *Hine* v. *S.S. Insurance Syndicate* (1895) 72 L.T. 79.
57 *Sweeting* v. *Pearce* (1859) 7 C.B.N.S. 449; 121 R.R. 584; *Bartlett* v. *Pentland* (1830) 10 B. & C. 760; 34 R.R. 560; *Scott* v. *Irving* (1830) 1 B. & Ad. 605; 35 R.R. 396.
58 *Emmerson* v. *Heelis* (1809) 2 Taunt. 38; 11 R.R. 520; *White* v. *Proctor* (1811) 4 Taunt. 209; 13 R.R. 580. But see *Bartlett* v. *Purnell* (1836) 4 A. & E. 792; 43 R.R. 484; *Rickards* v. *Phillips* (1968) 2 W.L.R. 14, 22.
59 *Bell* v. *Balls* (1897) 1 Ch. 663. *Cp. Sims* v. *Landray* (1894) 2 Ch. 318.
60 *Rickards* v. *Phillips,* 1968 (2) W.L.R. 14, 22.

The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction.[61] An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him.[62] Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve.[63] Nor has an auctioneer implied authority to rescind a contract of sale made by him,[64] nor warrant goods sold,[65] nor to deliver goods sold except on payment of the price, or allow the buyer to set off a debt due to him from the seller.[66]

When limited.—Where the principal had limited the ostensible authority of the agent which was publicised, any representation made by the agent beyond that limited authority will not bind the principal. Therefore where an auctioneer had advertised the sale of the principal's property and the auction catalogue excluded, the authority of the auctioneer to make any representation in connection with the property but the auctioneer did give information to a prospective purchaser which was erroneous, the principal will not be liable because the representation was beyond the authority given to the auctioneer.[67]

Auctioneers liability for conversion.—Provisional bid procedure adopted by the auctioneer was indistinguishable in its essential nature and legal consequences from a sale under the hammer and therefore the auctioneer in selling a chattel to which a purported seller had no title was liable for conversion to the true owner and for damages amounting to the unpaid instalments of the hire in the *case of hire* purchase agreements.[68]

Authority of shipmaster.—The extent of a shipmaster's authority to bind his principals personally by contract,[69] or to sell or hypothecate the ship or cargo,[70] is governed by the law of the flag,[71] i.e. by the law of the country to which the ship belongs. Thus, if the master of an Italian ship give a bond hypothecating an English cargo under circumstances which according to Italian law do, but according to English law do not, justify the hypothecation, the bond will be held valid, and will be enforced by the English Courts.[72]

The authorities indicating the extent of the implied authority of masters of British ships are very numerous.[73] For present purposes it seems sufficient to cite only some of the more important cases. Being appointed to conduct the voyage on which the ship is engaged to a favourable termination, a shipmaster has implied authority to do all things necessary for the due and proper prosecution of the voyage.[74] He may enter into reasonable towage[75] or salvage[76] agreements, when necessary for the benefit of the owners, but not merely for the purpose of saving life without regard to the saving of the owners' property,[77] and may render

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61 *Mews* v. *Carr* (1856) 1 H. & N. 484; 108 R.R. 683.
62 *Williams* v. *Evans* (1866) L.R. 1 Q.B. 352.
63 *Daniel* v. *Adams* (1764) Ambl. 496; *Marsh* v. *Jelf* (1862) 3 F. & F. 234; 130 R.R. 836.
64 *Nelson* v. *Aldridge* (1818) 2 Stark. 435; 20 R.R. 709.
65 *Payne* v. *Leconfield* (1882) 51 L.J.Q.B. 642.
66 *Brown* v. *Staton* (1816) 2 Chit. 353; 23 R.R. 750.
67 *Overbrooke Estates Ltd.* v. *Glencombe Properties Ltd.* (1974) 3 All E.R. 511; *Mendelssohn* v. *Normand* (1969) 2 All E.R. 1215 disting 819 Halsbury Laws of England 1 (4th ed.) 491-2.
68 *R.H. Wilson & Sons* v. *British Car Auctioneers Ltd.* (1978) 2 All E.R. 392, 396, 397, 398.
69 *Lloyd* v. *Guibert* (1865) 6 B. & S. 100, 120.
70 *The Karnak* (1869) L.R. 2 P.C. 505; *The August* (1891) P. 328.
71 See notes on s. 151, "Carriers by sea for hire," above.
72 *The Gaetano and Maria* (1882) 7 P.D. 137.
73 See Bowstead on Agency, 12th ed., p. 67.
74 *Arthur* v. *Barton* (1840) 6 M. & W. 138; 55 R.R. 542; *Beldon* v. *Campbell* (1851) 6 Ex. 886; 86 R.R. 534.
75 *Wellfield* v. *Adamson* (1884) 5 Asp. M.C. 214.
76 *The Renpor* (1883) 8 P.D. 115; *The Inchmaree* (1899) P. 111. Unreasonable or inequitable agreements for towage or salvage services will not be enforced: *The Medina* (1876) 2 P.D. 5. And a salvage agreement made by the master is only binding to the extent of the value of the property saved.
77 See last note.

salvage services to other vessels in distress.[78] He may pledge his principal's credit for necessary repairs or stores, such as a prudent owner would himself order,[79] where it is reasonably necessary, under the circumstances of the case, to obtain them on credit.[80] He may also borrow money on the credit of his principals, if the advance is necessary for the prosecution of the voyage, communication with the principals is impracticable, and they have no solvent agent on the spot.[81] But he has authority to bind personally only his own principals, or persons who have held him out as their agent.[82] If a ship is chartered, and possession given up to the charterers, who appoint the master, they and not the registered owners are liable on the master's contracts.[83] The same principle applies if the ship is chartered to the master himself, and possession given to him. In such case, he alone is liable on his contracts.[84]

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable.[85] The cargo alone may be hypothecated (*respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible.[86]

In the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue the voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur, the master has implied authority to sell the ship.[87] But to justify a sale, the necessity must be such as to leave no other alternative, and communication with the owners must be impracticable.[88] Where repairs are absolutely necessary in order to prosecute the voyage, and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage.[89] But his authority as agent of the owners of the cargo is strictly one of necessity,[90] and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination.[90] In no case has he implied authority to stop the voyage and sell the whole of the cargo in a foreign port, even if a continuation of the voyage is impossible, and to sell appears the best course to take in the owners' interest under the circumstances.[91] Modern facilities of communication however tend to make obsolete earlier authorities on this branch of law.

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78 *The Thetis* (1869) L.R. 2 Ad. 365.

79 *Frost* v. *Oliver* (1853) 1 C.L.R. 1003; *Webster* v. *Seekamp* (1821) 4 B. & Ald. 352; 23 R.R. 307.

80 *Gunn* v. *Roberts* (1874) L.R. 9 C.P. 331.

81 *Rocher* v. *Busher* (1815) 1 Stark, 27; 18 R.R. 742; *Arthur* v. *Barton* (1840) 6 M. & W. 138; 55 R.R. 542; *Stonehouse* v. *Gent* (1841) 2 Q.B. 431 n.; 57 R.R. 718 n.; *Edwards* v. *Havill* (1853) 14 C.B. 107; 98 R.R. 561.

82 *Mackenzie* v. *Pooley* (1856) 11 Ex. 638; *Mitcheson* v. *Oliver* (1855) 5 E. & B. 419. As to holding out, see *Manchester Trust* v. *Purness* (1895) 2 O.B. 539; *The Great Eastern* (1868) L.R. 2 Ad. & E. 88.

83 *Baumwoll Manufacture* v. *Furness* (1893) A.C. 8.

84 *Frazer* v. *Marsh* (1811) 13 East, 238; 12 R.R. 336; *Reeve* v. *Davis* (1834) 1 A. & E. 312; 40 R.R. 300; *Colvin* v. *Newberry* (1832) 1 Cl. & F. 283; 33 R.R. 437.

85 *Kleinwort* v. *Cossa Marittima Genoa* (1877) 2 App. Cas. 156; *The Staffordshire* (1872) L.R. 4 P.C. 194; *Hussey* v. *Christie* (1807) 13 Ves. 599; 9 R.R. 585; *Stainbank* v. *Shepard* (1853) 13 C.B. 418; 93 R.R. 599.

86 *The Sultan* (1859) Swa. 504; *The Onward* (1873) L.R. 4 Ad. 38; *The Hamburg* (1863) 2 Moo. P.C. N.S. 289; 41 R.R. 77.

87 *The Australia* (1859) 13 Moo. P.C. 132; *Robertson* v. *Clarke* (1824) 1 Bing. 445; 25 R.R. 676; *Ireland* v. *Thomson* (1847) 4 C.B. 149; 72 R.R. 560.

88 *Cobequid Marine Insurance Co.* v. *Barteaux* (1875) L.R. 6 P.C. 319; *The Bonita* (1861) 30 L.J. Ad. 145.

89 *Australasian Steam Navigation Co.* v. *Morse* (1872) L.R. 4 P.C. 222; *Benson* v. *Duncan* (1849) 3 Ex. 644; 77 R.R. 776.

90 *Gibbs* v. *Grey* (1857) 2 H. & N. 22; 115 R.R. 408; *Freeman* v. *East India Co.* (1822) 5 B. & Ald. 617; 24 R.R. 497.

91 *Atlantic Mutual Insurance Co.* v. *Huth* (1879) 16 Ch. D. 474; *Wilson* v. *Millar* (1816) 2 Stark, 1; 19 R.R. 670; *Acatos* v. *Burns* (1878) 3 Ex. D. 282; *Van Omeron* v. *Dowick* (1809) 2 Camp. 42; 11 R.R. 656.

A shipmaster has implied authority to enter into contracts for the carriage of merchandise according to the usual employment of the ship,[92] and to enter into a charter-party on behalf of the owners if he is in a foreign port, and there is difficulty in communicating with them.[93] But he has no implied authority to vary any contract made by the owners,[94] or to agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or to make any contracts outside the scope of the voyage.[95] His authority to sign bills of lading is limited to signing for goods actually received on board,[96] and he has no authority to sign at a lower freight than the owners contracted for,[97] or making the freight payable to any other persons than the owners.[98]

Corporation.—An agent of a corporation or an incorporated company cannot have any authority, express or implied, to do any act which is *ultra vires* the corporation or company.[99]

Agent's authority in an emergency.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Illustration (b) seems to be suggested by Story's opinion that, "if goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be sold": S.A. §. 193. Under this head comes the authority already referred to[1] by which the master of a ship may sell the goods of an absent owner in case of necessity when he is unable to communicate with the owner and obtain his directions.[2] But the manager of a business which does not include borrowing money as part of its ordinary course has no implied authority to borrow money on his principal's credit to carry on the business, even if the money is urgently needed.[3] It has been said that "the authority of the master of a ship rests upon the peculiar character of his office and affords no analogy to the case of an ordinary agent.[3] However in *Prager* v. *Blatspiel,*[4] McCardie J. expressed the view *obiter* that the judges should

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92 *Grant* v. *Norway* (1851) 10 C.B. 665; 84 R.R. 747; *McLean* v. *Fleming* (1871) L.R. 2 H.L. Sc. 128.
93 *The Fanny* (1883) 5 Asp. M.C. 75; *Grant* v. *Norway, supra.*
94 *Pearson* v. *Goschen* (1864) 17 C.B.N.S. 352; 142 R.R. 390.
95 *Burgon* v. *Sharpe* (1810) 2 Camp. 529; 11 R.R. 788.
96 *Cox* v. *Bruce* (1886) 18 Q.B.D. 147; *Hubbersty* v. *Ward* (1853) 8 Ex. 330; 91 R.R. 519. The master's signature is *prima facie* evidence against the owners that the goods signed for were put on board, but it is not conclusive against them; *Brown* v. *Powell Duffryn Coal Co.* (1875) L.R. 10 C.P. 562; *Smith* v. *Bedouin Steam Navigation Co.* (1896) A.C. 70, unless there is an agreement that the bill of lading shall be conclusive evidence against the owners as to the quantity shipped: *Lishman* v. *Christie* (1887) 19 Q.B.D. 333.
97 *Pickernell* v. *Jauberry* (1862) 3 F. & F. 217; 130 R.R. 834.
98 *Reynolds* v. *Jex* (1865) 7 B. & S. 86; 147 R.R. 351.
99 *Sutlej Cotton Mills Ltd.* v. *Dr. Ranjit Singh,* 1952 A. Punj. 263.
1 See notes on S. 188, "Authority of shipmaster," above.
2 *Australasian Steam Navigation Co.* v. *Morse* (1872) L.R. 4 P.C. 222. Whether there is such urgent necessity as to give no time or opportunity for communicating with the owner is a question of fact: *Acatos* v. *Burns* (1873) 3 Ex. D. 282.
3 *Hawtayne* v. *Bourne* (1841) 7 M. & W. 595, 600; 56 R.R. 806, 810, apparently overlooked in *Dhanpat Rae* v. *Allahabad Bank* (1926) 12 Luck. 253; 98 I.C. 783; 1927 A.O. 44 (see on s. 188, above); followed *Re Cunningham & Co.* (1887) 36 Ch. D. 532.
4 *Prager* v. *Blatspiel* (1924) 1 K.B. 566, where the agent who sold goods as of necessity could not communicate with the principal, but the other requisite conditions of actual commercial necessity and good faith on the agent's part were not established.

expand the doctrine of agency of necessity to meet the needs of an expanding society, but the opposite view of Scrutton L.J. in *Jebara* v. *Ottoman Bank*[5] has been repeatedly approved in *obiter dicta*.[6]

Sub-Agents

When agent cannot delegate.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

For a similar rule in the case of trustees, see the Indian Trusts Act, 1882, s. 47.

"One who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another": S.A. §. 13. Thus in England the auctioneer at a sale by auction "is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties"; but he cannot of his own motion delegate that authority to his clerk.[7] The reason that no such power can be implied as an ordinary incident in the contract of agency is that confidence in the particular person employed is at the root of the contract. Accordingly, auctioneers,[8] factors,[9] directors of companies,[10] brokers,[11] and other agents in whom confidence is reposed have, generally speaking, no power to delegate their authority. "But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed." And "an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may be reasonably presumed that the parties to the contract originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute".[12] So it is "where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be",[12] for it is obvious that the agent cannot himself be prepared to do the business at every such port. Authority to delegate is implied whenever the act to be done by the sub-agent is purely ministerial, and does not involve the exercise of any discretion.[13]

In some cases the custom of trade justifies the delegation of special branches of work. Thus it has been found to be a usage of trade for architects and builders to have the quantities taken out from their designs by surveyors, who are more expert in that work, for the purpose of enabling proper estimates to be made; and the surveyor can sue the architect's employer for his charges.[14]

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5 (1924) 1 K.B. 566, 569.
6 *Per* Goddard L.C. J. in *Sachs Miklos* (1948) 2 K.B. 23, 36; *Per* Lynskey J. in *Munro* v. *Willmott* (1949) 1 K.B. 295, 297; *per* Vaisey J. in *Re Banque des Marchands* (1952) 1 T.L.R. 739, 749.
7 *Bell* v. *Balls* (1897) 1 Ch. 663, 669.
8 *Coles* v. *Trecothick* (1804) 9 Ves. 234; 7 R.R. 167.
9 *Cockran* v. *Irlam* (1813) 2 M. & S. 301; 15 R.R. 257.
10 *In re Leeds Banking Co.* (1886) L.R. 1 Ch. 561.
11 *Henderson* v. *Barnwell* (1827) 1 Y. & J. 387; 30 R.R. 799.
12 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 310, 311.
13 *Ex parte Birmingham Banking Co.* (1868) L.R. 3 Ch. 461. A bank appointed to lease out houses is entitled to employ house agents: *Mahinder Das* v. *Mohan Lal* (1939) All. L.J. 37; 180 I.C. 617; 1939 A.A. 188; but a *shebait* cannot delegate his power to lease trust properties since no one can delegate a fiduciary discretion: *Shree Shree Gopal Sridhar* v. *Shasheebhushan* (1932) 60 Cal. 111; 142 I.C. 485; 1933 A. Cal. 109.
14 *Moon* v. *Witney Union* (1837) 3 Bing. N.C. 814; 43 R.R. 802.

"Sub-agent" defined.

191. A "Sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

The relation of the sub-agent to the original agent is, as between themselves, that of agent to principal. "It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals": S.A. §. 386. In the three next following sections the Act has defined, in accordance with settled law, the relations of the ultimate principal to the sub-agent in different cases.

Custody of sub-agent.—The custody of the agent can be constructive. Goods sent under instruction of the agent to the sub-agent are deemed to be in the custody of agent.[15]

Representation of principal by sub-agent properly appointed.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.

The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Principal and sub-agent.—Where authority to appoint a sub-agent in the nature of a substitute for the first agent "exists" either by agreement or as implied in the nature of the business "and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself".[16] This is the class of cases contemplated in s. 194. Otherwise the sub-agent looks to and is controlled by the agent who appointed him, and is not under any contract with the principal. If money due to *A* is paid to *P*, who is *Z's* servant, *Z* having authority from *A* to collect it, *P* is accountable only to *Z*, and *A* cannot recover the money direct from *P*.[17] In *Summan Singh* v. *National City Bank of New York* [18] *A* had instructed the American bank to remit money to *X* in Jullundur. The bank issued instructions to a Jullundur bank to pay the money to *X*, in Jullundur. There were in Jullundur two persons of the name of *X*, and the Jullundur bank paid the money to the wrong person. It was held that *A* could not recover the money from the Jullundur bank, as there was no privity of contract between them. It was further decided that *A* could not recover from the American bank in view of an exemption clause protecting the latter from liability, the Court holding that it was possible to contract out of s. 192, in reliance on the decisions that it is possible to contract out of s. 151.[19] But a sub-agent is accountable to the principal for a secret commission improperly received by him.[20]

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15 *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143; *Hoole* v. *Royal Trust Co.* (1930) A.PC. 274 relied on.

16 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 311.

17 *Stephens* v. *Badcock* (1832) 3 B. Ad. 354, 37 R.R. 448.

18 (1952) Punj. 189, 1952 A. Punj. 172, (1952) 54 Pun.L.R. 102.

19 See *Kariadan Kumber* v. *B.I.S.N. Co.* (1913) 38 Mad. 941, and other cases cited under s. 151.

20 *Powell* v. *Jones* (1905) 1 K.B. 11, C.A.

And a sub-agent who does not know that his employer is an agent is entitled to the same rights as any other contracting party dealing with an undisclosed principal (see ss. 231, 232, below). "If *A* employs *B* as his agent to make any contract for him, or to receive money for him, and *B* makes a contract with *C*, or employs *C* as his agent, if *B* is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by *C* to be acting as an agent for any one, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences."[21]

Accordingly where goods consigned have been sold in good faith by a sub-agent appointed by the consignee, and the proceeds have been brought into account between the consignee and the sub-agent, the latter is not liable to account to the consignor. His account with the consignee cannot be interfered with by the consignee's principal except on the ground of bad faith.[22]

Sub-agent to account.—*'A'* authorised *'B'* to carry on business on his behalf in any manner that he liked. *'B'* appointed *'C'* as Commission Agent to enter into transactions of purchase and sale of bullion on the following terms (1) To render accounts to *'B'* of all transactions to purchase and sale; (2) *'C'* was to be responsible for the solvency of persons with whom he did business; (3) to act on instructions of *'B'* on behalf of *'B'*; (4) *'C'* was to charge certain commission on the transactions. It was held that the terms of business including the indicating of the names of persons with whom business was done showed that the relationship between *'B'* & *'C'* was one of principal and agent and not of principal and principal and therefore of *katcha arhatia* and not *pucca arhatia*. Therefore *'C'* was a sub-agent and the case fell under s. 192 and not s. 226. As such *'C'* was not answerable to *'A'* and suit for accounts by *'A'* against *'C'* was not sustainable.[23]

Agent's responsibility for sub-agent.—A commission agent for the sale of goods, who properly employs a sub-agent for selling his principal's goods, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment. The last clause of this section, giving a principal in cases of fraud or wilful wrong the right of recourse to the sub-agent, does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent.[24] If an agent appoints a sub-agent to carry through certain transactions, his position as an agent is not divested by the mere circumstance of direct communications between the principal and the sub-agent.[25] The agent is responsible for the acts of the sub-agent,[26] his negligence and other breaches of duty.[27] It has, however, been held that an agent may exempt himself from liability for the negligence of a sub-agent by a special term in the contract.[28]

Collecting Bank.—*'A'* drew a cheque on his bank *'B'* in favour of *'C'* who had an account with *'D'*. *'C'* sent the cheque to *'D'* bank who in turn sent it for collection to *'B'* Bank but it did not make the payment and suspended payment. It was held that *'B'* Bank became

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21 Bowen L.J. in *Montagu* v. *Forwood* (1893) 2 Q,B. 350, 355. *Cp. New Zealand and Australian Land Co.* v. *Watson* (1881) 7 Q.B.D. 374.

22 *Peacock* v. *Baijnath* (1891) 18 I.A. 78, at p. 109; 18 Cal. 573, 613.

23 *Ragunath Prasad* v. *Sewaram Tikandas* (1981) A.A. 15, 18; *Subbagmal Giancmal* v. *Mukandchand Balia* (1926) A.PC 119; *Sheo Narain* v. *Bhullar* (1950) A.A. 352 reld. on.

24 *Nensukhdas* v. *Birdichand* (1917) 19 Bom. L.R. 948; 43 I.C. 699. The agent in this case was a commission agent acting for an up-country constituent, and the sub-agent was a *muccadam* employed by the commission agent. As to the position of a *dubash* in Madras, see *South Indian Industries Ltd.* v. *Mindi Rama Jogi* (1914) 27 Mad. L.J. 501; 26 I.C. 822.

25 *Purushottam* v. *Amruth Ghee* (1961) A.A.P. 143; *Lockwood* v. *Abdy*, 60 E.R. 428 reld. on

26 *Purushottam* v. *Amruth Ghee* (1961) A.A.P. 143; *Peacock* v. *Baijnath*, 18 Cal. 573; 18 I.A. 78.

27 *Hoole* v. *Royal Trust Co.* (1930) A.P.C. 274; *Mackersey* v. *Ramsays* (1843) C. & F. 818; *Meyerstein* v. *Eastern Agency Co.* (1885) 1 T.L.R. 595.

28 *Summan Singh* v. *National City Bank of New York* (1952) Punj. 189, 1952 A. Punj. 172. (For facts see *supra*).

substituted agent and not sub-agent and therefore the Bank *'D'* would not be liable for the amount of the cheque; that *'D'* Bank must be taken to have implied authority to appoint *'B'* Bank for the purpose of collection and the act of *'B'* Bank would be binding on *'C'*. *'D'* Bank in the absence of receipt of payment from *'B'* Bank would not be liable, the liability being of *'B'* Bank.[29]

Agent's responsibility for sub-agent appointed without authority.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

If the sub-agent purports to act in the name of the ultimate principal, that principal may adopt his acts by ratification, as he might adopt acts purporting to be done on his behalf by any other person (ss. 196—200, below). But it is conceived that, if a sub-agent acts in his own name or in that of the agent who has taken on himself without authority to delegate to him business which is in fact the principal's, the acts so done cannot be ratified by the principal.

A person to whom a trust has been improperly delegated is not an agent of the beneficiaries, but he is not the less liable to account to them, independently of agency, for trust property which has come to his hands.[30]

Relation between principal and person duly appointed by agent to act in business of agency.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A's* agent for the conduct of the sale.

(b) *A* authorises *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C & Co*. *B* instructs *D*, a solicitor, to take legal proceedings against *C & Co*. for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

In such cases as are put in the illustrations *B*, as between *A* and the auctioneer or solicitor, is treated as merely the messenger of *A's* direct authority. This section apparently means to draw a clearly marked line between the ordinary sub-agent and a person who is put in relation with the principal, a "substitute" as he is called in a passage already quoted above.[31] The distinction is probably convenient, though we cannot find it so sharply defined in any English authority. Apparently this section covers the case of an upper servant in a household who has

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29 *Punjab National Bank* v. *Ishwarbhai Lalbhai Patel* (1971) A.B. 348; (1971) 2 Bom. 1413; *Bengal Bank* v. *Satyendra Nath Das* (1952) A. Cal. 385 folld.

30 *Myler* v. *Fitzpatrick* (1822) 6 Mad. 360; 23 R.R. 247; *Re Barney* (1892) 2 Ch. 265.

31 *De Bussche* v. *Alt* (1878) 8 Ch. D. 310, 311; *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75; (1960) A.SC. 233.

authority to select and dismiss under-servants, although the language is perhaps not the most appropriate. Such a servant, at any rate, is not answerable to third persons for acts or defaults of those under him which he has not specifically authorised.[32]

Substituted agents.—In *Union of India* v. *Amar Singh,*[33] the Supreme Court has held that the principal embodied in section 194 is the same as stated by Thesiger, L.J. in *De Bussche* v. *Alt.*[34] The maxim "*delegatus non potest delegare*" merely imports that the agent cannot without authority from the principal devolve upon another obligations undertaken by himself.[35]

"But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute'; and, on the other hand, to constitute, in the interest and for the protection of the principal, a direct privity of contract between him and such substitute.[36]

An authority to that effect should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade or the nature of the particular business, it may reasonably be presumed.[37] When such an authority exists and is duly exercised, privity of contract arises between the principal and the substitute and the latter becomes responsible to the former for the due discharge of his duties as if he was appointed by the principal.[38] Such agency was presumed where a shipowner employed an agent to effect the sale of a ship at any port where the ship happened to call. The appointment of substitutes at ports other than where the agent carried on business is a necessity and must be presumed.[39] So also where the agent employed for forward transactions at a place *N* employed another commission agent for similar transactions at *H*. The latter was a "substitute" for the agent at *N* for that part of business of the agency as was entrusted to it; for substitute was entitled to deduct income-tax which he had to pay[40] on the profits arising out of the transactions. Goods in a wagon booked from Quetta before the partition of India were found missing from the wagon when it arrived at Delhi Railway Station after the Partition. Indian Railway was held to be an agent of the railway receiving the goods and a bailee of the consigner under s. 194 of the Act.[41]

The trustees of the Industrial Trust Fund were appointed agent of certain mills with authority to employ another and to delegate powers to such other. The appellant was thus appointed and certain powers were delegated to him.

He was held to be an agent under s. 194 for such part of the business as was entrusted to him and not a servant or a sub-agent.[42]

A bought *mohua* flowers at Sakti through merchants there and had them sent to Jharia for sale. The Railway Receipt was in his own name, the permit for export out of Sakti was also obtained by him. The Sakti merchant wrote to Jharia merchants to sell the *mohua* flowers under instructions of *A*.

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32 "It was never heard of that a servant who hires labourers for his master was answerable for all their acts": *Stone* v. *Cartwright* (1795) 6 T.R. 411; 3 R.R. 220.

33 *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75; (1960) A.S.C. 233; *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143; *Central Bank of India* v. *Rurchand Kuramal* (1958) A. Punj. 159; (1958) Punj. 1115.

34 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 310; 1874-80 All E.R. Rep. 1247.

35 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 310; (1874-80) All E.R. Rep. 1247, 1251; *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75; (1960) A.S.C. 233; *Aggarwal Chamber of Commerce* v. *F. Ganpatrai Hiralal* (1958) S.C.R. 269; 33 I.T.R. 245: (1958) A.S.C. 269.

36 *Union of India* v. *Amar Singh* (1960) A.S.C. 233, 237; (1960) 2 S.C.R. 75.

37 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286; (1874-80) All E.R. Rep. 1247; *Aggarwal Chamber of Commerce* v. *Ganpatrai Hiralal* (1958) S.C.R. 935; (1958) A.S.C. 269; 33 I.T.R. 245.

38 *Supra* n. 39.

39 *Supra* n. 38.

40 *Supra* n. 41.

41 *Union of India* v. *Amar Singh* (1960) 2 S.C.R. 75; (1960) A.SC. 233, *De Bussche* v. *Alt* (1878) 8 Ch. D. 296, 310 refd. to.

42 *Qamar Shaffi Tyabji* v. *Commr. E.P.T.* (1960) 3 S.C.R. 546; 39 I.T.R. 611; (1960) A.S.C. 1269.

The Jharia merchants were held "substituted agents" and accountable to *A* and not sub-agents of Sakti merchants.[43] A bank was held liable for negligence in collecting a hundi even where it had no branch at the place of collection and the sub-agent was another bank nominated by the principal.[44] But the facts in that case are not quite clear and unless there were some peculiar circumstances in that case, the decision it is submitted is erroneous.

Substituted agent.—Letter of Credit:

"A letter of credit is in principle an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit in accordance with the conditions therein laid down."[45]

A banker must comply rigidly with the instructions and this applies to the paying banks as to the intermediary banker. The latter is indemnified only if it complies strictly with the instructions. The person who requires the bank to establish the credit can impose what conditions he likes.[46]

Termination of original agency.—The mere fact that the principal accepts the terms on which the sub-agent would sell goods and advance money against goods would not *ipso facto* end the agency between the principal and the agent.[47] Where the agent names another and he is accepted, the agent has no concern with the business transactions of the principal and the named agent.[48] Where privity is established between the principal and the substituted agent, the agent is not concerned with the character or efficiency of the substituted agent or his negligence. In this case the agent was the agent of the principal for handing over the documents.[49] In view of the context of the events after the Partition of India, an Indian port must mean a port of post-Partition India. Therefore, goods to be shipped to an Indian Port could not be shipped to Karachi (in Pakistan).[50]

A receiver appointed to carry on a business by mortgagees, trustees for debenture-holders, or the like, appears to be in a similar position,[51] though it by no means follows that those who appoint him under the special powers conferred on them for that purpose, whether by law or by agreement of parties, are liable as principals for his acts.[52] In Bombay, the appointment of a *muccadam* by a commission agent acting for an up-country constituent is an ordinary case of the appointment of a sub-agent. The *muccadam* is not a substituted agent of the up-country constituent.[53]

The following section and this section, read together, show that they do not apply to the case of an agent being instructed to hand over all or part of the business to a certain named person and no other; in such case he is not answerable for the capacity or conduct of that person; his duty is done when he has established relations between the substituted agent and the principal, and then ss. 191, 192 have no place.[54]

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43 *Saligram* v. *Ayodhya Parshad* (1966) A.P. 61; *De Bussche* v. *Alt* (1878) 8 Ch.D. 286 reld. on.
44 *Punjab National Bank* v. *Benarsidas & Co.* (1960) A. Punjab 590; (1960) 2 Punj. 788.
45 *Eastern Traders Ltd.* v. *Punjab National Bank Ltd.* (1966) A. Punj. 303.
46 *Eastern Traders (I) Ltd.* v. *Punjab National Bank Ltd.* (1966) A. Punj. 303; *Rayner & Co. Ltd.* v. *Hambros Bank Ltd.* (1942) 2 All E.R. 694; *English, Scottish & Australian Bank Ltd.* v. *Bank of South Australia,* 13 LI. L.R. 21.
47 *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143.
48 *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143; *Central Bank of India* v. *Rur Chand Kuramal* (1958) A. Punj. 159; (1958) Punj. 1115.
49 *Gambhirmull* v. *Indian Bank* (1963) A. Cal. 163. See Halsbury's Laws of England (3rd Ed.), p. 172.
50 *Eastern Traders (I) Ltd.* v. *Punjab National Bank Ltd.* (1966) A. Punj. 303.
51 *Owen & Co.* v. *Cronk* (1895) 1 Q.B. 265. See *per* Lord Esher at p. 272.
52 *Gosling* v. *Gaskell* (1897) A.C. 575.
53 *Nensukhdas* v. *Birdichand* (1917) 19 Bom. L.R. 948, 960; 43 I.C. 699. As to a *dubash* in Madras, *South Indian Industrials Ltd.* v. *Mindi Rama Jogi* (1914) 27 Mad. L.J. 501; 26 I.C. 822.
54 *T.C. Chowdhury & Bros.* v. *Girindra Mohan Neogi* (1929) 56 Cal. 686; 121 I.C. 636.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case ; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Little, if any, direct authority can be produced for this rule,[55] but it is not open to doubt in English law. Were it otherwise, no man would take the responsibility of choosing an agent for another without an express indemnity.

Although an agent is not responsible for the negligence of a substituted agent, he may revoke the power of the substituted agent in the interests of his principal.[56]

Ratification

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

Right of person as to acts done for him without his authority. Effect of ratification.

Conditions of ratification: "On behalf of another."—The rules on this subject are now familiar in the Common Law. Some of them are perhaps over-subtle, but on the whole they are for the advantage of commerce. Ratification must be by the person for whom the agent professes to act. "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority.[57] But "where *A* does an act as agent for *B* without any communication with *C*, *C* cannot, by afterwards adopting that act, make *A* his agent and thereby incur any liability, or take any benefit, under the act of *A*".[58] "Ratification in the proper sense of the term, as used with reference to the law of agency is applicable only to acts done on behalf of the ratifier. And this rule is recognised in s. 196 of the Indian Contract Act".[59] Ratification can be express or implied from conduct,[60] and it will be held adopted throughout.[61]

"A ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made... on account of the agent himself".[62]

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55 See, however, *Cahill* v. *Dawson* (1857) 3 C.B.N.S. 106; 111 R.R. 565.
56 *Ramchandra* v. *Chinubhai* (1943) 45 Bom. L.R. 1075, 214 I.C. 42, 1944 A.B. 76.
57 *Wilson* v. *Tumman* (1843) 6 Man. & Gr. 236, at p. 243; 64 R.R. 770; at p. 776, *per Cur.*
58 *Ib.*, head-note.
59 *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (1908) 35 I.A. 48, at p. 58; 12 C.W.N. 393, at p. 408.
60 *Bhawani Shankar* v. *Gordhandas*, 1943 A.P.C. 66.
61 *Union Bank of Australia* v. *Mclintock* (1922) I A.C. 240.
62 *Per Cur.* in *Shiddheshvar* v. *Ramchandrarav* (1882) 6 Bom. 463, at p. 466.

A man cannot adopt by ratification an act which was not authorised by him at the time and did not purport to be done on behalf of any principal.[63] It is essential to an agency by ratification that the act to be ratified is one wherein the agent was not acting for himself but, on behalf of the named or ascertained principal.[64]

Since a ratification is in law equivalent to a previous authority, a person not competent to authorise an act cannot give it validity by ratifying it.[65] An act by an authority not competently constituted cannot be subsequently ratified.[66] Appointment of a Tahsildar by the Divisional Commissioner under delegated powers, which the Government cannot legally delegate, are void and cannot be ratified by Government.[67]

"Ratification must be by an existing person on whose behalf the contract might have been made at the time".[68] The intended principal in order to be able to ratify a contract must be in existence and ascertainable at the time when the contract is entered into and be himself capable of entering into it.[69] If there is no such principal, there can be no agency and the so-called agent will himself be liable on the contract and can also sue upon it.[70] Thus a newly-formed company cannot ratify an act done in its name before it was incorporated.[71] And where a time is limited for doing an act, and *A* does it on behalf of *B*, but without his authority, within that time, *B* can ratify it only before the time has expired.[72]

The person on whose behalf an act purports to be done need not be individually known to the agent; it is enough if he is ascertainable as owner of specified property or the like. A man may effect an insurance on behalf of all persons interested, and any such person may adopt the contract of insurance for his own share by ratification.[73] A bailiff may receive the rent of land on behalf of the unknown heirs of the last owner in possession, and those heirs, when their title is ascertained, can ratify his acts.[74]

"Acts done without knowledge or authority".—An act done by an agent in excess of his authority may also be ratified.[75] But "there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future." Therefore the ratification by a company of certain acts done by its directors in excess of the authority given to them by the articles of the company does not extend the authority of the directors so as to authorise them to do similar acts in future.[76]

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63 *Keighley, Maxted & Co.* v. *Durant* (1901) A.C. 240 (the decision of the C.A. which the H.L., reversed, (1900) 1 Q.B. 629, was certainly novel); *Raghavachari* v. *Pakkiri Mahomed* (1916) 30 Mad. L.J. 497, 501; 34 I.C. 760 ; *Government of India* v. *Jamunadhar* (1960) A.A.P. 19; *Kalyani Achi* v. *Ramanathan Chettiar* (1953) A.M. 860; *Bank Melli Iran* v. *Barclays Bank* (1951) 2 T.L.R. 1057, 1063. E.R.

64 *Imperial Bank of Canada* v. *Begley* (1936) 2 All E.R. 367, 374. Halsbury's Laws of England, Vol. I, (3rd Ed.), p. 175.

65 *Irvine* v. *Union Bank of Australia* (1877) 2 App. Ca. 366, at p. 374; 4 I.A. 86; 3 Cal. 280; *Tukaram* v. *Madhorao* (1947) Nag. 710.

66 *Dilawar Ali* v. *A.P. Muslim Waqf Board* (1967) A.A.P. 291.

67 *K. Panduranga* v. *State of Mysore* (1965) A. My. 244.

68 *Kelner* v. *Baxter* (1886) L.R. 2 C.P. 174, at p. 185.

69 *Watson* v. *Swann* (1862), 11 C.B.N.S. 756; *Foster* v. *Bates* (1843), 12 M. & W. 226. See also Halsbury's Laws of England, Vol. 1 (4th Ed.), p. 454; para 760. See also *Mohammad Taqi ud Din* v. *Ghulam Mohammad* (1960) A.A.P. 340; (1959) Andh. Pra. 1272. See *supra* in s. 70. under s. 175(3) of Govt. of India Act.

70 *Harper & Co.* v. *Vigers Brothers* (1909) 2 K.B. 549. See also Halsbury's Laws of England, Vol. I, (4th Ed.), p. 454, para 760.

71 *In re Empress Engineering Co.* (1880) 16 Ch. D. 125; *Ganesh Flour Mills Co.* v. *Puran Mal* (1905) Punj. Rec. no. 2.

72 *Dibbins* v. *Dibbins* (1896) 2 Ch. 348.

73 *Hagedorn* v. *Oliverson* (1814) 2 M. & S. 485; 15 R.R. 317. And such ratification is good even after known loss: *Williams* v.*North China Insurance Co.* (1876) 1 C.P.D. 757.

74 *Lyell* v. *Kennedy* (1889) 14 App. Ca. 437, at p. 456.

75 *Secretary of State* v. *Kamachee Boye* (1859) 7 M.I.A. 476.

76 *Irvine* v. *Union Bank of Australia* (1877) 2 App. Cas. 366, at p. 375; 4 I.A. 86; 3 Cal. 280, at p. 287; see also *Pratt (Bombay), Ltd.* v. *E.D. Sassoon & Co.* (1935) 60 Bom. 326; 37 Bom. L.R. 978; 161 I.C. 126, affirmed in (1938) Bom. 421; 174 I.C. 545; 1938 A.P.C. 159.

Retrospective effect.—Ratification, if effective at all, relates back to the date of the act ratified. If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time.[77] The rule goes so far that if *A* makes an offer to *B* which *Z* accepts in *B*'s name without authority, and *B* afterwards ratifies the acceptance, an attempted revocation of the offer by *A* in the time between *Z*'s acceptance and *B*'s ratification is inoperative.[78] So long as the professed agent purports to act on behalf of the principal, it is immaterial whether in his own mind he intends the principal's benefit or not, and what his real motive and intention may be; nor does it make any difference if the third party discovers before ratification that the agent meant to keep the contract for himself.[79] In fact, the third party gets by the ratification exactly what he bargained for.

But if *Z* pays money to *B* as in satisfaction of *A*'s debt, and *B*, afterwards discovering that *Z* had no authority, returns him the money by agreement between them, *A* can no longer adopt the payment and rely on it as a discharge. A man is not bound to accept payment of a debt, or satisfaction of any other obligation from a stranger to the contract, though, if *B* had accepted the payment with knowledge of *Z*'s want of authority, or acquiesced in it after he obtained that knowledge, he would have been estopped from denying *Z*'s authority as against *A*.[80]

It goes without saying that if an offer is accepted by an agent subject to ratification no contractual relationship with the principal comes into existence until ratification, and therefore up to that moment the offer can be withdrawn.[81] It has been held that where a partner without authority to do so referred a dispute between a third party and the partnership to arbitration, and the other partners did not ratify the submission to arbitration, the award cannot be enforced even against the partner who so referred the dispute.[82] It is submitted that in India the liability is joint and several, and the partner submitting the matter to arbitration is bound by the award.[83] For cases under *Sick Mills Nationalisation Act* see *infra*.

What acts cannot be ratified.—A transaction which is void *ab initio* cannot be ratified.[84] This is illustrated in England by a line of cases in company law marking the distinction between irregularities capable of being made good if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's objects as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law.[85] A forged signature cannot be ratified; but a person whose signature has been forged may be estopped from denying that a signature is his, if for example, he has by his conduct induced the holder of a bill or cheque to alter his (the holder's) position.[86] An agent, who had authority to draw bills, drew some fraudulently, which were subsequently impliedly ratified by the principal. The principal was liable on the bills.[87] For Supreme Court cases see Ratification, *infra*..

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77 *Danish Mercantile Bank* v. *Beaumont* (1951) Ch. 680.

78 *Bolton Partners* v. *Lambert* (1889) 41 Ch. D. 295. This decision has been freely criticised, but for the present remains authoritative. It is open to reconsideration in a Court of last resort: see the judgment of the Privy Council in *Fleming* v. *Bank of New Zealand* (1900) A.C. 577, 587.

79 *Re Tiedemann and Ledermann Freres* (1899) 2 Q.B. 66.

80 *Walter* v. *James* (1871) L.R. 6 Ex. 124. The language of Kelly C.B. about "mistake in fact" is not incorrect, but also not luminous. See also. s. 41.

81 *Watson* v. *Davies* (1931) 1 Ch. 455.

82 *Madangopal* v. *Sanwaldas* (1947) Kar. 206, 1948 A.S. 79.

83 This is also the law of England: *Strangford* v. *Green* (1677) 2 Mod. 228, 86 E.R. 1041.

84 *Mauji Ram* v. *Tara Singh* (1881) 3 All. 852 (not an ordinary case of agency, but the principle is the same); *Madura Municipality* v. *Alagirisami* (1939) Mad. 928; 1939 A.M. 957; *Mst. Malam* v. *Mohan Singh*, 1935 A.L. 547; 158 I.C. 261. See also *Kalyani Achi* v. *Ramanathan*, 1953 A.M. 860; *Bengal Coal Co. Ltd.* v. *Union of India* (1971) A. Cal. 219; *Mulam Chand* v. *State of M.P.* (1968) 3 S.C.R. 214; (1968) A.S.C. 1218 reld. on.

85 *Runganathan Chetty* v. *Ramaswami Chetty*, 27 Mad. 162; *Kulasekaraperumal* v. *Pathakutty* (1961) A.M. 405; a case of coparceners. See Pollock on Contracts, appendix 561.

86 *Brook* v. *Hook*, L.R. 6 Ex. 89; *McKenzie* v. *British Linen Co.*, 6 App. Ca. 82, 99; *Greenwood* v. *Martins Bank* (1933) A.C. 51.

87 *Bezonji Byramji & Co.* v. *Central Bank of India Ltd.* (1963) A.A.P. 348.

Agents of Government.—Acts done by public servants in the name of the Crown, or the Government of India, may be ratified by subsequent approval in much the same way as private transactions (see *Secretary of State* v. *Kamachee Boye*[88] and *Collector of Masulipatam* v. *Cavally Vencata*.[89] In these cases the effect may not be to create legal duties but, where the acts in question are of the kind known as "acts of State," to preclude courts of law from entertaining any claim founded upon them.[90] Such acts are political, and outside the scope of municipal law, and cannot, in ordinary circumstances, occur within the jurisdiction.

Sick Mills Nationalisation Act.—Ratification provided for in s. 30 of the Sick Mills Nationalisation Act is different from the ratification contained in s. 196, Contract Act. The principle of retrospectivity of s. 196 does not apply to s. 30 of the Nationalisation Act. Therefore a contract with the Electricity Board if ratified by the Textile Board has not the effect of accepting the contract as from its inception; hence a liability incurred by the owners for the period previous to the nationalisation does not become the liability of the Board.[91]

Ratification.—In *Chaturbhuj* v. *Moreshwar,* the Supreme Court held that a contract though not in accordance with Article 299(1) could be ratified under section 230(3) of the Contract Act. The effect of the Article was that the principal could not be sued and not that the contract was void and incapable of ratification.[92] Therefore, a contract of service even though not in the form under section 175(3) of the Government of India Act can be ratified by subsequent correspondence and conduct of the Government payment of salaries, and allowance for two and a half years.[93] But the High Courts of Punjab and Madras have held that an agreement contrary to section 175(3), Government of India Act, cannot be ratified by a subsequent agreement to accept goods at a reduced rate[94] nor by making payments for the goods already received by the Government.[95] Illegal seizure by a prohibition Sub-Inspector cannot be considered ratified by sale of the goods by a superior officer nor can it be considered an act of Government.[96] The Supreme Court has in a later case held that in the absence of a valid contract under s. 175(3) of the Government of India Act the provisions of which are madatory, there can be no valid arbitration agreement and there is no ratification even by the Union taking part in the arbitration proceedings.[97] In later cases it has been held that there is no question of estoppel or ratification in cases which are void.[98]

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations.

(a) A, without authority, buys goods for *B*, Afterwards *B* sells them to *C* on his own account. *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

88 (1859) 7 M.I.A. 476.
89 (1860) 8 M.I.A. 529, 554.
90 *Buron* v. *Denman* (1847) 2 Ex. 167; 76 R.R. 554; see more in Pollock on Torts, 15th ed., 79-80.
91 *National Textile Corporation* v. *M.P. Electricity Board* (1980) A.M.P. 32; *Sir A.D. Stewart* v. *J.S. Kennedy* (1890) 15 A.C. 75, 107 reld. on.
92 (1954) S.C.R. 817, 835; (1954) A.SC. 236, 243. But see *Union of India* v. *A.L. Rallia Ram* (1964) 3 S.C.R. 164; (1963) A.SC. 1685 (case of arbitration). See also under s. 70 *supra*.
93 *Union of India* v. *Jyotirmoyee* (1967) A. Cal. 461; *Chaturbhuj* v. *Moreshwar* (1954) A.S.C. 236 (folld.) (1954) S.C.R. 815.
94 *Kishan Lal* v. *Union of India* (1961) A. Punj. 5.
95 *State of Madras* v. *Saifud Din* (1963) A.M. 140. See under s. 70 *supra*..
96 *Mani* v. *State of Madras* (1957) A.M. 190.
97 *Union of India* v. *A.L. Rallia Ram* (1964) 3 S.C.R. 164; (1963) A.SC. 1685; on app. from 1960 A. Punj. 567 (revd.); *Kishan Lal* v. *Union of India* (1961) A. Punj. 5; Contra *Union of India* v. *B.M. Sen* (1963) A. Cal. 456.
98 *Bulchand* v. *State of Madhya Pradesh* (1968) 3 SCR 210, 214; (1968) B.SC. 1213, 1222; *Seth Bhikraj Jaiparia* v. *Union of India* (1962) 2 SCR 880; (1962) A.SC. 113; *State of W. Bengal* v. *B.K. Mondel & Sons* (1962) Supp. 1 SCR 876; (1962) A.SC. 779; *Bengal Coal Co. Ltd.* v. *Union of India* (1971) A. Cal. 219 (later S.C. Case reld. on.); *Smt. Raj Kumari Soni* v. *State of Him. Pradesh* (1972) A.HP. 1,4 (Case of tenancy).

Express ratification.—An express ratification cannot become complete until it is communicated; till then it is liable to revocation.[99]

Implied ratification.—An express ratification cannot become consent to an agreement, may be conveyed otherwise than in words (*cp.* s. 9, above); and taking the benefit of the transaction is the strongest, as it is the most usual, evidence of tacit adoption. Accepting the results of the agent's proceeding, whether obviously beneficial to the principal or not, will have the same effect.[1] Where an agent, without authority to do so, referred certain matters to arbitration, and the principal, after knowledge of the arbitration proceedings, acquiesced in them and did not raise any objection thereto, it was held that his conduct amounted to a ratification of the reference.[2] A clause in an agreement entered into by a Superintending Engineer for reimbursing the sales tax payable which was beyond his authority and which was not ratified by the Government nor had the Government led the other party to believe that the officer had such authority, is not binding on the Government.[3] The agreement would not be binding even where the person supplying the goods is induced to believe that payment will be made.[4] Where a principal adopts a benefit stipulated by the act of an agent, he is said to have ratified the act of the agent.[5]

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

English authority is to the effect that a principal is not liable for excessive or irregular execution of his authority (nor *a fortiori* for a wholly unauthorised act done on his behalf) unless he ratifies the act with knowledge of the irregularity, or shows an intention "to take upon himself, without inquiry, the risk of any irregularity".[6] More lately the Privy Council laid down in general terms that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction".[7] The two latter conditions might perhaps have been more clearly expressed. Still more lately the Court of Appeal in England has said: "To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were".[8] Reluctant ratification by a solicitor of an unauthorised use of his name which is represented as merely formal, and at the time reasonably appears so, will not

99 *Rajagopalacharyulu* v. *The Secretary of State of India* (1913) 38 Mad. 997, 1008; 22 I.C. 107.

1 *A* buys a speculative stock in *P*'s name without authority, thereby involving *P* in loss. It may be a question of fact whether money ultimately realised by re-sale at a loss and paid by *A* to *P* was taken by *P* in such a way as to amount to ratification or only as compensation due from *A*: *Kadiresan Chettiar* v. *Ramanathan Chetti,* 102 I.C. 561; 1927 A.M. 478 (long unprofitable report of complicated facts).

2 *Saturjit Pertap Bahadoor* v. *Dulhin Gulab Koer* (1897) 24 Cal. 469; *Hanuman Chamber of Commerce* v. *Jassa Ram,* 1949 A.E.P. 46; *Shankar Das* v. *Governor-General in Council,* 1952 A. Punj. 234. (The last two cases were ratifications by partners of submission to arbitration).

3 *Britannia Building & Iron Co.* v. *State of Orissa* (1962) A. Or. 117; *Young & Co.* v. *Mayor & Corporation of Royal Lamington Spa* (1883) 8 App. Cas. 517; and *Collector of Masulipatam* v. *Venkata Narainapah,* 8 Moo. I.A. 538 reld. on; *Secretary of State* v. *G.T. Sarin & Co.,* 11 Lah. 375; (1930) A.L. 364 refd. to.

4 *State of Madras* v. *Saifud Din* (1963) A.M. 140; *Bhikraj* v. *Union of India* (1962) A.S.C. 113; (1962) 2 S.C.R. 880; *Collector of Masulipatnam* v. *Venkata Narainapah,* 8 M.I.A. 529 reld. on. Storey's Law of Agency, page 379 refd. to.

5 *Hukamchand Insurance Co. Ltd.* v. *Bank of Baroda* (1977) A. Knt. 204.

6 *Lewis* v. *Read* (1845) 13 M. & W. 834; 67 R.R. 828.

7 *La Banque Jacques-Cartier* v. *La Banque d'Epargne, etc.* (1887) 13 App. Ca. 111. The appeal was from the Province of Quebec, but the principle is one of universal jurisprudence.

8 *Marsh* v. *Joseph* (1897) 1 Ch. 213, 246, followed in *Surendra Nath* v. *Kedar Nath,* 1936 A. Cal. 87; 63 Cal.L.J. 86; 161 I.C. 224.

make him, still less his firm, liable for the loss caused to third persons by money having been taken out of court under the assumed authority, and afterwards misapplied.[8] *A* entrusted moneys to *B* for investment, which *B* without the knowledge of *A* used in his own business. The Privy Council held that whether facts supported the plea of a novation or not, the doctrine of ratification could not be applied so as to turn a fund held in a fiduciary capacity into a deposit on ordinary banking terms.[9]

The Act does not expressly deal with the possible case of the principal deliberately waiving inquiry so as to make the agent's act his own at all hazards. Such cases fall under the general rule that a free agent may waive a legal advantage if he thinks fit, and there is no reason to suppose that the English authorities would not be followed.

Effect of ratifying unauthorised act forming part of a transaction.

199. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

It is obvious that a man cannot at his own choice ratify part of a transaction and repudiate the rest.[10] A contract cannot be ratified partially. If ratified the whole contract must be ratified and the agency accepted *cun onere.*[11] Ratification of one of a series of acts constituting one transaction operates as a ratification of the entire transaction.[12] The only possible exception is in the case of the part repudiated being wholly for the principal's benefit, which is not likely to occur. The general rule is that, "where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent": S.A. §. 250.

Ratification of unauthorised act cannot injure third person.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.[13]

Illustrations.

(a) *A*, not being authorized thereto by *B*, demands on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.[14]

(b) *A* holds a lease from *B* terminable on three months' notice. *C*, an unauthorised person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.[15]

This is the converse of the principal that a voidable transaction cannot be rescinded to the prejudice of third persons' rights acquired under it in good faith.[16] Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also

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9 *Murugappa Chetti* v. *Official Assignee of Madras* (1937) 64 I.A. 343; 40 Bom.L.R. 1; 170 I.C. 329; 1937 A.P.C. 296.

10 See *Keay* v. *Fenwick* (1876) 1 C.P.D. 745, 753. Authority is really needless.

11 Halsbury's Laws of England, Vol. 1 (4th Edn.), p. 457, para 763.

12 *Rodmell* v. *Eden* (1859) 1 F. & F. 542. Halsbury's Laws of England, (3rd Edn.), Vol. 1, page 178.

13 Authority is not needed to show that this section does not apply where no third person would be prejudiced; for illustration, if desired, see *Garapati Narasimudu* v. *Basara Sankaram,* 85 I.C. 439; 1925 A.M. 249.

14 S.A. §. 247. *Cp. Bird* v. *Brown* (1850) 4 Ex. 786; 80 R.R. 775; where the act was stoppage in transit, and the recognition of the same rule in the House of Lords in *Lyell* v. *Kennedy* (1889) 14 App. Ca. 437, 461, 462.

15 Such a notice, in order to be good, must be binding on all parties concerned at the time when it is given: *Right & Fisher* v. *Cuthell* (1804) 5 East, 491; 7 R.R. 752, from which this illustration appears to be simplified.

16 The section is not exhaustive of the general rules of the law on the subject: see *Thinnappa Chettiar* v. *Krishna Rao,* 1941 A.M. 6; (1940) 2 Mad. L.J. 726; 195 I.C. 329.

stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself.[17] The ratification of a contract does not give the principal a right to sue for a breach committed prior to the ratification.[18] *A* holds a lease from two joint receivers, *B* and *C*. *B*, without *C's* authority, gives notice to quit to *A*. The notice cannot be ratified by *C* so as to be binding on *A*.[19]

Revocation of Authority

Termination of agency.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

This is English law, subject to the remark that there is little authority as to the case of insanity, and it was formerly thought that insanity of either principal or agent would determine the agency only if it had been judicially established by "inquisition".[20] But it seems the true rule is that the principal's insanity in fact is sufficient to annul the agent's authority.[21] The present section has, in any case, made the law clear in India. We have to read it with the following ones to 210 inclusive, which modify its effect in various ways.

Completion of business of agency.—The Allahabad and Calcutta High Courts hold that where an agent for the sale of goods receives the price, the agency does not terminate on the sale of the goods, but continues until payment of the price to the principal. S. 218 (below) provides "that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipts of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them".[22] In a Madras case, Wallis C.J. expressed the opinion that the agency terminates when the sale is completed, and that it does not continue until payment of the price.[23] The question in the above cases was one of limitation.[24] But the authority of an agent for sale to contract on the principal's behalf ceases as soon as the sale is completed. He has no power to alter the terms of the contract without fresh authority from the principal.[25]

The authority of an agent to collect bills and to remit the amount, when realised, by drafts, terminates as soon as the drafts are despatched.[26] Where a duly appointed guardian of a minor litigant has duly appointed a lawyer, his agency is not terminated on the attainment of majority by the minor, unless he expressly revokes the authority.[27]

Death of principal.—A power of attorney to an agent to present a document for registration is revoked by the death of the principal. It was accordingly held by the Privy Council that

17 *Bird* v. *Brown, supra,* note 14.
18 *Kidderminster* v. *Hardwick* (1873) L.R. 9 Ex. 13.
19 *Cassim Ahmed* v. *Eusuf Haji Ajam* (1916) 23 Cal. L.J. 453; 34 I.C. 221. Joint receivers, unlike joint owners. should all join in giving the notice.
20 Kent, Comm. ii. 645.
21 So assumed in *Yonge* v. *Toynbee* (1910) 1 K.B. 215, C.A.
22 *Babu Ram* v. *Ram Dayal* (1890) 12 All. 541, followed in *Fink* v. *Buldeo Dass* (1899) 26 Cal. 715, 724, 725.
23 *Venkatachalam* v. *Narayanan* (1914) 39 Mad. 376, 378-379; 26 I.C. 740.
24 See the Limitation Act, 1908, Sch. I., art. 89; (Art. 3 of 1963 Act).
25 *Blackburn* v. *Scholes* (1810) 2 Camp. 343; 11 R.R. 723. And see *Seton* v. *Slade* (1802) 7 Ves. 265, 276; 6 R.R. 124.
26 *Alliance Bank of Simla* v. *Amritsar Bank* (1915) Punj. Rec. no. 79, 322; 31 I.C. 215, 1915 A.L. 214. But see *In re Calcutta National Bank,* 1955 A. Cal.91.
27 *Madho Prasad* v. *Kanhaiyalal* (1945) All. 882, 222 I.C. 375, 1946 A.All. 1.

where the principal died before the presentation, and the registrar, knowing of the principal's death, accepted and registered the document, the registration was invalid.[28] Where a power of attorney is given by the members of a joint Hindu family to one of them in connection with the family business, it is a question of construction in each case whether the power comes to an end on the death of any of them or whether it is to continue even after then.[29] See notes to s. 209, below.

Where the agency is for a fixed term.—"Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended".[30]

Dissolution of firm.—The section, it has been held, is not exhaustive of the circumstances in which an agency is determined, and it has been held that a power of attorney, executed by a firm, to sell immovable property is terminated by the dissolution of the firm.[31]

Payment or act by attorney under power.—S. 3 of the Powers-of-Attorney Act, 1882 provides that any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic or insolvent, or had revoked the power, if the fact of the death, etc., was not at the time of the payment or act known to the person making or doing the same.

Termination of agency.—Once the relationship of agency is terminated between a customer and a bank, there is no preferential claim or a trust in regard to collection of bills because the fiduciary relationship continues so long as the agency continues.[32]

Termination of agency where agent has an interest in subject-matter.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations.

(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death. (*Gauseen* v. *Morton* (1830) 10 B. & C. 731; 34 R.R. 558).

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself, out of the price, the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death (S.A. §. 371).

Authority coupled with interest.—In these cases the current phrase is that the agent's authority is "coupled with an interest." In England, however, this does not seem to be quite accurate, unless it is understood that the word "coupled" implies, beyond the mere fact of the agent having an interest in the subject-matter, some specific connection between the authority and the interest. The principal is thus stated: "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some

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28 *Mujid-un-Nissa* v. *Abdur Rahim* (1900) 28 I.A. 15; 23 All. 233.
29 *Re Sital Prosad* (1916) 21 C.W.N. 620; 41 I.C. 288, A.I.R. 1917 Cal. 436.
30 *Per* Mookerjee J. in *Lalljee* v. *Dadabhai* (1915) 23 Cal. L.J. 190, at p. 202; 34 I.C. 807. This is really too elementary to need authority.
31 *Janardhan* v. *Gangaram* (1951) Nag. 90, 1951 A.N. 313.
32 *Madhya Pradesh Co-operative Bank* v. *P.D. Dalal* (1967) A.B. 279.

benefit to the donee of the authority, such an authority is irrevocable".[33] In fact, the circumstances must be such that revocation of the authority would be a breach of faith against the agent. The language of this section is wider. Still there is not any evident intention to overrule the English decisions. In fact, illustration (b) supplies just the circumstances which, in a leading English case where the authority was held to be revocable, were wanting, namely, that the consignment is made after the factor's advances, and with an express request by the principal to repay himself out of the price of the goods. In that case the Court said: "We think this doctrine"—i.e., the rule of the present section—"applies only to cases where the authority is given for the purpose of being a security, or ... as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only; as, for instance, in the present case ... the goods are consigned to a factor for sale. This confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest, but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement".[34] The material variation of the facts in this case which is given in illustration[35] does amount to evidence of agreement. Whether there is such an agreement in a particular case is a question of fact.[35] Indian decisions, as we shall immediately see, take the same line. The Act itself is, of course, the primary authority.[36]

A direction by *A* to *B* to receive income payable to *A*, and apply it towards discharge of *A*'s debt to *Z*, is obviously not an authority coupled with an interest in *B*, whether the revocation of it would or would not be a breach of any contract between *A* and *Z;* but in such circumstances loosely worded or ambiguous new instructions from *A* to *B* will not be readily construed as a revocation.[37]

An example of a transaction including such an agreement as the rule requires is that of an "underwriting contract" addressed to the vendor-promoter of a new company. Here we have a bargain by which, for valuable consideration in the form of commission, the underwriter agrees to take certain shares, and this he knows to be for the benefit of the promoter, who is to be paid out of money raised by the issue of shares, and in order to enable the promoter to secure the performance of the contract the underwriter authorises the promoter to apply for shares in his name, and expressly agrees not to revoke that authority. The authority is coupled with an interest, and an allotment of shares to the underwriter on the promoter's application makes him a member of the company notwithstanding an attempted revocation in the meantime.[38]

Indian authorities.—The interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom do not constitute such an interest as would prevent the termination of the agency.[39] Upon the same principle, where an agent is appointed to collect rents, and his salary is agreed to be paid out of those rents, it does not give the agent an interest in the subject-matter of the agency within the meaning of this section.[40] But where an

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33 *Smart* v. *Sandars* (1848) 5 C.B. 895, at p. 917; 75 R.R. 861, approved in *Taplin* v. *Florence* (1851) 10 C.B. 744, 758; 84 R.R. 773; repeated word for word by Williams J. in *Clerk* v. *Laurie* (1857) 2 H. & N. 199, 200; 115 R.R. 489, in Ex. Ch.; adopted by Lindley L.J. in *Carmichael's Case* (1896) 2 Ch. 643, 648.

34 *Smart* v. *Sandars* (1848) 5 C.B. 895, at p. 918 ; 75 R.R. 849. And see *Frith* v. *Frith* (1906) A.C. 254

35 *De Comas* v. *Prost* (1865) 3 Moo. P.C. (N.S.) 158; *Ramchandra* v. *Chinubhai* (1943) 45 Bom.L.R. 1075, 214 I.C. 42, 1944 A.B. 76.

36 See 17 Bom. 520, at pp. 543, 545; 20 Mad. 97, at p. 103.

37 *Clerk* v. *Laurie* (1857) 2 H. & N. 199; 115 R.R. 489, argued mainly on the question whether the authority was revocable, but decided on the ground that in any case there was nothing amounting to revocation.

38 *Carmichael's Case* (1896) 2 Ch. 643, 647.

39 *Lakmichand* v. *Chotooram* (1900) 24 Bom. 403.

40 *Vishnucharya* v. *Ramchandra* (1881) 5 Bom. 253; and see *Dalchand* v. *Seth Hazarimal,* 1932 A.N. 34; 136 I.C. 878. So also where an agent is to be remunerated from the proceeds of execution of a decree: *Palani Vannan* v. *Krishnaswami Konar* (1946) Mad. 121, 1946 A.M. 9.

agent is authorised to recover a sum of money due to a third party to the principal, and to pay himself, out of the amount so recovered, the debts due to him from the principal, the agent has an interest in the subject-matter of the agency, and the authority cannot be revoked.[41] A power of attorney in favour of a bank to sell property hypothecated to it is irrevocable till the loan is repaid and the consideration therefore is relatable to the loan advanced by the Bank.[42] So is a power of attorney in favour of a Bank to execute the debtor's decree against a third party and to credit the same to his debt owing to the Bank; more so when the power is irrevocable expressly. The Supreme Court held it to be a power coupled with interest and hence irrevocable.[43]

"Section 202 of the Contract Act provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked."[44]

The power to pay off the debts, raised for the debtor, out of the rents and profits from a particular estate is an irrevocable authority "as an engagement to pay out of a particular fund."[45]

A creditor advanced money to a debtor to finance the latter's contract with the Government and the debtor by an irrevocable power of attorney constituted the creditor his attorney to recover or receive the amounts due on the contracts and appropriate the same towards the advance made. He was further authorised to sue for the amounts due in consultation with the debtor.

This was held to be an authority irrevocable with an equitable assignment of interest "in the fund".[46] A member of a *tarwad* who is entitled to be maintained out of the *tarwad* property and is appointed an agent to collect the rents has an interest in the subject-matter of the agency, and his authority cannot be revoked.[47] A vendee retaining part of the price to pay off incumbrances is an agent of the vendor with an interest.[48]

Factors for sale of goods.—The question has often arisen as to whether a factor who has made advances as against goods consigned to him for sale has such an interest in the goods consigned as to prevent the termination of his authority to sell. The result of the cases appears to be that the authority of a factor to sell is in its nature revocable, and the mere fact that advances have been made by him, whether at the time of his employment as such or subsequently, cannot have the effect of altering the revocable nature of the authority to sell, unless there is an agreement express or implied between the parties that the authority shall not be revoked.[49] Where the factor is expressly authorised to repay the advances out of the sale proceeds, as in illustration (b), he has an interest in the goods consigned to him for sale, and the authority to sell cannot be revoked. In such a case "an interest in the property" is expressly created. But the "interest" need not be so created, and it is enough to prevent the termination of the agency that the "interest" could be inferred from the language of the document and from the course of dealings between the parties. Thus where a factor who had made advances

41 *Pestanji* v. *Matchett* (1870) 7 B.H.C.A.C. 10. See also *Subrahmania* v. *Narayanan* (1901) 24 Mad. 130 and *Jagabhai* v. *Rustamji* (1885) 9 Bom. 311; *Clerk* v. *Laurie* 2 H. & N. 199, cited above, would have resembled these cases if the debt which the banker was directed to pay had been due to himself and not to a third person.

42 *Board of Revenue* v. *Annamalai & Co.* (1968) A.M. 50; (1967) 2 M.L.J. 515, 517; (1968) 2 Mad. 1; *Union of India* v. *Chaman Lal & Co.* (1957) A.S.C. 652; 1957 Punj. 1701; reld. on. *Smart* v. *Sandars Powell* (1848) 5 C.B. 895, 917. Bowstead on Agency (2nd Edn.), 392. *Mariyakutty* v. *Choladeon Syrian Bank* (1957) A.T.C. 174 (Shares hypothecated).

43 *Loon Karan Sethiya* v. *Ivan E. John* (1964) A.A. 441; on app. (1969) A.SC. 73; *Bharat Nidhi Ltd.* v. *Takhtmal* (S.C.) C.A. 133-65 decided 7-8-68.

44 *Seth Loon Karan Sethiya* v. *Ivan E. John and Ors.* (1969) A.SC. 73.

45 *Prahlad Parshad* v. *T. Faldani Kumari* (1956) A.P. 233, 237; *Watson* v. *Duke of Wellington* (1820) 1 Russ. & M. 602; *Jagabhai Lallubhai* v. *Rustomji,* 9 Bom. 311.

46 *Bharat Nidhi* v. *Takhtmal,* S.C.C.A. 133-65 decided 7-8-68. *Jagabhai Lallubhai* v. *Rustomji* (1885) 9 Bom. 311 appd. *Loonkaran Sethiya* v. *State Bank of India Ltd.* (1969) A.SC. 73.

47 *Chathu Kutty Nair* v. *Kundan Appa,* 1932 A.M. 70; 61 Mad. L.J. 852; 136 I.C. 776.

48 *Subba Row* v. *Varadiah,* 1943 A.M. 482.

49 *Jafferbhoy* v. *Charlesworth* (1893) 17 Bom. 520, 542, citing *De Comas* v. *Prost,* 3 Moo. P.C. 158, 179.

as against goods consigned to him for sale was authorised to sell them "at the best price obtainable," and in the event of a shortfall to draw on the consignor, it was held that this arrangement gave an interest to the factor in the goods, and that the authority to sell could not be revoked.[50]

When principal may revoke agent's authority.

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal (S.A. § 465.)

What amounts to exercise of authority.—An agent authorised to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him "so as to bind the principal" if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with a third party, and the principal, therefore, may revoke the authority.[51]

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser,[52] and authority given to a policy broker to effect a policy at any time before the policy is executed so as to be legally binding.[53] Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid, even if it has been credited in account.[54]

Agency not revoked.—One of the conditions in a contract of the selling agency between a German Manufacturing Company and an English Company having sole selling rights was that a representative of the English Company would visit car manufacturers in England at least once a week. This condition was not complied with regularly (nine out of 96 visits all for what was good reason). The German Company repudiated the contract. The House of Lords held that the repudiation was wrongful. It held that the use of the term 'condition' gave a right to repudiate for howsoever small may be the breach but the Courts would not give that meaning to the terms if it produced unreasonable results which the parties could not have intended.[55]

Revocation where authority has been partly exercised.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations.

(a) *A* authorises *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payments for the cotton (*Cp*. D. 17, 1, *Mandati vel. contra* 15).

(b) *A* authorises *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

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50 *Kondayya* v. *Narasimhulu* (1896) 20 Mad. 97.
51 *Lakhmichand* v. *Chotooram* (1900) 24 Bom. 403.
52 *Warlow* v. *Harrison* (1859) 1 E. & E. 309; 117 R.R. 227; *In re Hare & O'More's Contract* (1901) 1 Ch. 93.
53 *Warwick* v. *Slade* (1811) 3 Camp. 127; 13 R.R. 772. *Cp. Thompson* v. *Adams* (1889) 23 Q.B.D. 361.
54 *Edgar* v. *Fowler* (1803) 3 East, 222; 7 R.R. 433; *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291; *Hastelow* v. *Jackson* (1828) 8 B. & C. 221; 32 R.R. 369.
55 *Wickman Machine Tools Ltd.* v. *L. Sehu Schuler* A.G. (1974) (A.C. 285.).

Authority partly exercised.—The rule here laid down is connected with the principal's duty to indemnify the agent (s. 222, below). "If a principal employs an agent to do something which by law involves the agent in a legal liability"—or even in a customary liability by reason of usage in that class of transactions known to both agent and principal—"the principal cannot draw back and leave the agent to bear the liability at his own expense".[56] There is no conclusive English authority really covering the ground, but Lord Lindley states it as the better opinion that "an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties.... is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is *entitled* to obey the counter-order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and, having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions".[57] Conversely, if a principal revokes his agent's authority to carry on an enterprise, and the agent nevertheless carries it on and contrary to expectations makes a profit, the principal cannot then ignore his own revocation and claim the profit.[58]

Compensation for revocation by principal or renunciation by agent.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation.—By this section "the principal is bound to make compensation to the agent whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent".[59]

The valuable consideration here spoken of must be something more than undertaking the agency. Where *A* appointed *B* as exclusive agent for the sale of *A*'s coal in Liverpool for seven years, and *B* undertook not to sell any other owner's coal there during the time without *A*'s consent, this was decided by the House of Lords not to imply any condition that *A* should continue to keep his colliery during the term. "Upon such an agreement as that ... unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive".[60]

There is a class of cases in which an agent for sale, having proceeded far enough in the transaction to be entitled to commission on its completion, has been deprived of his commission by the principal putting an end to the whole matter. But these cases do not depend on the rule here laid down, or on any rule peculiar to the law of agency. They are examples of the rule that one party to a contract must not prevent another from performing his part (ss. 53, 67,

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56 *Read* v. *Anderson* (1884) 13 Q.B.D. 779, at p. 783, *per* Bowen L.J. The question whether undoubted principal was rightly applied in this case by the majority of the Court, having regard to the statute law, which is not material here, was cut short by the Gaming Act, 1892.

57 Lindley on Partnership 11th ed., 458.

58 *Haridar Prasad Singh* v. *Kesho Prasad Singh,* 93 I.C. 454, 605; 1925 A.P. 68.

59 *Per Cur.* in *Vishnucharya* v. *Ramchandra* (1881) 5 Bom. 253, at p. 256.

60 *Rhodes* v. *Forwood* (1876) 1 App. Ca. 256; *per* Lord Penzance at p. 272; *Shivlal Mulchand* v. *Manekji Mancharji* (1930) 54 Bom. 510, 126 I.C. 316, 1930 A.B. 203; *Ranganatha* v. *Indo Union Assurance Co.*, 1946 A.M. 20. *Cp. Hamlyn & Co.* v. *Wood & Co.* (1891) 2 Q.B. 488, C.A. (not a case of agency); *cf. Official Assignee of Madras* v. *Frank Johnson Sons & Co.* (1930) 54 Mad. 409; 128 I.C. 849; 1931 A.M. 65.

above), or "each party is entitled to the full benefit of his contract without hindrance from the other".[61] See further the commentary on s. 219, below.

Notice of revocation or renunciation.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. (S.A. § 478).

An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals.[62] If the authority is joint and several, revocation by one principal will only determine the authority which he himself has given.[63]

Where an insurance agent had acted as agent for a long period of time and had to maintain a large staff of canvassers, it was held by the Privy Council that three and a half months' notice was not reasonable: their Lordships expressed the opinion that in the circumstances two years' notice would not have been unreasonable.[64]

Revocation and renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority. (S.A. § 474).

With reference to the illustration to the section, *A* could let the house himself or through an agent other than *B* without incurring any liability to remunerate *B*, unless *A* had specifically agreed to the contrary.[65]

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations.

(a) *A* directs *B* to sell goods for him, and agrees to give *B* 5 per cent commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B*, after the letter is sent, but before he receives it, sell the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter, directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B*, to send the cotton to Madras. *B*, after

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61 *Prickett* v. *Badger* (1856) 1 C.B.N.S. 296; 107 R.R. 668; *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864) 17 C.B.N.S. 733; 142 R.R. 603. See the judgment of Willes J. But these two cases were distinguished by the H.L. in *Luxor (Eastbourne) Ltd.* v. *Cooper* (1941) A.C. 108.

62 *Bristow* v. *Taylor* (1817) 2 Stark. 50; see however *Kirtyanand* v. *Ramanand,* 1936 A.P. 456; 164 I.C. 220, where *Bristow* v. *Taylor, supra,* was distinguished on the ground that the agency in that case was for an indefinite period. In the case cited it was for a fixed period of three years and the appointment of a joint manager was clearly part of the terms of the contract of the joint owners *inter se.*

63 *Monindra Lal Chatterjee* v. *Hari Pada,* 1936 A. Cal. 650; 166 I.C. 608; *Charu Chandra* v. *Sital Prasad,* 1949 A. Cal. 656.

64 *Sohrabji Dhunjiboy Medora* v. *Oriental Government Security Life Assurance Co. Ltd.* (1946) 72 I.A. 315, (1946) Bom. 159, 48 Bom.L.R. 123, 223 I.C. 15, 1946 A.P.C. 6.

65 *Brinson* v. *Davies* (1911) 27 T.L.R. 442, Pickford J., as Lord Sterndale M.R. then was. See also *Bentall, Horsley and Baldry* v. *Vicary* (1931) 1 K.B. 253 (*supra*) and notes on s. 187.

receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*, *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

Time from which revocation operates.—"Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before." (S.A. § 470).

Except as to illustration (c), which removes an anomaly, this section is in accordance with the common law. When *A* trades as *B*'s agent with *B*'s authority (even though the business be carried on in *A*'s name, if the agency is known in fact), all parties with whom *A* makes contracts in that business have a right to hold *B* to them until *B* gives notice to the world that *A*'s authority is revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account.[66]

Illustration (c) follows the rule of the Roman law and systems derived from it against the English authorities, which are admitted to be unsatisfactory.[67] Accordingly an acknowledgment of a debt made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a "reasonable step (taken by the agent) for the protection and preservation" of the assets of the principal within the meaning of s. 209.[68]

If the authority of an agent to admit execution of a document is revoked before the registration thereof, but such revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, though it is registered by the agent after the revocation of his authority.[69]

Notice to third parties.—So far as third parties are concerned the termination of an agency has no effect till they have notice of the same.[70]

Agent's duty on termination of agency by principal's death or insanity.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him

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66 *Trueman* v. *Loder* (1840) 11 A. & E. 589 ; 52 R.R. 451; *Kulsekharapatnam Cooperative Society* v. *Radhelal,* (1971) A.M.P. 191.

67 In England the principal's estate is not liable on the contract, but perhaps may be liable for actual loss; *Drew* v. *Nunn* (1879) 4 Q.B.D. 616; *Blades* v. *Free* (1829) 9 B. & C. 167; 32 R.R. 620; but the agent is liable on implied warranty of authority; *Yonge* v. *Toynbee* (1910) 1 K.B. 215, C.A. Nor can the agent recover agreed remuneration from the principal's estate for service in the business of the agency performed after the principal's death; *Campanari* v. *Woodburn* (1854) 15 C.B. 400; 100 R.R. 406.

68 *Ebrahim Haji Yakub* v. *Chunilal* (1911) 35 Bom. 302; 10 I.C. 888.

69 *Mahendra Nath* v. *Kali Proshad* (1902) 30 Cal. 265. The Lahore High Court held in *Moosajee* v. *Administrator-General of Bengal* (1921) 3 Lah. L.J. 265, that the manager of a distillery was empowered under this section to enter into contracts for the purchase of molasses after the death of the proprietor. If it was within his ordinary authority, and he had not heard of the principal's death, one fails to see what there was to report.

70 *Kulsekarapatnam Hand Match Workers Society* v. *Radhelal* (1971) A.MP. 191, 195; *Janardhan* v. *Gangaram* (1951) Nag. 90; (1951) A.N. 313 folld.

See S.A.§ § 491, 492.There does not seem to be any English authority, and there are few Indian cases on the section. In *Anand Behari* v. *Dinshaw & Co.*,[71] it was held that the accountant of a bank on the verge of liquidation could not pray in aid the section as a justification for selling bank property after the death of the director of the bank. It had been urged that this was the only way in the circumstances to obtain ready cash for carrying on the bank's business.

An agency is terminated under s. 201 by the death of the principal. If the agent thereafter continued in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms.[72] The Proprietor of a Bus Service had granted power of attorney to an agent who continued to act after the death of the principal. His acts were ratified by his legal representatives according to law. He can validly hold himself out to be an agent within authority. Therefore a charge sheet given by the agent to a worker in an industrial dispute on acceptance of the report of the Enquiry Officer. See notes to s. 208, above.

Termination of sub-agent's authority.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

As a general rule this is obvious. There may be cases where a substitute rather than a sub-agent has been appointed, and there appears by express agreement or by the nature of the case an intention that his authority shall not be determined when that of the original agent is revoked; S.A. § 469.

Agent's Duty to Principal

Agent's duty in conducting principal's business.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

Additional Illustrations.

(c) An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed. (*Lilley* v. *Doubleday* (1881) 7 Q.B.D. 510.)[74]

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71 1942 A.O. 417; 200 I.C. 485.
72 *Madhusudan* v. *Rakhal Chandra* (1915) 43 Cal. 248 254-255; 30 I.C. 697.
73 *Management of Sri Sivasakthi Bus Service* v. *P. Gopal* (1971) A.M. 434.
74 In English law, this doctrine of deviation applies even to a gratuitous bailee: *Ronneberg* v. *Fakland Islands Co.* (1864) 144 E.R. 1, 6, Williams J.

(d) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value in the event of their being lost. *(Smith* v. *Lascelles* (1788) 2 T.R. 187; 1 R.R. 457.) This is a case of direct and not remote damages.[75]

(e) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade. He must make good the loss. *(Solomon* v. *Barker* (1862) 2 F. & F. 726; 121 R.R. 828.

(f) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured. (*Ferrers* v. *Robins* (1835) 2 C. M. & R. 152).

(g) An agent, bound by his contract to keep proper books of account, omits to scrutinize, examine or check the accounts of his subordinates whom he implicitly trusts. Taking advantage of this, the subordinates commit gross frauds on him and his employers. The frauds and defalcations being due to the agent's failure to perform his duty he is liable to make good the loss thereby caused. (*Taylor* v. *United Africa Co. A.I.R.* 1937 P.C. 78; 168 I.C. 494. See also *Punjab National Bank* v. *Diwan Chand* A.I.R. 1931 Lah. 302; 134 I.C. 577.).

Acting according to instructions—documents lost.—Where an agent acts in accordance with the terms of agreement and loss results, the agent is not liable. So where a bank under an agreement sent the motor transport receipt and the hundi by ordinary post and it was lost and the unauthorised person took delivery of goods, the bank was held not to be liable.[76]

Consequences of acting against duty.—Sections 211 and 212 provide for the consequences of an agent acting otherwise than according to his duty towards the principal.[77]

Departure from instructions.—In *Bostock* v. *Jardine*[78] the defendants were authorised to buy a certain quantity of cotton for the plaintiff. "Instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people." so that there was no contract on which the plaintiff could sue as principal. Accordingly, "though a contract was made, it was not the contract the plaintiff authorised the defendants to make," and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase-money. In an old equity case where a landowner's steward was also lessee of part of the property, and in that capacity had made profitable arrangements with adjacent owners, it was held "that the benefit he had got as lessee by the use of the property should, upon reasonable terms, be acquired for his landlord and not for himself".[79] When an agent conducts the business of the principal otherwise than according to the directions given by the principal, he must make good to his principal any consequential loss.[80] He is liable for damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct.[81] An Indemnity clause in a letter of credit does not empower a banker to accept shipping documents for any port anywhere. The banker is indemnified for anything done in good faith. But where the shipping documents are not in accordance with instructions and mandate in the letter of credit, the accepting banker cannot be said to have acted *bona fide* so as to be indemnified for the loss.[82]

It is not an agent's duty to obey instructions which are unlawful. If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest *bona fide* bid, though it may be lower than that price.[83]

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75 *Firm Pannalal Jankidas Mohanlal* (1950) S.C.R. 979; (1951) A.S.C. 144, 149, 150; *Tichel* v. *Short* (1750) Ves. 239; 28 E.R. 154 (he is an insurer). *Polemis* v. *Furness Withy & Co. Ltd.* (1921) 3 K.B. 560. (Distinction between direct and remote damages). *Monarch Steamship Co.* v. *Karlsamns Oljefabriker* (1949) A.C. 196; (1949) 1 All E.R. 1. (When damages are not remote).

76 *Padam Prashad* v. *Punjab National Bank* (1974) A. Punj. 22.

77 *Firm Pannalal Jankidas* v. *Mohanlal* (1950) S.C.R. 979; (1951) A.S.C. 144.

78 (1865) 3 H. & C. 700.

79 *Beaumont* v. *Boultbee* (1802) 7 Ves. 599, at p. 608.

80 *Pannalal Jankidas* v. *Mohanlal* (1950) S.C.R. 979; (1951) A.S.C. 144; *Smith* v. *Lascelles* (1788) 2 T.R. 187; 1 R.R. 457. (Agent not insuring goods although instructed to do so.).

81 *F. Pannalal Jankidas* v. *Mohanlal* (1950) S.C.R. 979; (1951) A.S.C. 144.

82 *Eastern Traders (I) Ltd.* v. *Punjab National Bank* (1966) A. Punj. 303.

83 *Bexwell* v. *Christie* (1776) Cowp. 395.

"If any loss be sustained."—Where an agent sells his principal's goods in breach of his duty below the limit placed upon them by the principal, the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of price placed on the goods? Where no loss is suffered, the principal is entitled at least to nominal damages, the sale being wrongful.[84]

The measure of damages where an agent, who had been instructed not to part with the possession of certain goods until they are paid for, parted with them without payment, was held to be the value of the goods, the purchaser having failed to pay the price.[85] But the dominant rule of law is the principal of *restitutio ad integrum* and subsidiary rules can only be justified if they give effect to that rule.[86]

A principal, who set a price on goods to be sold by the agent were sold by the agent at a lesser price without the consent of the principal, is entitled to recover as damages, the difference between the price at which the principal would have sold them and the price at which they were sold. It is submitted the proper quantum would be the difference of the price set and the price at which the sale took place. Further in such a case the agent is not entitled to commission.[87]

As to the duty to account for profits, see s. 216 and commentary thereon below.

Custom of trade.—According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe, at a fixed price, net free *godown,* including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.[88]

Usage of the Bombay market known as the pakki adat system.—The following are the incidents of a contract entered into on *pakki adat* terms:—

(1) The *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant, either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

The relation between the *pakka adatia* and the up-country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins C.J.:—

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84 *Manchubhai* v. *Tod* (1894) 20 Bom. 633; *Chelapathi* v. *Surayya* (1902) 12 M.L.J. 375. Much less can an agent claim from the principal expenses incurred in acting contrary to instructions: *Mathra Das-Mustaddi Lal* v. *Kishen Chand-Ramji Das,* 86 I.C. 567; 1925 A.L. 332.

85 *Stearine Co.* v. *Heintzmann* (1864) 17 C.B.N.S. 56; 142 R.R. 245; *Gambhirmull* v. *Indian Bank Ltd.* (1963) A. Cal. 163.

86 *Firm Pannalal Jankidas* v. *Mohanlal* (1950) S.C.R. 979; (1951) A.S.C. 144, 149; *Liesbosh (Owners) Ltd.* v. *Edison (Quriers) Ltd.* (1933) A.C. 449; (1933) All E.R. Rep. 144 (*The Edison).*

87 *Smt. Pani Bai* v. *Smt. Sire Kanwar* (1981) A. Raj. 184.

88 *Paul Beier* v. *Chotalal Javerdas* (1906) 30 Bom. I.

"I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia,* in circumstances like the present, is one whereby he undertakes or, to use the word in its non-technical sense as business men on occasion do use it, guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

"I do not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point, and that this is legally possible is shown by Mellish L.J. in *Ex parte White*[89] where he speaks of 'a person who is an agent up to a certain point'. So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score".[90] In *Manilal Raghunath* v. *Radhakisson Ramjiwan*[91] Macleod C.J. said the only distinction between a *pakka adatia* and broker who is liable on his contracts is that the former does not contract as agent, but as principal; in other words, the *pakka adatia* undertakes business for his principal, but the particular contracts by which he carries out that business are his own affair.[92]

Pakka Adatia's right to sue as consignee.—A pukka adatia cannot sue as a consignee but he can when goods are transferred to him as owner.[93]

Usage of the Bombay market known as the kachhi adat system in cotton business.—Under the *kachhi adat* system, when an *adatia* receives an order from an upcountry constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled[94] becomes from that moment binding upon both the *adatia* and the broker, and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two methods: he either procures a party willing to take up the contract and introduces him to the *adatia,* and the party and the *adatia* thus exchange *kabalas* (contracts) with each other; or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia* and the other party to his (*broker's*) contract, and these two then exchange *kabalas* with each other. If, when the party is brought to the *adatia*, the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such usage.[95]

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89 (1870-1871) L.R. 6 Ch. 397, at p. 403.

90 *Bhagwandas Narotamdas* v. *Kanji Deoji* (1906) 30 Bom. 205, in app. from (1905) 7 Bom. L.R. 57; *Bhagwandas* v. *Burjorji* (1917) 45 I.A. 29, 32-33; 42 Bom. 373; 377-378; 44 I.C. 284. See also *Chandulal Sukhlal* v. *Sidhruthrai Soojanrai* (1905) 29 Bom. 291; *Kedarmal Bhuramal* v. *Surajmal Govindram* (1907) 33 Bom. 364; *Ramgopal Parsram* v. *Uggersain* (1942) Kar. 38; 201 I.C. 513; 1942 A.S. 115.

91 (1920) 45 Bom. 386; 62 I.C. 361.

92 For other cases relating to *Pakka adatias,* see *Jot Ram* v. *Jiwan Ram,* 1932 A.L. 633; *Buddulal* v. *Shrikisan* (1961) A.M.P. 57, 139 I.C. 637 (*pakka adat* contract not contrary to public policy); *Balkrishnan & Co.* v. *Ram Nath,* 1940 A.L. 195; 189 I.C. 690 (where the case law is reviewed); *Sakarbhai* v. *Ramriklal,* 1932 A.B. 328; 34 Bom. L.R. 709; 138 I.C. 244 (right of *pakka adatia* to demand 'margin'); *Ganpat Mal* v. *Kher Singh* (1937) 18 Lah. 1883; 1937 A.L. 581; *Baksiram* v. *Jasroop Shrinath* (1948) Nag. 409, 1948 A. Nag. 173; *Ram Dev* v. *Seth Kaku,* 1950 A.E.P. 92 (what accounts are to be rendered).

93 *Ibrahim* v. *Union of India* (1966) A. Guj. 6; (1964) Guj. 928.

94 The rates are settled in consequence of constant fluctuation in the market which may rise or fall every two minutes.

95 *Fakirchand Lalchand* v. *Doolub Govindji* (1905) 7 Bom. L.R. 213; *Sheo Narain* v. *Bhallar,* 1950 A.A.

Pacca Adatia.—Pukka Adatia is a principal in certain respects and can buy from and sell to his constituent but he retains some of the attributes of an agent to fall within the provisions of the Contract Act and has to carry out the directions of his constituent. But a pucca adatia can export on his own name goods purchased from the constituent without intimation to him if within the limits of price given by the constituent. The constituent will be entitled to recover the price of those goods, the price being what he was willing to charge the third parties.[96]

Bombay Silver Market.—There is a custom of the Bombay Silver Market for forward contracts that only shroffs are the ostensible buyers and sellers, though shroffs may have and often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachhi adat* and sometimes for *pakka adat*. In the case of *kachhi adat,* the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat,* the *adatia shroff,* who then acts for a higher rate of commission, is liable as principal both to his own employer and to the other shroff. This custom whereby only shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari shroffs; first, that on every forward silver transaction a commission becomes payable to one or both of the Marwari shroffs; and, secondly, that the *adatia* shroff guarantees to the other shroff performance of the contract. There is no such custom, however, that the selling shroff is not personally liable to the principal of the buying *adatia*. Thus if *A* enters into a contract in the name of his *kachha adatia H* whereby *H* agrees to buy and *S* agrees to sell silver bars for the ensuing *vaida, A* is entitled to demand performance of the contract from *S*.[97]

Agency—Fiduciary relationship.—Fiduciary relationships are not confirmed to a certain defined category. The test is whether in the eyes of equity the relationship between the parties gives rise to a constructive trusteeship which imposed on a defendant certain fiduciary duties towards the plaintiff. Therefore where a proposed purchase of land during the negotiations assumed the position of a self appointed agent and made profit without the knowledge or consent of the vendor he is bound to account to the vendor for all profits.[98]

Skill and diligence required from agent.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as *e.g.*, by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual inquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

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352. As to the discretion to call for margin in the Bombay Cotton Market, *Devshi* v. *Bhikamchand* (1926) 29 Bom. L.R. 147; 100 I.C. 993; 1927 A.B. 125.

96 *Nathmull Bhaironbux* v. *Kashi Ram* (1973) A. Raj. 271, 278; *Gordon Woodroff & Co.* v. *Sheikh M.A. Majid* (1967) A.SC. 181 folld.

97 *Abraham* v. *Sarupchand* (1917) 42 Bom. 224; 41 I.C. 256.

98 *English* v. *Dedham Vale Properties Ltd* (1978) 1 All ER 382, 398; *Selongor United Rubber Estates Ltd.* v. *Cradock* (No. 3) (1968) 2 All ER at p. 1079 applied; *Phipps* v. *Boardman* (1965) 1 All ER 855 affd. on appeal (1966) 3 All E.R. 721.

(c) *A*, an insurance broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.[99]

Cp. S.A. §§ 183—185, 191, 217, 220, 221: "When a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the art he undertakes.... An express promise or express representation in the particular case is not necessary.... The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and therefore misconduct." And the employer is justified in dismissing an employee who shows himself incompetent, though he may have been engaged for a term not expired.[1] But the obligation of diligence may be waived by express agreement.[2] How far an agent employed in the general supervision of work has to answer for the skill and diligence of workers under him must depend on the nature of the work and on local usage.[3] On the other hand, any express undertaking or guarantee by the agent will bind him according to its terms; and an agreement exempting an agent from the consequences of his own fraud or wilful wrong seems on principle to be void (S.A. § 188). An agent is bound to know so much of the law material to the business in hand as will enable him to protect the principal's interest, and make the transaction binding on the other party.[4] Every person acting as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties.[5] It is not enough for him to rely and act upon the statements of other persons.[6] But an agent who is definitely authorised to enter into a particular transaction is not liable to the principal for any loss which may be suffered in consequence of the imprudent nature of the transaction,[7] nor is he liable for the consequences of a mere mistake or error of judgment provided he exercises such care and skill as may be reasonably expected under the circumstances.[8]

Direct consequences of his own neglect.—As stated in the section, the loss is recoverable only if it is the direct consequence of the agent's negligence.[9] In a case before the Supreme Court,[10] the agent had been directed to insure the goods against fire, which he had failed to do. Owing to an explosion in the Bombay docks, the goods were destroyed. Under a fire insurance policy, such a loss was not recoverable, but the Government passed an ordinance that compensation for goods which were insured against fire would be fully paid, and, if the goods were not insured against fire, only half the value of the goods would be paid. The agent obtained half the value of the goods from the Government, and it was held that he was liable to compensate his principal for the other half, as the loss inflicted upon the principal was the direct consequence of the agent's not insuring the goods as instructed, and it was immaterial whether the loss was foreseeable.[11] A bank was asked to collect money on behalf of a customer and remit it to him. The money about Rs. 34,000 was sent by draft by ordinary post which was

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99 For a further elementary illustration see *Suraj Mal-Chandan Mai* v. *Fateh Chand* (1929) 11 Lah. 227.
1 *Harmer* v. *Cornelius* (1858) 5 C.B.N.S. 236; 116 R.R. 654, *Cur. per* Willes J.
2 *Austin* v. *Manchester, etc. Ry. Co.* (1850) 10 C.B. 454; 84 R.R. 645.
3 *Nagendra Nath Singha* v. *Nagendra Bala Chowdhurani*, 97 I.C. 200; 1926 A. Cal. 988; 43 C.L.J. 479; *Narayan Deo* v. *Hanumantha Rao* (1950) Cut. 174, 1950 A. Or. 241.
4 *Park* v. *Hammond* (1816) 6 Taunt. 495; 16 R.R. 658; *Neilson* v. *James* (1882) 9 Q.B.D. 546.
5 *Lee* v. *Walker* (1872) L.R. 7 C.P. 121; *Jenkins* v. *Betham* (1855) 15 C.B. 168; 100 R.R. 297.
6 *Sitarampur Coal Co.* v. *Colley* (1908) 13 C.W.N. 59.
7 *Overend* v. *Gibb* (1872) L.R. 5 H.L. 480.
8 *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1899) 2 Ch. 392; *Nand Ram* v. *Gokal Chand*, 1933 A. Lah. 841.
9 *Narayan Deo* v. *Hanumantha* (1950) Cut. 174, 1950 A. Or. 241; *Ganbhirmull* v. *Indian Bank Ltd.* (1963) A. Cal. 163.
10 *Pannalal Jankidas* v. *Mohanlal* (1950) S.C.R. 979, 1951 A.S.C. 144, (1951) S.C.J. 149; *Tichel* v. *Short* (1750) Ves. 239; 28 E.R. 154 (he is an insurer); *Polemis* v. *Furness Withy & Co. Ltd.* (1921) 3 K.B. 560 (Distn. between direct and remote damages); *Monarch Steamship Co.* v. *Karlshamns Oljefabriker* (1949) A.C. 196; (1949) 1 All E.R. 1 when damages are not remote).
11 Citing *Re Polemis* (1921) 3 K.B. 560, C.A.

lost. The bank as agent was held to be negligent in sending the amount in that manner. The duty of the bank is to use care according to circumstances of the case.[12]

Forwarding Agent.—English Importers of machinery from Italy employed forwarding agents in Italy. On their advice the machinery was put in containers and not in crates as before. The forwarding agents were allowed under their contract to transport the goods in a manner they thought fit. They gave an oral assurance that the machinery would be carried under deck. But actually the machinery was put on deck. On the voyage it was lost by falling into the sea. It was held that the oral assurance given by the forwarding agents was an enforceable contractual promise and was binding as a collateral contract and was binding on the forwarding agents. Further the defendants were not entitled to rely on the printed conditions exempting them from liability for breach of the oral promise. The printed conditions were repugnant to the oral promise and if applied they would render the oral promise illusory.[13]

Exchange restrictions and Agency.—An agent sold the principal's property in Ceylon but due to exchange restrictions the money could not be brought into India. The agent was, therefore, not liable to pay the price in India in rupees.[14]

Liability of Agent in tort.—Agents liability in Tort is established where he fraudulently represents that he has authority[15] and in appropriate cases where he is negligent in so doing[16] provided a duty of care[17] is established.

Gratuitous agent.—A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent.[18] For the liability of a gratuitous bailee, see note under s. 151.[19] Even where there is no bailment at all, there may be liability in English Law under the rule in *Wilkinson* v. *Coverdale,*[20] whereby if *A* promises gratuitously to perform some service for *B* and does it so negligently that *B* suffers damage, *A* will be liable to *B*. In the case from which the rule takes its name, *P* in August purchased from *D* premises that *D* had insured with an insurance company up to December, *P* pleaded that *D* had undertaken to get the insurance renewed on *P*'s behalf, but neglected to procure a proper endorsement, so that when subsequently the premises were destroyed *P* could recover nothing from the insurance company. *P* admitted that there was no consideration, but it was held that he had *prima facie* a good cause of action, although ultimately his suit failed as he could not establish any such undertaking by *D*. This rule is well known, but rarely applied.[21] There is authority from the United States that it does not apply where the gratuitous promisor takes no action at all,[22] but this limitation has been questioned, at any rate where the promisor is a gratuitous bailee.[23] There is also liability for failing to exercise due care in offering gratuitous advice, at all events

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12 *Bank of Bihar* v. *Tata Scob Dealers* (1960) A. Cal. 475; *Mitchell-Henry* v. *Norwich Union Life Insurance* (1918) 2 K.B. 67. (The bank asked to send by post £48-5-8*d*. in notes by registered post and that was stolen. Bank held liable).

13 *J. Evans & Sons Ltd.* v. *Andrea Merzario Ltd.* (1976) 2 All E.R. 930, 933-934.

14 *Kumarappan (D.V.)* v. *Suppiah (L.)* (1965) A.M. 314; (1965) Mad. 265.

15 *Polhill* v. *Walter* (1832) 3 B & Ad. 114; *Randell* v. *Trimesn* (1856) 18 CB 786; *West London Commercial Bank* v. *Kitson* (1884) 13 Q.B.D. 360.

16 *Headley Byrne & Co.* v. *Hiller & Partners* (1964) A.C. 465; *Yeskell* v. *Continental Express* (1950) 1 All ER. 1033 disapproved at p. 532 (of A.C.). See also *Mutual Life and Citizens Insurance Co. Ltd.* v. *Evatt* (1971) A.C. 793; *McInerny* v. *Lloyds Bank Ltd.* (1974) 1 Llyods Rep. 246; *Fairline Shipping Corp.* v. *Adamson* (1975) Q.B. 180; *Esso Petroleum Ltd.* v. *Mardon* (1976) Q.B. 801; *Presser* v. *Caldwell Estate* (1971) 2 N.S.W.L.R. 471; *Barrett* v. *J.R. Jovita* (1973) 34 DLR (3 *rd.*) 107.

17 Chitty: On Contracts (24th ed.) para 2090.

18 *Agnew* v. *Indian Carrying Co.* (1865) 2 M.H.C. 449.

19 At p. 659.

20 (1793) 1 Esp. 75.

21 For two comparatively recent cases in the Court of Appeal, where the rule was pleaded, but held inapplicable, see *Davis* v. *Foots* (1940) 1 K.B. 116; *Kent* v. *East Suffolk Catchment Board* (1940) 1 K.B. 319, 340.

22 *Thorne* v. *Deas* (1809) (N.Y.) 4 Johns 84.

23 *Siegel* v. *Spear* (1923) 234 N.Y. 479, New York Court of Appeals.

where the defendant is a professional man, such as a doctor, solicitor, banker or valuer.[24]

Agent's accounts

213. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to account.—This duty is elementary, and will be enforced at need by following in the agent's hands property representing money for which he ought to have accounted.[25] It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them and produce the vouchers by which the items of disbursement are supported,[26] but where accounts have been sent by the agent to the principal, and the principal has kept them with him for a length of time, the accounts will be considered stated and settled,[27] and will not be reopened unless instances of fraud are proved.[28] If an agent neglects to keep proper accounts, everything consistent with established facts will be presumed against him in the event of his being called upon for an account of the agency.[29] Where an agent mixes up his moneys with the moneys of his principal the onus clearly lies on the agent to prove that in any particular transaction which he claims to be his own he employed his own moneys.[30] "The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person. The same principle controls the relation of bailor and bailee".[31] Possibly the framers of the Contract Act may have passed it over as belonging to the general law of estoppel; in any case it is quite consistent with the Act.

If any agent purports to act as such and in that capacity enters into a transaction on behalf of the principal, he is bound to render an account to the principal.[32] In *Ka Ron's case*[33] the facts were these:

A licensee for the sale of liquor paid a yearly licence fee for three shops. This amount was to be paid monthly in advance. The liquor was to be supplied by distilleries which were to be provided with rice for distillation by Government. Due to scarcity of rice, Government did not supply the rice and no liquor could therefore be made or supplied to the liquor seller, whose business therefore stopped. He claimed the amount paid by him as licence fee for the period of stoppage of business on the ground that he was agent of the Government for sale of liquor supplied to him through the distillers who were the agents of Government for the purpose.

The Assam High Court held that

If the Principal undertakes to supply goods to his agent for selling the goods and charges a fee from him for carrying on the business for and on behalf of the principal and if the principal fails to supply the goods during a particular period, the agent can sue for accounts at the end of the period of the contract and not for the refund of the specific amount of fee paid. The fact that the fee was calculated on the basis of the monthly supply and was payable every month is not material for determining the relationship of the parties.[33]

Mere producing accounts without explaining them and without producing vouchers is not rendering accounts.[34] According to the Gujarat High Court, when a principal sues an agent

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24 *Banbury* v. *Bank of Montreal* (1918) A.C. 625, *per* Lord Finlay at p. 657. Followed by Byrne J. in *Bell Hotels* v. *Motion* (1952) C.P.L. 403, Times Newspaper 8th May 1952.
25 *Chedworth* v. *Edwards* (1802) 8 Ves. 46; 6 R.R. 212.
26 *Annoda Persad* v. *Dwarknath* (1881) 6 Cal. 754. See also *Lawless* v. *Calcutta Landing and Shipping Co.* (1881) 7 Cal. 627; *Ramchunder* v. *Manick Chunder* (1881) 7 Cal. 428; *Shib Chunder* v. *Chunder Narain* (1904) 32 Cal. 719; *Ram Das* v. *Bhagwat Das* (1904) 1 All L.J. 347; *Madhusudan* v. *Rakhal* (1916) 43 Cal. 248, 259-260; 30 I.C. 697; *State of Rajasthan* v. *Manohar Lal* (1961) A. Raj. 143. The words 'on demand' have been thought to suggest that the demand should be made on the agent at his place of business: *Audinarayana* v. *Lakshminarayana,* 1940 A.M. 588; (1940) 1 Mad. L.J. 558.
27 *Maneklal Mansukhbhai* v. *Jwaladutt Pilani* (1946) 48 Bom. L.R. 727, 230 I.C. 461, 1947 A.B. 135.
28 *Ram Swaroop* v. *Partab Narain* (1947) All. 424, 1948 A.A. 130.
29 *Gray* v. *Haig* (1854) 20 Beav. 219; 109 R.R. 396.
30 *Sridhar Vasanta Rao* v. *Gopal Rao,* A.I.R. 1940 Mad. 299; 188 I.C. 626.
31 *Bhawani Singh* v. *Maulvi Misbah-ud-din* (1929) 56 I.A. 170; 115 I.C. 729; 1929 A.P.C. 119.
32 *Purushottam Haridas* v. *Amruth Ghee Ltd.* (1961) A.A.P. 143.
33 *Ka Ron Lanong* v. *State of Assam* (1959) A. Assm. 75, 90.
34 *State of Rajasthan* v. *Manohar Singh* (1961) A. Raj. 143; (1961) 11 Raj. 1; See n. 13 *supra*.

for accounts all the transactions between them have to be included but an agent, who is a *pucca adatia,* can sue on specific transactions and need not include all the items included in the contract.[35]

The duty to account is owed by the agent to the principal, and not to other persons. Thus an agent appointed by the administrator of the estate of a deceased person to recover outstanding debts due to the estate is not liable to account on the contract of agency to the person entitled to the estate, and it makes no difference that representation was granted to the administrator as attorney of the mother and guardian of the person entitled to the estate.[36]

When a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, and advances have been applied for the benefit of the minor, the agent ought to be allowed these advances in taking the accounts. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself.[37]

Suit for accounts by Agent:

As to the form of a suit for an account between a principal and an agent, see the undermentioned cases.[38] A decree may be passed in favour of an agent in a suit brought by the principal for accounts.[39] In fact in some circumstances, an agent may maintain an action against his principal for accounts. The right is based not upon statute but upon equity, and is available where the accounts are in the possession of the principal, and the agent does not possess any.[40] According to the Supreme Court, the position in India is that though an agent has no statutory right to sue for an account against the principal nevertheless in special circumstances it may be equitable that the principal should account to the agent. His right may also arise in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the amount due to him unless the accounts of the principal are gone into, e.g. direct sales to customers in contravention of the contract of sole agency.[41] But the relationship of principal and agent is not alone sufficient to entitle an agent to an account in equity when the matter can be dealt within an action at law.[42] A suit by a principal against his agent for an account, and also for recovery of money that may be found due from him, is governed by art. 89, sch. II, of the Limitation Act, 1877 (see now the Indian Limitation Act, 1963, Sch. 1, art. 3).[43] But where the agent knew of the actual State of Affairs of the accounts he is not entitled to maintain a suit for accounts against the prin-

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35 *Nathubhai* v. *Chhotubhai* (1962) A. Guj. 68; *Godhanram* v. *Jaharmull,* 40 Cal. 335 dist.

36 *Chidambaram Chetti* v. *Pichappa Chetti* (1907) 30 Mad. 243. The suit in this case was founded on the contract of agency.

37 *Surendra Nath Sarkar* v. *Atul Chandra Roy* (1907) 34 Cal. 892.

38 *Degamber* v. *Kallynath* (1881) 7 Cal. 654; *Hurrinath* v. *Krishna* (1887) 14 Cal. 147; *Ram Lal* v. *Asian Assurance Co.,* 1933 A.L. 483; 144 I.C. 595.

39 *Kanshi Ram* v. *Dula Rai,* 1938 A.L. 179 I.C. 418; *Bhawani Sahai-Salig Ram* v. *Chhajju Mal* (1937) A.L.J. 115; 168 I.C. 983; 1937 A.A. 276.

40 *Basant Kumar* v. *Roshanlal,* 1954 A.N. 300; *Ram Lal* v. *Asian Assurance Co.,* 1933 A.L. 483, 144 I.C. 505; *Gulabrai Dayaram* v. *India Equitable Insurance Co.,* 1937 A.S. 51; *Inder Sain* v. *Piare Lal,* 1955 A. Punj. 143; *Padwick* v. *Stanley,* 68 E.R. 664; *Ramchandra Madhavados & Co.* v. *Moidunkutti* (1938) 2 M.L.J. 112; (1938) A.M. 707; *Lakshmiji Sugar Mills Co. Ltd.* v. *Banwari Lal* (1959) A.A. 546; *Shephard* v. *Brown,* 66 E.R. 681; *Blyth* v. *Whiffin* (1872) 27 L.T. 330. Bullen & Leakes Precedents of Pleadings (11th Edn.) 71-72. *A.V. George & Co.* v. *Peter Kuruvilla* (1957) A.T.C. 264; *Life Insurance Corp.* v. *Gurdial Singh* (1960) A. Punj. 607. Contra *Smith* v. *Leveux.* 46 E.R. 274.

41 *Narandas Morardas Gaziwala* v. *Papammal* (1966) Supp. S.C.R. 38; (1967) 2 S.C.J. 8, 10; (1967) A.S.C. 333; 1; *Ramchandra Madhav Dass & Co.* v. *Moidunkutti* (1938) A.M. 707; *Ramlal Kapur & Sons* v. *Asian Commercial Assurance* (1933) A.L. 483; *Basant Kumar* v. *Roshanlal* (1954) Nag. 435; (1954) A.N. 300 applied; *H.N. Alu & Co.* v. *Sundar Lal Taneja* (1981) A.D. 279.

42 Bowsted on Agency (12th Edn.) 173 quoted by Ramaswami J. in *Narandas Morarji Gaziawala* v. *Papammal* (1967) 2 S.C.J. 8, 9; (1967) A.S.C. 333. Storey's Equity Jurisprudence, 14th Edn. *Ramchandra Madhavadas* v. *Moovakat Moidunkutti & Bros.* (1938) A.M. 707.

43 *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (1905) 32 Cal. 719.

cipal.[44] But an agent can sue for accounts on equitable grounds. Where the defendant who had a conduct for supplying potatoes to the Army, entrusted the supply to the plaintiff and agreed that the plaintiff should receive the price and also to get a commission of 2% at the end of the supply, but the defendant received the whole amount of the moneys payable, the plaintiff was held entitled to maintain a suit for accounts, as the defendant had all the accounts of payments.[45]

Where an agent enters into a contract with a third person in his own name, and subsequently sues on the contract and obtains a decree, the principal is not entitled to maintain a suit for a declaration that he is beneficially interested in the decree and to recover the amount thereof from the judgment-debtor. The fact that the principal is entitled to an amount from the agent does not entitle him to maintain a suit of this kind. He could have adopted the contract and sued on it himself; after a decree is passed for the agent, he is too late.[46]

See also the commentary on s. 218, *post*.

For Agent's rights against a principal see *infra* (S. 222).

Liability of representative of agent to account.—The legal representative of an agent cannot be called upon to render accounts to the principal in the same sense as the agent himself. The remedy of the principal is to sue the representative for any loss he may have suffered by reason of the negligence or misconduct of his agent. In other words, the suit is not one for accounts strictly so called, but a suit for money payable to the principal out of the estate of the agent.[47] If a suit for accounts is instituted against an agent, but he dies while the suit is pending, it can be proceeded with against the legal representative, and the latter is bound to deliver books of account, papers and vouchers, but cannot be called upon to explain the accounts, and the onus shifts to the plaintiff to prove the realisation of items by the deceased.[48]

However, in the absence of a plea for rendering accounts by the agent's legal representatives the principal has to prove what, if any, amount is due from them. He can show what amount was advanced to the agent and what profit he made out of it. It is open to the agent's legal representatives then to render accounts and show that nothing is due or what is due.[49]

Agent's duty to communicate with principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

There does not appear to be any reported authority in point on this section. Obviously the rule must be as stated.

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

215 If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

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44 *Chaubey Sushil Chandra* v. *Raj Bahadur* (1977) A.A. 259, 264; *Rama Krishna Agency (P) Ltd.* v. *Life Insurance Corporation* (1967) A.AP. 199 reld on.

45 *H.N. Alu & Co.* v. *Sunder Lal Taneja* (1981) A.D. 279; *Naraindes Morardas* v. *S.P.A.M. Papammal* (1967) A.S.C. 533 reld. on.

46 *Godhanram* v. *Jaharmull* (1912) 40 Cal. 335; 16 I.C. 583.

47 *Kumeda Charan* v. *Asutosh Chattopadhya* (1912) 17 C.W.N. 5; 16 I.C. 742; *Badrinath Upadhya* v. *Kesho Kumar,* 1940 A.P. 114; 184 I.C. 495; *Profulla Kumar* v. *Firoza Sundari,* 1951 A. Cal. 182; *Daulat Ram* v. *Balak Ram,* 1950 A.E.P. 250; *Ashutosh Roy* v. *Arun Sankar,* 1950 A. Dacca 13; *Purshottam Vasudeo* v. *Ramkrishna* (1944) 46 Bom. L.R. 649, 218 I.C. 483, 1945 A.B. 21.

48 *Profulla Kumar* v. *Firoza Sundari,* 1951 A. Cal. 182, 189-190; *Daulat Ram* v. *Balak Ram,* 1950 A.E.P. 250, 251.

49 *Sia Dulari* v. *Bhagwati* (1973) A.A. 260, 261; *Purshottam* v. *Rama Krishna* (1965) A.B. 21 reld. on.

Illustrations.

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B*, has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy in ignorance of the existence of the mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Authoritative illustrations of the principle here laid down might be multiplied almost indefinitely from the English reports. A few will suffice for all useful purposes. The kind of case given in illustration (a) is the most common subject animadversion, but there is no doubt that the rule is general. "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt".[50]

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper".[51]

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal,[52] or settle any claim of his against the principal on exorbitant terms thereby to increase his own profit.[53] An agent must give his principal "the free and unbiassed use of his own discretion and judgment".[54]

A principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on.[55]

English authorities do not recognise the qualifications added at the end of this section,[56] and it does not appear why it was thought necessary to add them. The English doctrine may be thought to have been affected by the well-known severity of Courts of Equity towards trustees, and to be in excess of a reasonable standard of ordinary commercial justice. In fact, the special provisions of the Trusts Act, ss. 51—54, are more stringent. However, in *Achutha Naidu* v. *Oakley, Bowden & Co.*,[57] where an agent dealt on his own account in the business of the agency and bought the goods of his principals in the name of a dummy, it was held that the fraudulent concealment of his identity and the fact that he was competing in the same market brought the case within the present section.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

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50 Lord Lyndhurst, *Charter* v. *Trevelyan* (1844) 11 Cl. & F. 714, at p. 732; 65 R.R. 305, at p. 315. In India it seems to be an ordinary question of fact, see *Rameshardas Benarasidas* v. *Tansookhrai Bashesharilal*, 102 I.C. 366; 1927 A.S. 195.

51 Willes J. in *Mollett* v. *Robinson* (1870) L.R. 5 C.P. 646, at p. 655. Local usage of a trade or market contravening the general rule is not binding on a principal not proved to have known it. See S.C. in H.L. (1874) L.R. 7 H.L. 802.

52 *Grant* v. *Exploration, etc., Syndicate of British Columbia* (1900) 1 Q.B. 233, is a later example.

53 *Mathra Das Jagan Nath* v. *Jiwan Mal-Gian Chand* (1927) 9 Lah. 7; 112 I.C. 29; 1928 A.L. 196 (the plaintiffs were in a ring, including some of the buyers, for artificial inflation of prices).

54 *Clarke* v. *Tipping* (1846) Beav. 284, at p. 292; 73 R.R. 355, at p. 361.

55 *Wentworth* v. *Lloyd* (1864) 10 H.L. Cas. 589; 138 R.R. 315.

56 *Ex parte Lacey* (1802) 6 Ves. 625; 6 R.R. 9, 11.

57 (1922) 45 Mad. 1005; 69 I.C. 927.

Illustration.

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

Additional Illustration.

A, acting as *B*'s agent, agrees with *C* for the sale to him of fifty maunds of grain for future delivery. *A* delivers his own grain to *C* as against the contract. Subsequently he receives grain from *B* for delivery to *C* under the contract, which he sells in the market at a profit. *B*, may, on discovering these facts, claim the profit from *A*. (*Damodar Das* v. *Sheoram Das* (1907) 29 All. 730.

English & Indian Law—Agents liability to account.—There is no difference in regard to the libility of an agent to account to the principal between the English and Indian Law. If the agent conceals the true nature of the transactions by fraud, he fails in his duty as agent and he is liable for all profits obtained without the knowledge and consent in his capacity as agent.[58]

Principal's rights to profits.—"It may be laid down as a general principle that in all cases when a person is, either actually or constructively an agent for other persons, all profits and advantages made by him in the business without the knowledge of his employers[59] beyond his ordinary compensation, are to be for the benefit of his employers": S.A. § 211, adopted by the Court of Queen's Bench.[60] In *Reading* v. *The King*,[61] it was held that the Crown could recover from a serving soldier a bribe given to the latter by a civilian for masking by his official position, and in particular his uniform, criminal activities carried on by the civilian. "If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit",[62] and it is immaterial that in acquiring the profit the agent may have run the risk of loss,[63] and that the principal may have suffered no injury.[64] Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can recover the sum of money received to his use.[65] The principal can also recover from the agent and from the person who bribed him under the name of commission or otherwise, jointly and severally, damages for any loss sustained by the principal by reason of entering into the contract, *e.g.*, an addition fraudulently made to the price of goods bought through the agent in order to give the agent a

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58 *Jaiswal Coal Co.* v. *Fatehgarh Cooperative Marketing Society Ltd.* (1975) A. Cal. 303, 313; *Regier* v. *Campbell Stuart* (1939) 1 Ch. 766; (1939) 3 All E.R. 235.

59 *Parker* v. *McKenna* (1874) 10 Ch. App. 96; *Imperial Credit Co.* v. *Coleman* (1873) 6 H.L. 189; *Cohen* v. *Kashre* (1900) 83 L.T. 102.

60 *Morison* v. *Thompson* (1874) L.R. 9 Q.B. 480, at p. 485. *Nordisk Insulin Laboratorium* v. *George Products* (1953) Ch.D. 430 (C.A.). There are limits to constructive agency. *A* is a mortgagee in possession, holding from *Z*, the mortgagor, a power of attorney to manage and sell the property. *M*, a subsequent mortgagee with whom *A* has nothing to do, exercises his power of sale. *A* is not *Z*'s agent for the purpose of that sale and is entitled to become the buyer without being liable to account to *Z*: *Official Assignee* v. *R.M.P.V.M. Firm* (1929) 7 Rang. 61; 118 I.C. 625; 1929 A.R. 140.

But the connection of mortgagees' peculiar rights and duties with the general law of contracting parties is at best remote.

61 (1951) A.C. 507, H.L.

62 Stirling L.J., *Costa Rica R. Co.* v. *Forwood* (1901) 1 Ch. 746, 766. In the particular case the plaintiff company was held to have no right to complain of one of its directors having made profit out of a contract with the company, partly because of a special provision in the articles of association and partly because the company was in substance informed of all the material facts.

63 *Williams* v. *Stevens* (1866) L.R. 1 P.C. 352.

64 *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96; *Kaluram* v. *Chimniram*, 1934 A.B. 86; 36 Bom. L.R. 68; 150 I.C. 467; *Giribala* v. *Ushangini Debi*, A. Ass. 177.

65 *Ib.*, and see note 41 above; *Manikka Mooppanar* v. *Peria Muniyandi*, 1936 A.M. 541; 70 Mad. L.J. 724; 164 I.C. 31.

secret profit. Recovery of the illicit profit from the agent is no bar to an action for further damages against the third person.[66] Privy Council has held that both remedies cannot be exercised. The principal has to elect at the time the judgement is entered.[67] The relation which arises in such cases between the agent in default and the principal is that of debtor and creditor, not of trustee and beneficiary.[68] The ordinary law of limitation is applicable, the time running from the principal's discovery of the facts,[69] and the special rules as to following trust money into its investments do not apply.[70] Interest is recoverable on bribes and on all secret profits received by the agent.[71] But in the case of fraud, lapse of time no defence.[72]

Secret Profit.—The principal knowing that the agent will receive profit from third persons and acquiesces even under a misapprehension as to the extent of the remuneration, it is neither benefit nor profit within the rule as stated unless the agent misled him or knowing of the misapprehension neglects to correct him.[73]

A & B formed a partnership and entered into a contract with Government. *B* got the contract cancelled and got the contract for himself. This contract was held to be for the benefit of the partnership. If the contract was on less advantageous terms, then *B* would be liable for the loss on account of his fraudulent conduct.[74]

Where an agent has in effect bought from his principal, a subsequent purchaser from the agent with knowledge of the agency is in no better position against the principal than the agent himself.[75]

Bribed agent.—Where an agent of a Building Society—a director and employee—in connivance with one *M*, by taking a bribe from him caused him to buy approved land and which *M* purchased at the agent's instance for a lesser price and sold to the Society at an exaggerated price and the Society sued the agent (i) for the bribe received and (ii) damages, the Privy Council held that the principal was entitled to two alternative remedies against the bribed agent and the briber (a) for the payment of the amount of the bribe as money had and received and (b) for damages quantified by the difference between the original purchase price paid by *M* and the price paid by the Society and the principal had to elect, but at the time the judgment was entered. In this case the election was damages being more beneficial. He could not get both reliefs (a) and (b) but could elect between the two.[76]

An agent commissioned to find a suitable house for the principal bought it himself and then by a fictitious sale made his brother-in-law purchase it and then sold it to the principal at a large profit of about £ 3,000/-. It was held by selling his own house to the principal did not terminate his agency. He was not precluded from buying the house himself and then sell it to the principal but it was his duty to disclose the true facts. In the absence of such disclosure he was liable to account for the secret-profit.[77] In such a case he becomes a trustee for the principal.[78]

A solicitor of the trustees of a will and a beneficiary by attending meetings of a company on behalf of the trustees of the will of a testator who held 8000 shares in the company, the

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66 *Mayor of Salford* v. *Lever* (1891) 1 Q.B. 168, C.A. But see *Mahesan* v. *Malaysia Govt. Officers Co-op. Society Ltd.* (1978) 2 All ER 405—both remedies not exerciseable.
67 *Mahesan* v. *Malaysia Govt. Officers Coop. Society* (1978) 2 All ER 408.
68 *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1; *Powell* v. *Jones* (1905) 1 K.B. 11.
69 *Metropolitan Bank* v. *Heiron* (1880) 5 Ex. Div. 319.
70 *Lister & Co.* v. *Stubbs* (1890) 45 Ch. D. 1; *Powell* v. *Jones* (1905) 1 K.B. 11.
71 *Nant-y-glo Iron Co.* v. *Grave* (1878) 12 Ch.D. 738; *Pearson's Case* (1877) 5 Ch. D. 336; *Tota Ram* v. *Zalim Singh,* 1940 A.A. 69; (1939) All L.J. 1065; 187 I.C. 277.
72 *Bowstead: Agency* (14th ed.) Art. 53 p. 98.
73 *Bowstead: Agency* (14th ed.) Art 54.
74 *Navinchandra* v. *Moolchand* (1966) A.B. 111; (1965) Bom. 641.
75 *Molony* v. *Kernan* (1842) 2 Dr. & W. 31; 59 R.R. 635.
76 *Mahesan* v. *Malaysia Government Officers Cooperative House Building Society* (1978) 2 All ER 405, 410, 411, 412. (P.C.); *Dicta in Salford Corpn.* v. *Lever* (1891) 1 Q.B. 168, 177, 180 disappd.
77 *Regier* v. *Campvell-Stuart* (1939) 3 All ER 235.
78 Bowstead on Agency (14th ed.) Art 50 p. 92.

solicitor and the beneficiary obtained information and they purchased shares of the company. When the capital of the company was distributed the solicitor and the beneficiary made a big profit, they were held liable to account to the trustees. It was held mere use of information coming to a trustee or an agent in course of trusteeship or agency does not necessarily render him accountable for profit by use of information but where both the information and the opportunity came to them by acting for the trustees at the meetings of the company they became constructive trustees and were liable to account to the trustees for the profits thereon. But the House allowed them credit (to be enquired into) for the use of skill and work in acquiring these shares.[79]

The Directors of a Company purchased shares of a subsidiary Company and sold them at a profit. It was held that they were in a fiduciary relationship and were liable to account to the company. This rule of equity in no way depends on fraud or absence of *bona fides* or whether the company would have made that profit or that the Directors ran a risk or whether the company had been damaged or benefitted by the action of the Directors who however honest and well intentioned cannot escape the liability to account (per Lord Russell).[80]

A barrister who was employed as a legal adviser and confidential agent knowing of the extent of properties and liabilities purchased certain charges for less than the nominal value after he had ceased to be adviser and agent. He was held to be entitled to the value he paid. He had purchased without the consent or knowledge of his client as the reasons continue to operate.[81]

A sub-agent employed to sell a ship at a minimum price being unable to sell the ship purchased her himself and later sold at a profit and it was held he must account to the principal for the same.[82] So also commission received by a sub-agent employed to procure an advance for the principal.[83]

Society: Officer—Profit by.—An officer of an incorporated non profit making society had duties of trust and confidence placed in him, in particular he was subject to the strict obligation not to make profit from his position of trust. If he were to launch a newspaper for himself without previous arrangement with the society there would at least be a case of saying that the claim to retain benefit from it would be breach of fiduciary duty.[84]

Interest on profits payable by Agent.—Mahajan J. has held that where an agent particularly retains money of the principal which he should have paid over a court of Equity or of Law will allow interest thereon. An agent must pay interest in all cases of fraud on bribes received and on secret profits.[85]

Agent.—whether trustee.—It is not every breach of the agents fiduciary duty which results in his being treated as a trustee. The principles for determining the existence of a trust have not been laid down by the Courts. The broad principle is that a trust will be held to exist where it is just that an agent should hold as a trustee.[86]

Agent—trustee.—It is suggested in Bowstead *Agency* that cases where a trust has been held to exist fall into two categories (i) where money or property has been specifically en-

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79 *Boardman* v. *Phipps* (1966) 3 All ER 721, 744, 748, 749 (H.L); *Phipps* v. *Boardman* (1965) 1 All ER 849 affd.

80 *Regal (Hartings) Ltd.* v. *Gulliver* (1942) 1 All ER 378, 386 (H.L.) Bowstead on Agency (14th ed.) Art. 54 p. 100.

81 *Carter* v. *Palmer* (1841) 8 CL&F. 637 (H.L.). *Hobday* v. *Peters* (1860) 28 Beav. 349. See *Patten* v. *Hamilton* (1911) 1 Ir. R. 46. (C.A.).

82 *De Bussche* v. *Ali* (1877) 8 Ch.D. 286 (C.A.).

83 *Powell* v. *Jones* (1905) 1 K.B. 11 (C.A.).

84 *New Zealand Netherland Society 'Orange' Inc.* v. *Kuys* (1973) 2 All ER 1222, 1225, 1227. (P.C.).

85 *Trojan & Co.* v. *Rm. N.N. Nagappa Chettiar* (1953) A.SC. 235, 240; *Johnson* v. *Rex* (1904) A.C. 817 (P.C.) applied.

86 Chitty: On Contracts (24th ed.) Vol. II Para 2101.

trusted to the agent by the principal to hold for his benefit or use for a specific purpose; and (ii) where money or property is handed over to the agent by a third party to hold or convert into specific property for the benefit of his principal.[87] Whether a trust exists or not will depend on the equities and facts of each case.

Fraud—Lapse of Time.—Where the agent is guilty of fraud or accounts have been settled under influence, his accounts will be reopened from commencement and lapse of time is no defence. Illegality is no bar to an action for accounts unless the agency is illegal or the principal gives money for illegal purposes.[88]

Agent authorised to sell.—The plaintiff kept her share scrips with blank transfer forms with her father with authority to deal with them as he liked including the power to sell or to otherwise dispose them of. He was thus a mercantile agent as he was held out as owner.[89] He entrusted the shares to the defendant whose possession was therefore legal and sale by him was binding on the plaintiff.[90]

Forfeiture of commission.—An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction, even if the principal adopts it, for the principal could forthwith recover it back from him under this section or the equivalent common law rule. Moreover, he had no authority to make a contract with himself, and therefore has earned nothing as agent.[91] The principal's option of ratifying the unauthorised transaction does not give the agent any better right.

Knowledge of principal.—A transaction of this kind may be approved or ratified by the principal,[92] but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do.[93] Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price.[94] In *Regier* v. *Campbell-Stuart,*[95] *R* instructed *C* to find him a London house to buy. *C* sent particulars of such houses from time to time. In January *C* heard of a house belonging to *V* which *V* was willing to sell for £2,000, though priced at £4,250. *B, C's* nominee and brother-in-law, bought the house from *V* for £2,000 provided by *C*. In February *B* sold it to *C* for £4,500. *C* then told *R* the particulars, saying that he had bought it for himself. *C* sold it for £5,000 to *R*, disclosing a profit of £500. Farwell J. held that *C* must account for all his profits, and that though *C* was not precluded from buying the house for himself, he was bound, if he proposed to resell it to *R*, to give *R* the fullest possible information.

It is open to the principal whose agent has bargained for a secret profit or commission to adopt the transaction, if he thinks fit, for the purpose of suing the third party and recovering for himself the sum promised by him to the agent, or any part of it which the agent has not received.[96]

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87 Bowstead on *Agency* (14th ed.) pp. 125-130.
88 Bowstead on *Agency* (14th ed.) Art. 53 p. 98.
89 *Sumitra Devi* v. *Satya Narayan* (1965) A. Cal. 355.
90 *Ibid.*
91 *Salomans* v. *Pender* (1865) 3 H. & C. 639; 140 R.R. 651; *Joachinson* v. *Meghjee Vallabhdas* (1909) 34 Bom. 292.
92 *Re Haslam* (1902) 1 Ch. 765.
93 Jessel M.R., *Dunne* v. *English* (1874) L.R. 18 Eq. 524, 533-536, citing and approving earlier authorities; *Gluckstein* v. *Barnes* (1900) A.C. 240.
94 *Damodar Das* v. *Sheoram Das* (1907) 29 All. 730.
95 (1939) Ch. 766.
96 *Whaley Bridge Printing Co.* v. *Green* (1879) 5 Q.B.D. 109.

Profit not acquired in course of agency.—The Court of Appeal in *In re Cape Breton Co.*[97] held that an agent who, without disclosure, sells to his principal goods which were the property of the agent before the commencement of the agency is not, in the absence of misrepresentation,[98] liable to account for the profit made by him or for the difference between the contract price and the market value, even if the remedy of rescission is not open to the principal owing to its having become impossible.[98] This decision, though obviously open to criticism, has been approved by the Privy Council in a Canadian appeal[99] where a director of a company purchased property on his own account, and subsequently sold it to the company at a higher price without disclosing the profit. The Bombay High Court[1] has held that, whether *In re Cape Breton Co.* was rightly decided or not, "it cannot be said to have laid down a principle so generally accepted that we must assume it to have been present to the minds of those who framed the Contract Act in 1872, and what we have to do is to construe the Contract Act. The words of s. 216 are quite general and contain no such qualification on the liability of an agent to account for a profit made by the sale of his own goods to the principal as was approved in *In re Cape Breton Co.*"[1]

Unauthorised profits of agents.—An agent is liable to refund to the principal the amount of "return commission" received by him from his sub-agent.[2]

Payments authorised by custom.—The law of the present section does not interfere with the customary mode of remunerating an agent, in certain branches of business, by a discount or percentage which is ultimately paid by the third party and not by his own principal. Here agent's position is almost that of an officer of a market paid by a toll on the goods dealt with. Such allowances are constant in brokerage and insurance business and are so well known that no special consent on the principal's part is needed to cover them. They are included in the agent's general authority to do business in the usual manner. "If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging.[3] These charges being allowed on a fixed scale to all persons employed in that kind of business alike, and notorious, are not obnoxious to the rule against secret profits and corrupt allowances.

Agreements against agent's duty void.—An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehta* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucri,* on the brokerage earned by them in respect of transactions carried out through them by the *mehta's* master, and no express consideration was alleged or proved by the *mehta,* the Court refused to imply as a consideration an agreement by the *mehta* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant. Westropp J. said: "To support such an agreement would be against the policy which should regulate the relation of master and servants, and would be subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals which the servant ought to be vigilant to expose and to check... Could any one

97 (1884) 29 Ch. D. 795. And see *Ladywell Mining Co.* v. *Brookes* (1887) 35 Ch. D. 400.
98 As to misrepresentation, see *In re Leeds, etc., Theatre of Varieties* (1902) 2 Ch. 809.
99 *Burland* v. *Earle* (1902) A.C. 83.
1 *Kaluram* v. *Chimniram,* 1934 A.B. 86, *per* Beaumont C.J., at p. 88; 36 Bom. L.R. 68: 150 I.C. 467.
2 *Mayen* v. *Alston* (1892) 16 Mad. 238, 265, 267. *Cp. Rossiter* v. *Walsh* (1843) 4 Dr. & W. 485; 65 R.R. 745; a peculiar case of an improvident lease by an agent to a sub-agent of the same principals, where, the agent not being in fact empowered by all the principals, Sir E. Sugden saw his way to set the lease aside.
3 *Great Western Insurance Co.* v. *Cunliffe* (1874) L.R. 9 Ch. 525, 540; *Baring* v. *Stanton* (1876) 3 Ch. D. 502.

contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for percentage on his master's purchases, supposing an agreement to that effect? It would be against all policy; it would place the servant in a position inconsistent with the duty which he owes to his master".[4]

An agreement whereby the defendant agreed to remunerate an executor appointed under her brother's will out of her own pocket for undertaking the duties of executor, which he declined to do without remuneration, does not create such an interest at variance with the duties imposed upon executors as to render the agreement illegal on the ground of public policy.[5] The Court said:[6]

"It has, however, been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty (see *Egerton* v. *Earl Brownlow,* 4 H.L.C. 1, 250); that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with care and diligence. We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy, we are not prepared to hold that such an agreement is necessarily unlawful. We think it should be borne in mind that if a sole executor, or where there is more than one all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that under the circumstances the agreement entered into between him and the Maharani was unlawful."

Agent's right of retainer out of sums received on principal's account.

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

The right conferred in terms by this section is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. S. 221 (below) further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, i.e., a right to have his claims satisfied, in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand, so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The Court will not allow any collusive arrangement between parties to deprive the solicitor of this benefit.[7] But intention to defraud the successful party's solicitor is not presumed from the mere fact of the action being settled without his assistance.[8] It seems doubtful, however, whether this rule can properly be regarded as having anything to do with the general law of agency, and therefore whether it can furnish any safe guidance for our present purpose.

An agreement entered into between a pleader and his client respecting his remuneration was void under the provisions of s. 28 of the Legal Practitioners Act, 1879, if not reduced to writing and filed in court; but the pleader did not, by reason of that fact, lose his right under

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4 *Vinayakrav* v. *Ransordas* (1870) 7 B.H.C.O.C. 90.
5 *Narayan Coomari Debi* v. *Shajani Kanta Chatterjee* (1894) 22 Cal. 14, cited under ss. 23 and 25, *ante*.
6 *Ibid.*, at pp. 20, 21.
7 *Ex. parte Morrison* (1868) L.R. 4 Q.B. 153, 156. See *Cullianji Sangjibhoy* v. *Raghowji Vijpal* (1906) 30 Bom. 27.
8 *The "Hope"* (1883) 8 P.D. 144.

the present section to retain disbursements made by him on his client's behalf out of the sums that may be received by him on account of his client in the case.[9]

The language of this section is not very well fitted to cover damages and costs for which the principal may be liable to indemnify the agent under s. 222, but it is hardly possible to suppose that it would not be held to do so.

Pakki adat.—A *pakka adatia* is entitled to the charges of remitting to the constituent the profits made by him on the constituent's behalf, as an agent is under this section.[10]

Business.—The word "business" in this section means the same business or a continuing business. Hence money received by an agent in one business cannot be retained by him on account of remuneration alleged to be due to him in a different business altogether which had long since been completed.[11]

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Mode of payment.—It follows from this rule that an agent to receive money has generally no authority to receive anything else as equivalent. As between the principal, and a third person, a set-off or balance of accounts between that person and the agent in his own right is not a good payment to the agent on behalf of the principal. The debtor "must pay in such a manner as to facilitate the agent in transmitting the money to his principal".[12] It seems that an alleged custom to the contrary cannot be sustained. If money is paid to an agent on his principal's account by a person who is also indebted to the agent personally, the agent is not entitled to appropriate the money to his own debt, but must pay it over to the principal.[13] Nor is an agent, who has received money on the principal's account, entitled to set up against the principal claims made by third persons in respect of the money.[14]

Payments in respect of illegal transaction.—If an agent receives money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money.[15] Upon this principle it has been held that an agent receiving cesses from tenants which are illegal under the Bengal Tenancy Act,[16] or moneys due to the principal under a wagering contract,[17] is bound under the provisions of this section to pay the same to the principal. But this rule does not apply where the contract of agency is itself illegal.[18] And it is open to an agent who has received money in respect of a void transaction, or otherwise under such circumstances that

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9 *Subba Pillai* v. *Ramasami Ayyar* (1903) 27 Mad. 512. S. 28 of the Act of 1879 has been repealed by the Legal Practitioners (Fees) Act, 1926; but the case cited is a useful illustration of the principle involved.
10 *Kedarmal Bhuramal* v. *Surajmal Govindram* (1907) 33 Bom. 364.
11 *Sardar Mohammad* v. *Babu Daswandhi* (1885) Punj. Rec. no. 49.
12 *Pearson* v. *Scott* (1878) 9 Ch. D. 102, at p. 108.
13 *Health* v. *Chilton* (1844) 12 M. & W. 632; 67 R.R. 447; *Shaw* v. *Picton* (1825) 4 B. & C. 715; 28 R.R. 455.
14 *Roberts* v. *Ogilby* (1821) 9 Price 269; 23 R.R. 671.
15 *Tenant* v. *Elliot* (1797) 1 B. & P. 3; 4 R.R. 755, and see editor's note there; *Bhola Nath* v. *Mul Chand* (1903) 25 All 639; *Palaniappa Chettiar* v. *Chockalingam Chettiar* (1921) 44 Mad. 334; 60 I.C. 127; *Haji Habib* v. *Bhikamchand Jankilal,* 1954 A.N. 306, 313 ; *Murlidhar* v. *Kishore Chand* (1960) A. Raj. 296; *Bholanath* v. *Mulchand,* 25 All. 639 folld.; *Hippisley* v. *Knee Brothers* (1905) 1 K.B. 1; *Babulal Swarupchand Shah* v. *South Satara (fixed delivery) Merchant's Assn.* (1960) A.B. 548; *Shivram Gobind* v. *Vishwanath Gobind* (1956) Bom. 185. See under s. 188 *supra.*
16 *Nagendrabala* v. *Guru Doyal* (1903) 30 Cal. 1011.
17 *Bhola Nath* v. *Mul Chand, supra,* note 79.
18 *Sykes* v. *Beadon* (1879) 11 Ch. D. 170, *per* Jessel M.R., at pp. 193 *et seq.*, where the earlier cases are considered and explained.

he was bound to repay it, to show in an action by the principal that it has been repaid to the person from whom it was received.[19]

When agent's remuneration bcomes due.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not actually complete.

"Special contract".—When there is an express contract providing for the remuneration of the agent, the amount of the remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of that contract.[20] There is no room for implication in such a case.[21] No other contract inconsistent therewith, whether founded on custom or usage or otherwise can be implied; but evidence of a particular usage may be given for the purpose of incorporating provisions that are not incosistent with the terms of the express contract.[20] In the absence of an express contract, the right to remuneration and conditions under which it is payable are held in English law to depend on the custom or usage of the particular business in which the agent is employed.[22] The same principle applies in India.[23] The words "special contract" in this section include a contract arising by implication from custom or usage.

"Completion of such act."—"The question whether or not an agent is entitled to commission has repeatedly been litigated and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him".[24] In other words, the commission becomes due if the broker has induced in the party for whom he acts the contracting mind, the willingness to open negotiations upon a reasonable basis.[25] And the right to brokerage is not lost even though a change or modification of the terms of the contract is made between the buyer and seller without the intervention of the broker.[26] A broker employed to procure a loan on property becomes entitled to his commission if he finds a party willing to advance the

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19 *Murray* v. *Mann* (1848) 2 Ex. 538; 76 R.R. 686; *Shee* v. *Clarkson* (1810) 12 East, 507; 11 R.R. 473. In the former case the contract under which the payment was made was rescinded on the ground of the agent's fraud.

20 *Green* v. *Mules* (1861) 30 L.J.C.P. 343; 126 R.R. 894 (if it is agreed that commission shall be payable only in the event of success, the agent cannot claim a *quantum meruit* in the absence of success); *Cutter* v. *Powell* (1795) 6 T.R. 320; 3 R.R. 185; *Warde* v. *Stewart* (1856) 1 C.B.N.S. 88; 107 R.R. 582; *Fullwood* v. *Akerman* (1862) 11 C.B.N.S. 737; 132 R.R. 735; *Biggs* v. *Gordon* (1860) 8 C.B.N.S. 638; 125 R.R. 824; *Parker* v. *Ibbetson* (1858) 4 C.B.N.S. 346;·114 R.R. 752; *Clark* v. *Wood* (1882) 9 Q.B.D. 276; *Ayyannath Chetty* v. *Subramania Iyer* (1923) 45 Mad.L.J. 409; 76 I.C. 756 (brokerage payable if title approved). Proof that a person has acted as a broker entitles him to commission at a reasonable rate if no rate has been specified: *Khurshed Alam* v. *Asa Khan,* 1933 A.L. 784, 146 I.C. 761; *Sellers* v. *London Counties Newspapers* (1951) 1 All E.R. 544.

21 *Raja Ram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29; *Jones* v. *Lowe* (1945) K.B. 73; (1945) 1 All E.R. 194.

22 *Read* v. *Rann* (1830) 10 B. & C. 438; 34 R.R. 473; *Broad* v. *Thomas* (1830) 7 Bing. 99; 33 R.R. 399 (custom of City of London by which shipbrokers entitled to commission only in the event of completion of contracts negotiated by them held to exclude any claim, even for *quantum meruit,* in respect of a contract not completed, though the non-completion was owing to the act of the principal); *Baring* v. *Stanton* (1876) 3 Ch. D. 502.

23 *Satchidananda Dutt* v. *Nritya Nath Mitter* (1923) 50 Cal. 878; 79 I.C. 287; *Karuthan Chettiar* v. *Chidambaram Chettiar* A.I.R. 1938 Mad. 725; (1938) 2 Mad. L.J. 79; 179 I.C. 225. See also *E. D. Sassoon & Co.* v. *Commissioners of Income-tax,* 1954 A.S.C. 470.

24 *Per* Erle C.J. in *Green* v. *Bartlett* (1863) 14 C.B.N.S. 681; 135 R.R. 868.

25 *Municipal Corporation of Bombay* v. *Cuverji Hirji* (1895) 20 Bom. 124; *Fazal Elahi* v. *Muhammad Saeed,* 1935 A. Pesh. 56; 156 I.C. 131.

26 *Wilkinson* v. *Martin* (1837) 8 C. & P. 1; *Mansell* v. *Clements* (1874) L.R. 9 C.P. 139; *Lara* v. *Hill* (1863) 15 C.B.N.S. 45; 137 R.R. 377, where the only disputed matter was the construction of special terms.

money, even "if the contract were afterwards to go off from the caprice of the lender, or from the infirmity of the title" [27] An authority to negotiate a sale and to secure a buyer at a stated price is complied with when the agent produces a buyer who makes a firm offer at that price. If the owner sells the property at a lower price to a nominee of the buyer produced by the agent, the latter will still be entitled to his full commission.[28] Whether the other party to the contract ultimately formed has been brought into relation with the principal by means of the agent's intervention is a question of fact. It is not necessary to establish his claim that he should have been the other party's first or sole source of information.[29] But in order to establish a claim for commission the agent must show that the transaction in respect of which the claim is made was a direct result of his agency.[30] It is not sufficient to show that the transaction would not have been entered into but for his introduction. He must go further, and show that his introduction was the direct cause of the transaction.[31] A broker employed to bring about a completed transaction of sale must show that he was the *cause causans* and not that he was a remote cause. Thus property obtained by litigation is not property obtained by fruits of a broker's labours and therefore the broker is not entitled to his commission.[32] But if a broker has complied with the terms of his employment, he is entitled to the entire remuneration due to him.[33]

Solicitors agreement for getting sale done—Act incomplete.—Where a Solicitor agreed not to charge anything except his out of pocket expenses until after the sale of the client's property was completed and the sale was not completed, the Solicitor is not entitled to charge his remuneration and costs on the agent's commission.[34]

Agent prevented from earning remuneration.—If, in breach of a contract, express or implied, with an agent, the principal, by refusing to complete a transaction or otherwise, prevents the agent from earning remuneration, the agent is entitled to damages;[35] and in such cases the measure of damages, where the agent has done all that he undertook to do, is the full amount of remuneration that he would have earned if the transaction had been duly completed, or the principal had otherwise carried out his contract.[36] In *Luxor (Eastbourne) Ltd.* v. *Cooper,*[37] the House of Lords held that where *C*, an agent, has produced a purchaser *B*, who is ready to buy *L*'s cinema 'subject to contract',[38] but *L* refuses to deal with *B, C* is not entitled to any remuneration, on the ground that, in the absence of an express term, an agent takes the risk of the owner not being willing to conclude a bargain with his nominee. Their Lordships distinguished *Prickett* v. *Badger*[39] as a case on special and very unusual facts. They regarded *Inchbald* v. *Western Neilgherry*[40] as a case where *X* employs *Y* to do for reward a piece of work which requires outlay and effort, the work depending on the continuing existence of a given subject-matter under *X*'s control, and the Court finds an implied term that *X* will not

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27 *Green* v. *Lucas* (1876) 31 L.T. 731, on appeal 33 L.T. 584; *Fisher* v. *Drewitt* (1878-9) 48 L.J. Ex. 32; *Elias* v. *Gobind* (1902) 30 Cal. 202; *Sheikh Farid* v. *Hargulal,* 1937 A.A. 46; 1936 All L.J. 1163; 166 I.C. 631.

28 *Abdul Ahmed* v. *Animendra* (1950) S.C.R. 30; (1950) A.S.C. 15; *Raja Ram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29.

29 *Mansell* v. *Clements* (1874) L.R. 9 C.P. 139; *Jordan* v. *Ram Chandra Gupta* (1904) 8 C.W.N. 831.

30 *Bray* v. *Chandler* (1856) 18 C.B. 718; 107 R.R. 419; *Gibson* v. *Crick* (1862) 1 H. & C. 142; 130 R.R. 425; *Tribe* v. *Taylor* (1876) 1 C.P.D. 505; *Antrobus* v. *Wickens* (1865) 4 F. & F. 291; 142 R.R. 690.

31 *Tribe* v. *Taylor, supra; Liladhar Chaturbhuj* v. *Mathuradas Goculdas* (1933) 58 Bom. 583; 36 Bom. L.R. 119; 1934 A.B. 158.

32 *Haribux Singhania* v. *Smt. Omrao Devi* (1956) A. Cal. 232; *Millar Son & Co.* v. *Radford* (1903) 18 T.L.R. 575; 576.

33 *Rajaram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29.

34 *Bissadendu Biswas* v. *Mt. Sakina Begum* (1973) A. Cal. 135, 139; *Jennings* v. *Johnson* (1873) L.R. 8 C.P. 425; *Clare* v. *Joseph* (1907) 2 K.B. 369; *Gundry* v. *Sainsbury* (1910) 1 K.B. 645 refd. to.

35 *Turner* v. *Goldsmith* (1891) 1 Q.B. 541; *Inchbald* v. *Western Neilgherry, etc. Co.* (1864) 17 C.B.N.S. 733; *Mehta* v. *Cassumbhai* (1922) 24 Bom. L.R. 847; 75 I.C. 193; 1922 A.B. 433.

36 *Prickett* v. *Badger* (1856) 1 C.B.N.S. 296; 107 R.R. 668; *Roberts* v. *Barnard* (1884) I.C. & E. 336.

37 (1941) A.C. 108.

38 See notes on s. 7.

39 (1856) 1 C.B.N.S. 296.

40 (1864) 17 C.B.N.S. 733.

prevent *Y* from doing the work by destroying the subject-matter.[41] Thus if *Y* is employed to paint *X*'s portrait, it is implied that *X* will co-operate to the extent of giving sittings.[42] Their Lordships held, however, that *L* could arbitrarily refuse to deal with *B*, as the work that *C* was invited to do was to produce an offer for the property, a piece of work that did not require *L*'s co-operation. It has also been held that an agent, who introduces a purchaser willing to buy at the seller's price, is not entitled to commission even where the purchaser has paid a deposit, if, before there is a binding contract, the seller changes his mind and decides not to sell.[43] But where a purchaser has agreed with the agent to pay a certain price, although the agent has no power to conclude a sale, and the owner subsequently sells to that very purchaser at a lower price, the agent is entitled to commission on the sum originally offered, not merely on the lower price.[44] The agent is also entitled to his commission if he introduces a purchaser with whom the owner concludes a contract, even though the owner is subsequently induced by the purchaser to release the latter from his obligations.[45] The agent is also entitled to his remuneration if a legally binding contract is concluded, even though the purchaser never pays the price.[46] Where the authority of an agent is revoked after it has been partly exercised or after the agent has attempted to exercise it, the question whether he is entitled to a *quantum meruit* for the work previously done depends upon the terms of the contract of agency, and the custom or usage of the particular trade or business.[47]

Express contract for remuneration.—Where the terms of remuneration are contained in a writing, the agent is not entitled to remuneration unless all conditions imposed by the writing have been fulfilled.[48] And no implied terms can be set up to add to or vary such terms.[49]

Agent not entitled to remuneration for business misconducted.

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations.

(a) *A* employs *B* to recover 100,000 rupees from *C*, and to lay it out on good security. *B* recovers the 100,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 100,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B* (*sic* in the Act, but it should obviously be *A*).

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his service, and must make good the loss.

(S.A., ss. 331—334. Negligence may disentitle an agent to recover even advances and disbursements out of pocket: *ib s.* 349). "A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission." The principle underlying section 220 is that a principal is entitled to have an honest person as his agent and not a person whose

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41 (1941) A.C. 108, 118.
42 *Ibid.* See also s. 53.
43 *Jones* v. *Lowe* (1945) K.B. 73, Hilbery J.
44 *Abdula Ahmed* v. *Animendra Kissen Mitter* (1950) S.C.R. 30, (1950) A.S.C. 15, distinguishing the *Luxor Case*. Approved by Professor Winfield in (1950) Ind. Law Rev. 311.
45 *Fowler* v. *Bratt* (1950) 2 K.B. 96, C.A.
46 *Midgley* v. *Hand* (1952) 2 Q.B. 432, C.A.
47 *Queen of Spain* v. *Parr* (1868) 39 L.J.Ch.73; *Simpson* v. *Lamb* (1856) 17 C.B. 603; 104 R.R. 806. The agent must show that there was a contract, express or implied, to pay remuneration in such a case. The burden of proof is on him. See *Liladhar Chaturbhuj* v. *Mathuradas Goculdas, supra,* note 95, where the law is fully discussed.
48 *Lalljee Mahomed* v. *Dadabhai* (1916) 23 Cal. L.J. 190, 196; 34 I.C. 807; *Chinnaswami* v. *C. Doctor & Co.*, 1944 A.M. 546; *Narayana Rao* v. *Ramachandra Rao* (1959) A.A.P. 370.
49 *Raja Ram Jaiswal* v. *Ganesh Prasad* (1959) A.A. 29; *Jones* v. *Lowe* (1945) 1 All E.R. 194.

actions are calculated to prejudice his interest and it is only such agent who can claim commission.[50] Accordingly where an agent for sale, having sold the property, retained half the deposit as commission with the principal's consent, and also, without the principal's knowledge, received a commission from the buyer, the agent was held liable not only to account for the secret commission to the principal but to return the usual commission, which he had retained.[51] But an agent who retains discounts received by him from third persons, in the honest belief that he is entitled to retain them, does not thereby forfeit his commission, although he may be liable to account for the discounts as profits received without the knowledge or consent of the principal.[52] And even if an agent makes fraudulent overcharges in respect of some transactions, that will not disentitle him to commission on other separate and distinct transactions in which he has acted honestly.[53]

Remuneration in an agency agreement cannot be forfeited unless there is interdependence between the act of misconduct and the performance of work or the fulfilment of condition upon which the right to remuneration depends.[54]

Commission secretly received by an auctioneer.—An auctioneer employed to sell goods was to be paid a lump sum and actual out-of-pocket expenses of advertisement. Any commission paid to him by the advertising agency, which was customarily paid, if not declared by the auctioneer would not disentitle him to the remuneration as it was not sufficiently connected with the subject-matter of their employment and was separable from his main duty. He was also held not to be entitled to the gross amounts of advertisement but the actual amounts spent, i.e. the commission received from advertisers was to be deducted.[55]

Agent's lien on principal's property.

221. In the absence of any contract to the contrary an agent is entitled to retain[56] goods, papers and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Agent's lien.—One practical consequence of this rule is that a buyer of property from an auctioneer, or other agent known to be in possession of the property and entitled to a lien on it, cannot set up payment to the principal as a defence to an action for the price at the suit of the agent.[57] Similarly a subsequent charge given by the principal to a third person will be postponed to a factor's lien. It seems that property is sufficiently "received" by an agent for the purpose of this section when there has been any dealing with it amounting to delivery to him under s. 90.[58] An auctioneer, employed to sell furniture at the house of the owner, is sufficiently in possession of the furniture to entitle him to a lien thereon for his charges and commission.[59] But a lien cannot be acquired by a wrongful act. The possession of the property, therefore, must be obtained by the agent lawfully in order that a lien, whether general or particular, may attach. If he obtains it by misrepresentations,[60] or without the principal's

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50 *Purushottam* v. *Amruth Ghee Co.* (1961) A.A.P. 143, 157, *Sridhar Vasanta Rao* v. *Gopala Rao* (1940) A.M. 299; See n. 15 *infra*.
51 *Andrews* v. *Ramsay & Co.* (1903) 2 K.B. 635, *per* Lord Alverstone C.J., at p. 638; *Sirdhar Vasanta Rao* v. *Gopala Rao*, 1940 A.M. 299; 188 I.C. 626.
52 *Hippisley* v. *Knee* (1905) 1 K.B. 1.
53 *Nitidals Taendstikfabrik* v. *Bruster* (1906) 2 Ch. 671.
54 *P & O. S.N. Co.* v. *Johnson & Co.* (1938) 60 C.L.R. 188, 253.
55 *Hippisley* v. *Knee Brothers* (1905) 1 K.B.1.
56 Not sell: *Mul Chand-Shib Dhan* v. *Sheo Mal Sheo Parshad*, 123 I.C. 867; 1929 A.L. 666 (elementary).
57 *Robinson* v. *Rutter* (1855) 4 E. & B. 954; 99 R.R. 849.
58 See *Bryans* v. *Nix* (1839) 4 M. & W. 775; 51 R.R. 829; See s. 33 of Act III of 1930.
59 *Williams* v. *Millington* (1788) 1 H. Bl. 81; 2 R.R. 724.
60 *Madden* v. *Kempster* (1807) 1 Camp. 12.

authority,[61] he has no lien thereon. Nor, where property is entrusted to an agent for a special purpose, can the agent claim any lien, the existence of which is inconsistent with such purpose.[62] See further on this subject the commentary on s. 171, *ante*.

A commission agent, who purchases goods for and on account of the principal and dispatches the goods by rail, has an agent's lien on the goods for the price and commission under section 221 of the Contract Act. This would be so even where the goods are dispatched to self and the Railway Receipt is sent with a hundi for the price and commission.[63]

The lien claimable under this section is confined to commission, disbursements, and services in respect of the specific property on which lien is claimed.[64] Where the secretaries and treasurers of a limited company claimed a lien under this section on "goods, papers, and other property, whether moveable or immoveable," of the company in their possession for loans made on behalf of the company and for the purpose of the *whole concern*, it was held that the loans, not having been specially assigned to the property, did not constitute "disbursements and services in respect of" that property, and the agents were, therefore, not entitled to the lien claimed.[65]

How far lien effective against third persons.—The lien, whether general or particular, of an agent attaches only to property in respect of which the principal has, as against third persons, the right to create a lien,[66] and, expect in the case of money and negotiable securities, is confined to the rights of the principal in the property at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time.[67] It seems unnecessary to give illustrations of this rule or to multiply authorities, which are numerous, because an agent's lien being founded on a contract, express or implied, with the principal, it obviously follows that the law must be as stated. In the case of moneys or negotiable securities, an agent's lien is not affected by the rights or equities of third persons,[68] provided he receives them honestly, and has no notice of any defect in the title of the principal at the time when the lien attaches.[69] This does not depend on any principal of agency, but on the rule that any person who takes a negotiable instrument in good faith and for value acquires a good title notwithstanding any defect in the title of the person from whom he takes it; a person taking such an instrument under circumstances giving him a lien thereon being considered a holder for value to the extent of the lien.[70]

Lien of sub-agents.—A sub-agent who is employed by an agent without the authority, express or implied, of the principal[71] has no lien, either general or particular, as against the principal.[72] But a sub-agent who is properly appointed has the same right of lien against the principal in respect of debts and claims arising in the course of the sub-agency, on property coming into his possession in the course of the sub-agency, as he would have had against the

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61 *Walshe* v. *Provan* (1853) 8 Ex. 843; 91 R.R. 795; *Gibson* v. *May* (1853) 4 De G. M. & G. 512; 102 R.R. 426; *Leete* v. *Leete* (1879) 48 L.J.P. 61.

62 *Buchanan* v. *Findlay* (1829) 9 B. & C. 738; *Ex parte Gomez* (1875) L.R. 10 Ch. 639; *Pestonji* v. *Ravji Javerchand, 1933 A.S. 235. See also Spalding* v. *Ruding* (1843) 6 Beav. 376; 63 R.R. 120; *Burn* v. *Brown* (1817) 2 Stark. 272; 19 R.R. 719.

63 *Venkatasubbamma* v. *Subbayya* (1963) A.A.P. 17, 21; *Balmukand* v. *Jagannath* A. Raj. 212; (1963) 13 Raj. 579.

64 *Hira Lal* v. *Ram Rakha*, 1953 A. Pepsu 113, 115.

65 *In re Bombay Sawmills Co.* (1889) 13 Bom. 314, 321, 322.

66 *Ex parte Beall* (1883) 24 Ch. D. 408; *Cunliffe* v. *Blackburn Building Society* (1884) 9 App. Cas. 857.

67 *London and County Bank* v. *Ratcliffe* (1881) 6 App. Cas. 722; *Turner* v. *Letts* (1885) 20 Beav. 185; 7 D.M. & G. 243; *Hollis* v. *Clardige* (1813) 4 Taunt. 807; 39 R.R. 662, 663; *Pratt* v. *Vizard* (1833) 5 B. & Ad. 808; 39 R.R. 660; *In re Llewellin* (1891) 3 Ch. 145.

68 *Jones* v. *Peppercorne* (1858) Johns. 430; 123 R.R. 177.

69 *Solomons* v. *Bank of England* (1810) 13 East, 135; 12 R.R. 341; *De la Chaumette* v. *Bank of England* (1829) 9 B. & C. 208; 32 R.R. 643; *Ex parte Kingston* (1871) L.R. 6 Ch. 632.

70 *London and Joint Stock Bank* v. *Simmons* (1892) A.C. 201; *Misa* v. *Currie* (1876) 1 App. Cas. 554.

71 See s. 190, above.

72 *Solly* v. *Rathbone* (1814) 2 M. & S. 298.

agent employing him if the agent had been the owner of the property; and this right is not liable to be defeated by a settlement between the principal and agent to which the sub-agent is not a party.[73] If a sub-agent properly appointed has no knowledge that the person employing him is an agent, but believes on reasonable grounds, at the time when the lien attaches, that the agent is the owner of the property and is acting on his own behalf, the sub-agent's lien, whether general or particular, is available against the principal to the same extent as it would have been against the agent if the agent had been the owner of the property; and the lien is not in such a case limited to debts and claims arising in the course of the sub-agency.[74] If, however, the sub-agent is aware of the existence of a principal at the time when the lien attaches, his general lien in respect of debts and claims not arising in the course of the sub-agency is available against the principal only to the extent of the lien, if any, to which the agent employing him would have been entitled had the property been in his possession.[75]

How lien lost or extinguished.—The lien of an agent,being a mere right to retain possession of the property subject thereto, is, as a general rule, lost by his parting with the possession;[76] and where goods, on which an agent had a lien, were delivered by him on board a ship, to be conveyed on account and at the risk of the principal, it was held that the agent had no power to revive the lien by stopping the goods in transit.[77] But where possession is obtained from the agent by fraud,[78] or is obtained unlawfully and without his consent,[79] his lien is not affected by the loss of possession. And if possession is given to a bailee for safe custody, or for some other purpose consistent with the continuance of the lien, and the circumstances are such as to show that the agent intends to retain his rights, the lien will not be prejudiced by his parting with the possession.[80] The lien of an agent is not affected by an order winding up the company whose agent he is. Therefore where the agent is in possession of property belonging to the company by virtue of his lien he cannot be required to deliver up possession to the official liquidator.[81]

An agent's lien is extinguished by his entering into any agreement,[82] or acting in any character,[83] inconsistent with its continuance; and may be waived by conduct indicating an intention to abandon it.[84] Whether the taking of other security for the claim secured by the lien

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73 *Fisher* v. *Smith* (1878) 4 App. Cas. 1 (policy broker's lien for premiums effective against principal of agent employing him though he new him to be an agent, and though the principal had paid the agent the amount due for premiums); *Cahill* v. *Dawson* (1857) 3 C.B.N.S. 106; 111 R.R. 565; *Mildred* v. *Maspons* (1883) 8 App. Cas. 874.

74 *Mann* v. *Forrester* (1814) 4 Camp. 60; 15 R.R. 724; *Westwood* v. *Bell* (1815) 4 Camp. 349; 16 R.R. 800; *Montagu* v. *Forwood* (1893) 2 Q.B. 350; all cases of policy brokers, in which it was held that the broker had a lien against the principal for a general balance due from the agent. *Taylor* v. *Kymer* (1832) 3 B. & Ad. 320; 37 R.R. 433, where a broker, employed by a commission agent to buy goods, was held to have a lien on the goods for a general balance due to him from the commission agent.

75 *Mildred* v. *Maspons* (1883) 8 App. Cas. 874; *Levy* v. *Barnard* (1818) 2 Moo. 34; 19 R.R. 484; *Snook* v. *Davidson* (1809) 2 Camp. 218; 11 R.R. 696; *Ex parte Edwards* (1881) 8 Q.B.D. 282.

76 *Kruger* v. *Wilcox* (1754) Ambl. 252; *Bligh* v. *Davies* (1860) 28 Beav. 211; 126 R.R. 95. Where goods are lost in transit, there can be no question of lien: *Kishun Das* v. *Ganesh Ram,* 1950 A.P. 481.

77 *Sweet* v. *Pym* (1800) 1 East, 4; 5 R.R. 497; *Hathesingh* v. *Laing* (1873) L.R. 17 Eq. 92.

78 *Wallace* v. *Woodgate* (1824) R. & M. 193.

79 *Dicas* v. *Stockley* (1836) 7 C. & P. 587; 48 R.R. 825; *In re Carter* (1886) 55 L.J. Ch. 230.

80 *North-Western Bank* v. *Poynter* (1895) A.C. 56; *Watson* v. *Lyon* (1855) 7 De G.M. & G. 288; 109 R.R. 122.

81 *Chidambaram Chettiar* v. *Tinnevelly Sugar Mills Co.* (1908) 31 Mad. 123.

82 *Forth* v. *Simpson* (1849) 13 Q.B. 680; 78 R.R. 493; *How* v. *Kirchner* (1856) 11 Moo P.C. 21; 117 R.R. 10; *The Rainbow* (1885) 5 Asp. M.C. 479.

83 *Barratt* v. *Gough-Thomas* (1951) Ch. 242 (solicitor acting for mortgagor loses his lien on title deeds for costs due from the mortgagor in whatever capacity, from the moment he becomes solicitor to the mortgagee); C.A. approving Bacon V.C. in *Re Nicholson* (1883) 53 L.J.Ch. 302, and overruling the contrary decision of Bacon V.C. in *Re Messenger* (1876) 3 Ch. D. 31, though *Re Messenger* has been followed in preference to *Re Nicholson* in Ireland: *In re Standard's Estate* (1897) 1 I.R. 415, and in Scotland: *Drummond* v. *Muirhead* (1900) 2 F. 585.

84 *Jacobs* v. *Latour* (1828) 5 Bing. 130; *Weeks* v. *Goode* (1859) 6 C.B.N.S. 367.

operates as a waiver depends upon whether, having regard to the nature of the security, the position of the parties and all the other circumstances of the particular case, an intention to abandon the lien may be inferred.[85]

The lien of an agent is not affected by the circumstance that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation,[86] or that the principal becomes bankrupt or insolvent,[87] nor by any dealing by the principal with the property subject to the lien,[88] after the lien has attached.

Partners—Company partner in liquidation.—In a partnership between some persons and a Company the goods of the company were in possession of a partner. He cannot be said to have a lien on the goods for money due to him. (besides the Company was in liquidation) because—

(1) Lien is not enforceable between partners as they are not in the position of principal & agent.

(2) The Official Liquidator is not a representative of the Company in liquidation and further S. 125 Companies Act makes such a lien created by agreement void, as it over rides S. 221 Contract Act.[89]

Principal's Duty to Agent

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations.

(a) *B*, at Singapore, under instructions from *A*, of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorises him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs, and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages, and costs, and incurs expenses. *A* is liable to *B* for such damages, costs, and expenses.

("For *there, i.e.,* Calcutta," in illustration (b), "we should probably read Singapur": Whitley Stoke's note, referring to s. 230. Or it must be assumed that in some other way *B* has made himself personally liable on the contract.).

Limits of agent's indemnity.—"If an agent has, *without his own default,* incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefore.... But it is not every loss or damage for which the agent will be entitled to re-imbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency".[90]

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85 *In re Taylor* (1891) 1 Ch. 590; *Groom* v. *Cheesewright* (1895) 1 Ch. 730; *In re Douglas* (1898) 1 Ch. 199 (a solicitor taking a security for costs must be deemed to waive his lien, unless he expressly reserves it, because it is his duty, if he intends to retain the lien, to inform the client that such is his intention); *Cowell* v. *Simpson* (1809) 16 Ves. 275; 10 R.R. 181; *Angus* v. *Maclachlan* (1881) 23 Ch.D. 330; *Tamvaco* v. *Simpson* (1866) L.R. 1 C.P. 363.

86 *Spears* v. *Hartley* (1798) 3 Esp. 81; 6 R.R. 814; *Curwen* v. *Milburn* (1889) 42 Ch. D. 424.

87 *Robson* v. *Kemp* (1802) 4 Esp. 233; 8 R.R. 831; *The Cella* (1888) 13 P.D. 82; *Ex parte Beall* (1883) 24 Ch. D. 408.

88 *West of England Bank* v. *Batchelor* (1882) 51 L.J. Ch. 199; *Godin* v. *London Assurance Co.* (1758) 1 W. Bl. 103.

89 *Official Liquidator* v. *Swaroop Cold Storage* (1976) A.A. 88, 90.

90 S.A. § 339, cited *arguendo* in *Duncan* v. *Hill*, L.R. 8 Ex. 242, at p. 244.

A principal is bound to compensate the agent against the consequences of all lawful acts done in exercise of the authority conferred upon him but not in excess of expressly stipulated consideration.[91] A suit to recover from the principal in Jodhpur payments made by the agent for losses suffered in transactions of sale and purchase of bullion at Indore, is not a suit to enforce any contract relating to purchase or sale of bullion falling within the prohibition imposed on such sales by Marwar Law but is one by the agent against the principal claiming indemnity for the loss suffered by the agent in carrying out the orders of the principal. It falls within section 222 of Contract Act and the acts of payment are all lawful acts as the transactions were outside Marwar.[92]

"The case of *Duncan* v. *Hill*[93] is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong,[94] such as insolvency[95] (or negligence)[96] or having sold at a loss in breach of his agreement with the principal".[97]

Where solicitors instructed stockbrokers to sell shares of their client *L*, but *L* refused to execute a transfer, and the stockbrokers incurred liability to a purchaser, it was held that the solicitors were acting as principals in the transaction and must indemnify the stockbrokers.[98]

The right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one.[99] or the principal had notice of it at the time when he conferred the authority;[1] but if the rule or custom is unlawful or unreasonable, and was unknown to the principal, he is under no liability to indemnify the agent against the consequences of acting on it.[2] Indemnity for lawful acts done by the agent cannot include charges incurred in excess of those stipulated.[3] A licensee under the Assam Food-stuffs Control Order taking grains for the Government is entitled to be indemnified by Government for all losses if the food-stuffs due to bad quality could not be sold.[4]

Ratification by the principal will cure the agent's default and restore his ordinary right to indemnity.[5]

The present group of sections must be taken as supplementing, not as restricting, the

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91 *Alopi Parshad* v. *Union of India* (1960) A.S.C. 588, 594; (1960) 2 S.C.R. 793, 808.

92 *Kishanlal* v. *Bhanwar Lal* (1955) 1 S.C.R. 439, 447; (1959) A.S.C. 500.

93 (1873) L.R. 8 Ex. 242.

94 *Ellis* v. *Pond* (1898) 1 Q.B. 426, 441. As to death or insolvency of the principal justifying an immediate sale by a broker who has bought on the principal's account with his own money see *Lacey* v. *Hill* (1873) L.R. 8 Ch. 921; as to the broker taking over shares that are practically unmarketable, *Re Finlay* (1913) 1 Ch. 565, C.A.

95 (1873) L.R. 8 Ex. 242.

96 *Lewis* v. *Samuel* (1846) 8 Q.B.D. 685; 70 R.R. 582.

97 *Ellis* v. *Pond, supra,* note 57.

98 *Hichens* v. *Jackson* (1943) A.C. 266, H.L.

99 *Davis* v. *Howard* (1890) 24 Q.B.D. 691; *Young* v. *Cole* (1837) 3 Bing. N.C. 724; 43 R.R. 783; *Biederman* v. *Stone* (1867) L.R. 2 C.P. 504. These were all cases of rules and usages of the Stock Exchange, but the principal is of general application. *Ex parte Bishop* (1880) 15 Ch. D. 400 (guarantee given by bill broker according to usage).

1 *Seymour* v. *Bridge* (1885) 14 Q.B.D. 460; and see *Kodusao* v. *Surajmal,* 1936 A.N. 37; 161 I.C. 787.

2 *Perry* v. *Barnett* (1885) 15 Q.B.D. 388 (custom to disregard the provisions of an Act of Parliament). *Westropp* v. *Solomon* (1849) 8 C.B. 345; 79 R.R. 530, seems anomalous as compared with the authorities for the general rule, and not easy to bring within any recognised exception, if indeed it is consistent with *Sheffield Corporation* v. *Barclay* (1907) A.C. 392. We do not think it a practical authority in England at this day, or of any value in India.

3 *M/s. Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793; (1960) A.S.C. 588.

4 *Bhowrilal Maheshri* v. *State of Assam* (1964) A.Assam 64; *Alluraiah* v. *State of Andhra Pradesh* (1963) A.A.P. 394.

5 *Hartas* v. *Ribbons* (1889) 22 Q.B.D. 254.

rights of an agent under the general law regulating contracts of indemnity, for which see the commentary on ss. 124, 125, above.

Costs of defending action.—Illustration (b) corresponds with an English decision, but omits the fact, there treated as material, that the agent was found by the verdict of the jury to have done what a prudent and reasonable man would have done in his own case.[6]. Perhaps it may be thought that this condition is sufficiently implied in the text. A similar condition is expressed in s. 195, above.

"Lawful".—A wagering contract is void, not unlawful (see s. 30). When therefore a suit is brought by a betting agent against his principal to recover a loss on betting paid by the agent, the principal cannot escape liability on the ground that the agent's act was *unlawful.*[7] See notes to s. 30 under the head "Agreements collateral to wagering contracts," above. If the agent has acted unlawfully, albeit innocently, he cannot recover under this section.[8] There is nothing unlawful in an agent contracting with a third party in his own name, even if not authorised to do so.[9] If the contract is illegal as the consideration was unlawful, there can be no claim on the basis of such contracts even if the claim is made for indemnity as agent.[10] Money paid at the instance of the defendant to remove a ban imposed by castemen is recoverable as it is not unlawful under section 145, Contract Act.[11]

C.i.f. contract with commission agent.—Though, under an ordinary c.i.f. contract between sellers and buyers, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the buyers are bound to accept, such a tender is a good tender when goods are ordered through a commission agent "on account and at the risk of" the principal, and the principal is bound to accept the tender and pay for the goods. "To throw these goods on the agent's hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency".[12]

Security with principal.—Whether a security deposited by an agent with the principal for the discharge of his agreement is impressed with a trust or is a mere loan depends on the facts and circumstances of the case or upon the terms of the contract. A deposit which the principal can use for his own purposes, there being no stipulation of segregation and on which interest is payable is not impressed with trust.[13] Segregation is an important test.[14]

Agent to be indemnified against consequences of acts done in good faith.

223. Where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

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6 *Broom* v. *Hall* (1859) 7 C.B.N.S. 503; 121 R.R. 614. And see *Frixione* v. *Tagliaferro* (1855) 10 Moo. P.C. 175, 110 R.R. 21.

7 *Behari Lal* v. *Parbhu Lal* (1908) Punj. Rec. no. 79; *Shibho Mal* v. *Lachman Das* (1901) 23 All. 165; *Chekka* v. *Gajjila* (1904) 14 Mad.L.J. 326; *Kantilal Manilal* v. *Ranchhoddas,* 1953 A.B. 98.

8 *Ram Kumar* v. *Laksmi Narayan,* 1947 A. Cal. 157, 225 I.C. 530. The agent may, however, have a remedy under s. 73 as in that case. See notes to s. 73.

9 *Ganges Valley Bone Mills* v. *Kali Nath Datta* (1945) 1 Cal. 565.

10 *Ratanlal* v. *F. Mangilal* (1963) A.M.P. 323. Contra *F. Hangamilal* v. *Bhuralal* (1961) A. Raj. 52; (1960) 10 Raj. 1304.

11 *Hazarimal Kochanji* v. *Khemchand* (1962) A. Raj. 86; (1961) 11 Raj. 462.

12 *Harry Meredith* v. *Abdulla Sahib* (1918) 41 Mad. 1060; 49 I.C. 196.

13 *Jessaram Fateh Chand* v. *O.N. Tankha* (1967) 1 S.C.A. 635; *Kshetra Mohan Das* v. *D.C. Basu* (1943) 1 Cal. 313; refd. to.

14 *In re Hallett & Co.* (1894) 2 Q.B.D. 237; *Frank M. McKey* v. *Maurice Paradise,* 81 Law Ed. 75.

Illustrations.

(a) *A*, a decree-holder, and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C* in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B*, and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay *C*, and for *B*'s own expenses.

Illustration (a) seems to have been suggested by the observations of the Court of Exchequer Chamber on similar facts. A judgment creditor who requires an officer of the law to take specified goods, pointing them out as the goods of the debtor, makes that officer his agent, and must indemnify him if, acting in good faith, he commits a trespass in obeying the instructions.[15] Where working charges are reasonably incurred by a person for another in dealing with the other's property, he is entitled to such expenses when his *bona fides* are established by proved facts. Therefore a person felling and cutting trees for the owner of a forest is entitled to be paid those expenses.[16]

Unlawful acts.—The preceding section deals with indemnity against the consequences of lawful acts; this section with the consequences of unlawful acts done in good faith. It is clearly settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal, whether on an express or implied promise.[17] Any such promise is void as being contrary to public policy.

Non-liability of employer of agent to do a criminal act.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations.

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C* and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C*, and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

The rule in the text is elementary. Illustration (b) seems to assume that every libel for which damages can be recovered is also a crime, or, in other words, that defamation as defined in the Indian Penal Code includes all the cases in which a civil action for injurious words is maintainable in India. We are not aware of any authority for such an assumption. An indemnity against damages for libel is now a common clause in agreements with publishers in England, and we have not heard of any one suggesting that such a term is invalid as being against public policy. Probably the true construction of the section is that it only applies where the act is criminal on the part of the agent, which in most cases would amount to the same thing as saying that it must be criminal to his knowledge. The rule could hardly be held to apply to a crime committed by means of an innocent agent.

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15 *Collins* v. *Evans* (1844) 5 Q.B. 820, 829, 830; 64 R.R. 656, 663.

16 *State of Kerala* v. *Chalciat Bros.* (1975) A. Ker. 13, 14; *Currinbhoy & Co.* v. *L.A. Greet* (1930) A. Cal. 113 folld.

17 Illegal insurance: *Allkins* v. *Jupe* (1877) 2 C.P.D. 375. Illegal payment: *In re Parker* (1882) 21 Ch.D. 408. Purchase of smuggled goods: *Ex parte Mather* (1797) 3 Ves. 373; *Betts* v. *Gibbins* (1834) 2 A. & E. 57; 41 R.R. 381. On this and the following section cp. *Madhowji Thawor* v. *Yar Hussain Hydor Dasti* (1925) 88 I.C. 980, where the only question was whether there was any illegality at all.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence.[18] This subject belongs to the law of civil wrongs; the English law must be sought in works on the law of torts or in monographs on negligence, of which the late Mr. Thomas Beven's is the most learned and complete. It cannot be usefully discussed or stated here. The same remark applies to the defence of "common employment," which, however, is not applicable to cases where the negligence is the employer's own.[19] Sections on these matters were in the original draft of the Indian Law Commissioners, but were omitted at a later stage, presumably as not being appropriate in a Contract Act. For the modern law of workmen's compensation, see the Workmen's Compensation Act, 1923.

An agent is not, generally speaking, entitled to sue the principal on any contract made on his behalf, even if the agent is personally liable on the contract to the third party. If a merchant resident abroad employs an agent to buy goods, and the agent buys them and gives his own acceptance for the price, he cannot sue the principal as for goods sold, because the contract between them is not one of buying and selling, but of agency.[20] Similarly, if a broker buys goods on behalf of an undisclosed principal, he cannot sue the principal for non-acceptance of the goods,[21] or for goods bargained and sold.[22] His only remedy is an action for indemnity under s. 222. There is an exception to this rule in the case of policy brokers, who, by custom, are entitled to sue their principals for premiums due under policies effected on their behalf, though the brokers may not have paid the premiums nor settled with the underwriters in respect thereof.[23]

Effect of Agency on Contracts with Third Persons

Enforcement and consequences of agent's contracts.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations.

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set off against that claim a debt due to himself from *B*.

(b) *A* being *B*'s agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.[24]

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18 Under the Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28), the contributory negligence of the plaintiff leads not to the dismissal of his action, but to apportionment of liability between plaintiff and defendant.

19 The defence of common employment was abolished in England by the Law of Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41).

20 *Seymour* v. *Pychlau* (1817) 1 B. & Ald. 14.

21 *Tetley* v. *Shand* (1872) 25 L.T. 58.

22 *White* v. *Benckendorff* (1873) 29 L.T. 475.

23 *Power* v. *Butcher* (1829) 5 M. & R. 327; 34 R.R. 432.

24 Both illustrations were applied in *Sunderlalji* v. *Sheikh Lal*, 1954 A.N. 60.

This section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or act done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. It is immaterial in such a case what may be the motive of the agent. The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith.[25] This does not depend on the principle of estoppel, and it is immaterial whether the third person has any knowledge of the existence or extent of the agent's actual authority or not.[26] With regard to contracts and acts which are not actually authorised, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorised act or transaction with respect to persons having notice that the actual authority is being exceeded. This subject is dealt with by s. 237, below, and the commentary thereon.[27]

A buyer of goods refusing to take delivery of goods purchased by description, on the ground of a part not in accordance with description, takes delivery on the promise of the agent to take back the goods not in accordance with the description and pay for them, the act of the agent is for the benefit of the principal and makes him liable when the buyer returns the goods not answering the description.[28]

The expression "contract" includes a promissory note. *A* authorises *B* to execute a promissory note on his behalf in favour of *C*. *B* executes the note by putting a mark described in the note as "*nishani* (mark) of *A*." *A* is bound by the note.[29]

Arbitration agreement by agent.—A sold note containing an arbitration clause signed by a broker acting as an agent is an arbitration agreement within the Arbitration Act.[30]

This section does not touch the conditions under which the agent can sue or be sued on the contract in his own name, as to which see s. 230-234, below. The principal must be able to show that the third party dealt with the agent as such.[31]

Principal how far bound, when agent exceeds authority.

227. When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only what he does as is within his authority is binding as between him and his principal.

Illustration.

A, being owner of a ship and cargo, authorises *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

"The principal is not bound by the unauthorised acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued": S.A. § 170. This and the following section must be read subject to s. 237, below.

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25 *Hambro* v. *Burnard* (1904) 2 K.B. 10, where authority was given to underwrite policies of insurance in the name of the principal according to the ordinary course of business at Lloyd's, and the agent, in fraud of the principal, underwrote certain guarantee policies. In this case the authority was in writing, but there does not appear to be any distinction in the application of the principal between a written and verbal authority. See also *Fazal Ilahi* v. *East Indian Railway Co.* (1921) 43 All. 623; 64 I.C. 868; 1922 A.A. 324.

26 See *supra*, note 25.

27 See also s. 178 as to pledge by mercantile agent and s. 178A as to pledge by person in possession under voidable contract, above.

28 *Kulsekaran Hand Match Society* v. *Radhelal* (1971) A.M.P. 19.

29 *Challa Balayya* v. *Kanuparthi* (1917) 40 Mad. 1171; 44 I.C. 813.

30 *Ramchandra Ram Nag Ram Oil Mills* v. *Howrah Oil Mills* (1958) A. Cal. 620; 62 C.W.N. 773.

31 *Sims* v. *Bond* (1833) 5 B. & Ad. 389; 39 R.R. 511.

A sub-lessee authorised to carry on mining operations independent of the control and supervision of the lessee is not an agent of the lessee. Therefore any contravention of an injunction by the sub-lessee will not make the lessee liable.[32] An authority given to the consignee to take delivery does not authorise the latter to rebook the goods to another Railway Station or to rebook them on different conditions.[33]

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration.

A authorises *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

The law declared in this and the preceding section is concisely illustrated by an English case where *B*, an insurance broker at Liverpool, was authorised by *A* to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel, *B* underwrote a policy for *Z*, without *A*'s authority or knowledge, for £150. *Z* did not know what the limits of *B*'s authority were, but it was well known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorised amount in each case was not disclosed. The Court held that *A* was not liable for the insurance of £150 which he had not authorised, and the contract could not be divided so as to make him liable for £100.[34] The only argument to the contrary was that in the circumstances *B* must be regarded as a general agent whose powers could not be limited by any private instructions.

Further illustrations are supplied by Indian cases.

A authorises *B* to draw bills to the extent of Rs. 200 each. *B* draws bills in the name of *A* for Rs. 1,000 each. *A* may repudiate the whole transaction.[35]

A instructs *B* to enter into a contract for the delivery of cotton at the end of January. *B* enters into a contract for delivery by the middle of that month. *A* is not bound by the contract, and any custom of the market allowing *B* to deviate from *A*'s instructions will not be enforced by the Court.[36]

Consequences of notice given to agent.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set off a debt owing to him from *C* against the price of the goods.

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32 *Mineral Development Ltd.* v. *State of Bihar* (1962) A.P. 443; *S.N. Bannerjee* v. *Kuchwar Lime & Stone Co. Ltd.* (1938) A.P.C. 295; 17 Pat. 770.

33 *Mohammad Ikram* v. *Union of India* (1959) A.P. 337; 37 Pat. 1355.

34 *Baines* v. *Ewing* (1866) L.R. 1 Ex. 320. The law is the same if the agent is authorised to raise not less than a certain sum on the security of documents of title and does raise less: *Fry* v. *Smellie* (1912) 3 K.B. 282, C.A.

35 *Premabhai* v. *Brown* (1873) 10 B.H.C. 319.

36 *Arlapa Nayak* v. *Narsi Keshavji* (1871) 8 B.H.C.A.C. 19. See also *Uttar Pradesh Government* v. *Church Missionary Trust Association Ltd.* (1948) 22 Luck. 93, 229 I.C. 421, 1948 A.O. 54.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set off against the price of the goods a debt owing to him from *C*.

(In illustration (b) it must be understood, as the fact was in the corresponding English case mentioned below, that *C* is *D*'s factor selling in his own name, and there is no question of fraud.)

The rule laid down in this section is intended to declare a general principle of law. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."[37]

But by the terms of the present section, which are cited in the same judgment, the application of the principle is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for the principal".[38] This is further enforced by illustration (b), which appears to be taken from a decision of the Court of Common Pleas in 1863. Here the general rule was laid down as being "that whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment, as agent, binds his principal".[39] This limitation, however, was rejected by the Court of Exchequer Chamber, which unanimously reversed the decision of the Common Pleas, and held that the buyer was not entitled to set off a debt due to him from the factor. "We think", the Court[40] said, "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal." Thus the law of India on this point follows the reversed decision of the Court of Common Pleas. It may have been a deliberate preference, or it may be permissible to conjecture that the section was originally drafted in 1864 or 1865, before the report of the case in the Exchequer Chamber was published, and that report was afterwards overlooked. Probably the difference is seldom of practical importance, but it seems inconvenient that such a difference should exist between English and Indian law without very strong reasons.

Intimation to the agent by the buyer of goods of his rejection of goods is due notice to the principal.[41] But notice to an agent of a previous contract of sale is not a notice to the principal.[42]

The following are illustrations from the English authorities of the rule stated in the section. An agent of an insurance company having negotiated a contract with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground of non-disclosure thereof by the assured.[43] A ship sustained damage in the course of a voyage, and the master subsequently wrote a letter to the owner, but did not mention the fact of the damage. It was held that the master ought to have communicated the fact, and, the owner having insured the ship after

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37 Judgment of the Privy Council in *Rampal Singh* v. *Balbhaddar Singh* (1902) 29 I.A. 203, at p. 212; 25 All. 1, at p. 17; *Kulsekarapatnam Cooperative Society* v. *Radhelal* (1971) A.M.P. 191.

38 See *Chabildas Lalloobhai* v. *Dayal Mowji* (1907) 34 I.A. 179, 184; 31 Bom. 566, 581.

39 *Dresser* v. *Norwood* (1863) 14 C.B.N.S. 574, 587, *per* Erle C.J., Willes J. and Keating J. delivered judgments to the same effect.

40 Pollock C.B., Crompton J., Bramwell B., Channell B., Blackburn J., and Shee J.: S.C. in Ex. Ch. 1864, 17 C.B.N.S. 466, 481. This is contrary to Story's opinion (S.A. § 140), but is accepted by his later editors and in American decisions to which they refer.

41 *Kulsekarapatnam Hand Match Society Ltd.* v. *Radhelal* (1971) A.M.P. 191, 192.

42 *Simanchal Mohanti* v. *Budhiram Padhi* (1976) A. Or. 113; *Himmatlal Motilal* v. *Vasudev Ganesh* (1912) 36 Bom. 446; *Veeramalai Vanniar* v. *Thadikara Vanniar* (1963) A.M. 383.

43 *Bawden* v. *London, etc., Assurance Co.* (1892) 2 Q.B. 534.

receipt of the letter, that the insurance was void on the ground of non-disclosure.[44] When the knowledge of an agent is imputed to the principal, the principal is considered to have notice as from the time when he would have received notice if the agent had performed his duty and communicated with him with reasonable diligence.[45]

The knowledge of an agent is not imputed to the principal unless it is of something that it is his duty as agent to communicate to the principal. It is not the duty of a policy broker, employed to effect an insurance, to communicate to his principal material facts coming to his knowledge in relation to the subject-matter of the proposed insurance, but only to make disclosure of all such facts to the insurers; and, accordingly, where a broker failed to effect a desired insurance, and another broker was employed, who succeeded, it was held that the policy could not be avoided on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker, but of which neither the principal nor the broker who effected the policy was aware.[46] Nor will notice given to or information acquired by an agent of circumstances which are not material to the business in respect of which he is employed be imputed to the principal.[47]

An insurance form was filled up by an insurance agent and the answers given by the insured were untrue statements. The insurance agent was held not to be acting on behalf of the insurer but on behalf of the insured. The policy was, therefore, void on account of breach of warranty.[48]

An important exception to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a fraud on the principal. In such cases notice is not imputed to the principal of the fraud or the circumstances connected therewith, because of the extreme improbability of a person communicating his own fraud to the person defrauded.[49] On this ground it has been held in India that notice will not be presumed to have been given by an attorney to his client where such notice would involve a confession by the attorney of a fraud practised by himself.[50] But the exception does not apply where the fraud is committed, not against the principal, but against a third person.[51] And the mere fact that an agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, if it is his duty to communicate them.[52] Where, however, the person seeking to charge the principal with notice was aware that the agent intended to conceal his knowledge, such knowledge will not be imputed to the principal.[53]

It is to be observed that notice through an agent is not the same thing as constructive notice and should not be confused with it. The agent's knowledge is imputed to the principal

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44 *Gladstone* v. *King* (1813) 1 M. & S. 35; 14 R.R. 392. And see *Fitzherbert* v. *Mather* (1785) 1 T.R. 12; 1 R. R. 134.

45 *Proudfoot* v. *Montefiori* (1867) L.R. 2 Q.B. 511, where it was held under the particular circumstances that the agent ought to have telegraphed.

46 *Blackburn* v. *Vigors* (1877) 12 App. Cas. 531. And see *In re Fenwick* (1902) 1 Ch. 507; *Societe Generale de Paris* v. *Tramways Union Co.* (1884) 14 Q.B.D. 424; *In re Payne* (1904) 2 Ch. 608.

47 *Wilde* v. *Gibson* (1848) 1 H.L. Cas. 605; 71 R.R. 191; *Powles* v. *Page* (1846) 3 C.B. 16; 71 R.R. 262, where the directors of a banking company, who had no voice in the management of the accounts, acquired knowledge of circumstances relating thereto; *Tate* v. *Hyslop* (1885) 15 Q.B.D. 368, where a material fact in connection with an insurance had been disclosed to the insurer's solicitor. It is not in the ordinary course of a solicitor's employment to receive notices in connection with mercantile transactions. See also *Texas Co.* v. *Bombay Banking Co.* (1920) 46 I.A. 250; 44 Bom. 139; 54 I.C. 121.

48 *Mrs. Maniluxmi* v. *Hindustan Co-operative Insurance Co.* (1962) A. Cal. 625; Macgillivray: On Insurance (4th Edn.) Art. 935 reld on; *V.K. Srinivasa* v. *Premier Life & General Insurance Co. Ltd.* (1958) A. My. 53; (1957) Mys. 304.

49 *Cave* v. *Cave* (1880) 15 Ch.D. 639; *Waldy* v. *Gray* (1875) L.R. 20 Eq. 238; *In re Fitzroy Steel Co.* (1884) 50 L.T. 144.

50 *Hormasji* v. *Mankuvarbai* (1875) 12 B.H.C. 262.

51 *Boursot* v. *Savage* (1866) L.R. 2 Eq. 134; *Dixon* v. *Winch* (1900) 1 Ch. 736.

52 *Rolland* v. *Hart* (1871) L.R. 6 Ch. 678; *Bradley* v. *Riches* (1878) 9 Ch. D. 189; *Dixon* v. *Winch, supra.*

53 *Sharpe* v. *Foy* (1868) 17 W.R. 65.

without regard to any question of what the principal in person knew or might have known. Such is not the nature of constructive notice. A man is said to have constructive notice of that which he is treated as having known because, though not proved to have actually known it, he might and ought to have known it with reasonably diligent use of the means of knowledge at his disposal. Now an agent's constructive as well as his actual notice may be imputed to the principal in any transaction where constructive notice has to be considered at all.[54] On the whole, then, a man may have notice either by himself or by his agent, and that notice may be either actual or (in an appropriate case) constructive.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:—

Presumption of contract to contrary.

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Principle of the rule and exceptions.—The test question in cases within the principle of this section is always to whom credit was given by the other party, or, if that cannot be proved as a fact, to whom it may reasonably be presumed to have been given. Thus, in the cases here specially mentioned, the party cannot be supposed to rely exclusively on a foreign principal whom, by general mercantile usage, the agent's contract is not understood to bind, or on a person whose name he does not know, and whose standing and credit he therefore cannot verify, or on a person or body who, for whatever reason, is on the face of the transaction not legally liable. For the general rule it is needless to multiply authorities. "Ordinarily an agent contracting in the name of his principal and not in his own name is not entitled to sue[55] nor can he be sued, on such contracts." "When in making a contract no credit is given to himself as agent, but credit is exclusively given to his principal, he is not personally liable thereon": S.A.§ § 261, 263, 271, 391. The rule applies although the agent knows that the contract is one that he has no authority to make on behalf of the principal, and makes it fraudulently. Even in that case he cannot be sued on the contract if it is professedly made by him merely in his capacity as agent.[56]

Contract to the contrary.—Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances.[57] The personal liability of the agent depends on the intention of the parties.[58] In the case of oral contracts the question is purely one of fact.[59] If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole.[60] Where, in an agreement to grant a lease, the agent was described as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease, it was held that he

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54 That the equitable refinements of constructive notice do not apply to commercial transactions, see *per* Lindley L.J. in *Manchester Trust* v. *Furness* (1895) 2 Q.B. 539, 545.

55 The same rule should apply to a counterclaim: *Raj Bahadur Lal* v. *Sitla Prasad*, 1951 A.A. 596, 598.

56 *Lewis* v. *Nicholson* (1852) 18 Q.B. 503; 88 R.R. 683; *Jenkins* v. *Hutchinson* (1849) 13 Q.B. 744; 78 R.R. 500. But he may be sued for compensation under s. 235, or in an action of deceit.

57 See Bowstead on Agency, 12th ed., pp. 262, *sqq*. The course of business between the principal and agent may lead to the inference that the agent has made himself personally liable: *Walter Smith* v. *Ahmed Abdeenbhoy*, 1935 A.P.C. 154; 69 Mad. L.J. 341; 157 I.C. 9.

58 *Orissa Textiles Mills* v. *Ganesh Das* (1961) A.P. 107.

59 *Lakeman* v. *Mountstephen* (1874) L.R. 7 H.L. 17; *Jones* v. *Littledale* (1837) 1 N. & P. 677; 45 R.R. 542; *Long* v. *Millar* (1879) 4 C.P.D. 650; *Williamson* v. *Barton* (1862) 7 H. & N. 899; 126 R.R. 751.

60 *Spittle* v. *Lavender* (1821) 5 Moo. 270 C.P.; 23 R.R. 508.

had contracted personally although the premises belonged to the principal.[61] A contract in the following form: "We the undersigned, three of the directors, agree to repay 500*l.* advanced..... to the company," was held to be a personal contract on the part of the directors.[62] On the other hand, a contract in the terms "I undertake on behalf of *A* (the principal) to pay, etc." signed by the agent, was held not to involve personal liability.[63] A broker selling expressly on account of a known principal will not be liable to him for the price, although the buyer is undisclosed and described in the sold note as "my principal".[64] A "contract to the contrary" may be contained in the terms of a bill of lading which also may not disclose the name of the principal. In such a case the agent can enforce a contract, e.g. of carriage by sea.[65]

An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally unless a contrary intention plainly appears from the body of the instrument,[66] and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature.[67] On the other hand, if words are added to the signature indicating that he signs "as an agent," or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party.[68] The authorities in support and illustration of these rules of construction are very numerous,[69] but the rules are well established, and the case in the House of Lords which we shall immediately cite has probably superseded several of the earlier judgments. Where an agent signed a charter-party in his own name without qualification he was held personally liable, although he was described as an agent for named principals.[70] A similar decision was given in a case where the agent was described in a body of the contract as "consignee and agent on behalf of" his principal, naming him.[71] On the other hand, the words "on account of"[72] or "on behalf of"[73] a named principal in the body of the contract are sufficient to exclude personal liability, notwithstanding an unqualified signature; and words of description in the body of the instrument, such as "charterer," which might make the agent personally liable without a clear qualification of the signature, will not counteract such a qualification.[74]

Oral evidence of intention is not admissible for the purpose of discharging an agent from liability on a written contract, from the terms of which he appears to have intended to contract personally,[75] although it has been held in England that he is entitled, by way of equitable

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61 *Norton* v. *Herron* (1825) 1 C. & P. 648; 28 R.R. 797. And see *Tanner* v. *Christian* (1855) 4 E. & B. 591; 99 R.R. 637.

62 *McCollin* v. *Gilpin* (1881) 6 Q.B.D. 516.

63 *Downman* v. *Williams* (1845) 7 Q.B. 103; 68 R.R. 413. *Cp. Iveson* v. *Conington* (1823) 1 B. & C. 160; 25 R.R. 344.

64 *Southwell* v. *Bowditch* (1876) L.R. 1 C.P.D. 374.

65 *Asiatic Steam Navigation Co. Ltd.* v. *Jethalal Dharamshi* (1959) A. Cal. 479.

66 *Higgins* v. *Senior* (1841) 8 M. & W. 834 ; 58 R.R. 884; *Fairlie* v. *Fenton* (1870) L.R. 5 Ex. 169; *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486; *Dutton* v. *Marsh* (1871) L.R. 6 C.P. 361; *Basma* v. *Weekes* (1950) A.C. 441, P.C.; *Rusholme Ltd.* v. *S.G. Read Ltd.* (1955) 1 All E.R. 180.

67 *Hough* v. *Manzanos* (1879) 4 Ex. D. 104; *Hutcheson* v. *Eaton* (1884) 13 Q.B.D. 861.

68 *Deslandes* v. *Gregory* (1860) 30 L.J. Q. B. 36; *Redpath* v. *Wigg* (1866) L.R. 1 Ex. 335.

69 See Bowstead on Agency, 12th ed., pp. 262 *sqq.*

70 *Parker* v. *Winlow* (1857) 7 E. & B. 942.

71 *Kennedy* v. *Gouveia* (1823) 3 D. & R. 503; 26 R.R. 616.

72 *Gadd* v. *Houghton* (1876) 1 Ex. D. 357, C.A., disapproving *Paice* v. *Walker* (1870) L.R. 5 Ex. 173, where the words were "as agent for" a named principal.

73 *Ogden* v. *Hall* (1879) 40 L.T. 751.

74 *Lennard* v. *Robinson* (1855) 5 E. & B. 125, is overruled, and *Gadd* v. *Houghton* (note 31 *supra*) approved: *Universal Steam Navigation Co.* v. *James McKelvie & Co.* (1923) A.C. 492. The contract, including the terms of the signature, is to be construed as a whole; see Lord Sumner's opinion.

75 *Higgins* v. *Senior* (1841) 8 M. & W. 834; 58 R.R. 884; *Holding* v. *Elliott* (1860) 5 H. & N. 117; 120 R.R. 504.

defence, to prove an express oral agreement that, having regard to his being merely an agent, he should not be sued on such a contract.[76] But where the terms of the written contract are such as not to import a personal liability on the part of the agent, oral evidence may be given to show that by the custom of the particular trade an agent so contracting is personally liable, either absolutely or conditionally,[77] provided the custom is not inconsistent with the express written terms.[78]

Thus where a firm of brokers entered into a contract "for principals" for the sale of gunny and hessian, oral evidence was allowed to show that by custom of the trade in gunny and hessian in Calcutta brokers were personally liable both to buyers and[79] sellers.

The expression "claiming under a party" in section 34 of the Arbitration Act may include an agent liable under section 230, Contract Act, but not a mere employee.[80]

Agency coupled with interest.—It is also settled law that when an agent "has made a contract in the subject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name".[81] Such is the case of a factor,[82] and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman," and a special property by reason of his lien.[83] Conversely the auctioneer may be liable to the buyer for neglect to deliver the goods[84] or to an outstanding true owner for conversion,[85] and if the sale has been advertised as being without reserve, the auctioneer is deemed impliedly to contract to accept the offer of the highest *bona fide* bidder and is liable to him in damages if he accepts a bid from the vendor.[86] An auctioneer, who receives earnest money from the highest bidder, is liable to return the money to the bidder in case the contract fails due to the default of the principal. The auctioneer cannot forfeit the money and keep it if the bidder does not pay the balance and complete the sale.[87]

The like rule is laid down by Indian Courts: "Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name".[88] This is not a real exception to the rule laid down at the beginning of the section, the agent being in such a case virtually a principal to the extent of his interest in the contract.

Whenever an agent has entered into contract in such terms as to be personally liable, he has a corresponding right to sue thereon,[89] and this right is not affected by his principal's renunciation of the contract.[90] Policy brokers also are entitled by custom to sue in their own

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76 *Wake* v. *Harrop* (1862) 1 H. & C. 202; 130 R.R. 461, affg. 6 H. & N. 768.

77 See *Pike* v. *Ongley* (1887) 18 Q.B.D. 708, citing and summarising former decisions. Such a custom may make the agent liable as well as the principal, but would be bad if it purported to make him exclusively liable. The existence of any such custom is of course a question of fact; *cp.* (1923) A.C. 496.

78 *Barrow* v. *Dyster* (1884) 13 Q.B.D. 635, where a clause providing that the agents (brokers) should act as arbitrators in the event of dispute was held inconsistent with a custom making them personally liable.

79 *Joy Lall & Co.* v. *Monmotha Nath* (1916) 20 C.W.N. 365; 35 I.C. 3.

80 *Satyendranath* v. *Union of India* (1962) A. Cal. 177; 66 C.W.N. 774.

81 2 Sm. L.C. 378 (13th ed.).

82 *Snee* v. *Prescott* (1743) 1 Atk. 248; *Fisher* v. *Marsh* (1865) 6 B. & S. 411.

83 *Seth Loon Karan Sethiya* v. *Ivan E. John & ors.* (1969) A.SC. 73; *Williams* v. *Millington* (1788) 1 H.Bl. 81; 2 R.R. 724.

84 *Woolfe* v. *Horne,* (1877) 2 Q.B.D. 355.

85 *Consolidated Co.* v. *Curtis & Sons* (1892) 1 Q.B. 495. The material part of the judgment in *Williams* v. *Millington* is quoted at p. 499.

86 *Warlow* v. *Harrison* (1858) 1 E. & E. 295, 309; 117 R.R. 219, 227; *Heatley* v. *Newton* (1881) 19 Ch.D. 326.

87 *Naunho Bibi* v. *Ram Sarup* (1965) A.A. 533; (1965) 1 All 773.

88 *Subrahmania* v. *Narayanan* (1900) 24 Mad. 130; *Hardayal* v. *Kishan Gopal,* 1938 A.L. 673; 178 I.C. 939; *Subodh Gopal* v. *Province of Bihar,* 1950 A.P. 222.

89 *Cooke* v. *Wilson* (1856) 1 C.B.N.S. 153; *Agacio* v. *Forbes* (1861) 14 Moo. P.C. 160; *Robertson* v. *Wait* (1853) 8 Ex. 299; 91 R.R. 497.

90 *Short* v. *Spackman* (1831) 2 B. & Ad. 962 (broker, who had bought goods in his own name, held en-

names on all policies effected by them.[91] But the mere fact that an agent is acting under a *del credere* commission does not give him the right personally to enforce a contract which he is not otherwise entitled to enforce.[92]

Right of agent to sue for money paid by mistake etc.—An agent may in his own name sue for the recovery of money paid on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of the fraud or other wrongful act of the payee, or otherwise under circumstances rendering the payee liable to repay the money.[93]

Presumed exceptions: Foreign principal.—This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner, "according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner";[94] for "a foreign constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account.[95] Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue[96] nor be sued[97] on it. The question was originally one of fact,[95] but at this day doubts in particular cases are reducible to a question whether, on the construction of the contract with regard to the facts there does appear an intention that the principal shall be a party.[97] On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced, as in other cases, from the terms of the contract and surrounding circumstances. The circumstances that the principal is a foreigner gives rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary.[98] Where an agent was described as contracting "on behalf of" a foreign principal, who was named, it was held that the agent was not personally liable though he signed the contract in his own name,[99] and a similar decision was come to where the contract note described the agents having sold "on account of" certain foreign principals,[1] and where signature "as agents" was combined with description of the principal parties as "seller" and "buyer".[2]

A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such company in India, it can be enforced against the agents personally, unless the foreign company is in writing made the contracting party, and the contract is made directly in its name.[3]

Exemption from liability of damages—extent of:—The plaintiff agreed to purchase goods from an American firm through the defendant, acting as agent of the American firm and paid a substantial amount of money by letters of credit. The contract provided absolute immunity to the agent but no protection as to return of moneys paid for the goods. They were found to be of inferior quality and were rejected.

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titled to recover damages for non-delivery, though the principal, with the broker's acquiescence, had renounced the contract).

91 *Provincial Insurance Co.* v. *Leduc* (1874) L.R. 6 P.C. 224; *Oom* v. *Bruce* (1810) 12 East, 225, 11 R.R. 367; *Kensington* v. *Inglis* (1807) 8 East, 273; 9 R.R. 438.

92 *Bramwell* v. *Spiller* (1870) 21 L.T. 672.

93 *Stevenson* v. *Mortimer* (1778) Cowp. 805; *Holt* v. *Ely* (1853) 1 E. & B. 795; 93 R.R. 398; *Colonial Bank* v. *Exchange Bank* (1885) 11 App. Cas. 84.

94 *Thomson* v. *Davenport* (1829) 9 B. & C. at p. 87; 32 R.R. at p. 585.

95 *Armstrong* v. *Stokes* (1872) L.R. 7 Q.B. 598, 605, *Cur., per* Blackburn J.

96 *Elbinger A.G.* v. *Claye* (1873) L.R. 8 Q.B. 473.

97 *Hutton* v. *Bulloch* (1874) L.R. 9 Q.B. 572.

98 See the authorities critically reviewed in *Miller, Gibb & Co.* v. *Smith & Tyrer* (1917) 2 K.B. 141, C.A., where some doubt was thrown on the continuing validity of the usage under modern conditions; at all events it is excluded when the terms of the contract make the foreign principal liable.

99 *Ogden* v. *Hall* (1879) 40 L.T. 751.

1 *Gadd* v. *Houghton* (1876) 1 Ex.D. 357, C.A.

2 Note 57, *supra*.

3 *Tutika Basavaraju* v. *Parry & Co.* (1903) 27 Mad. 315.

To this, section 230 was held applicable as defendant was acting for a disclosed foreign principal disclosed *ab initio* and he was equally liable for the return of money paid (in this case by letters of credit) though he could plead exemption from liability for damages because of the special contract.[4]

Agent's liability—Bill of ladings exemption.—In the case of a short delivery by a shipping carrier a clause on the back of the bill of lading relieving the agent of all responsibility irrespective of his not having observed the responsibility prescribed in Art. III of the Schedule of the Carriage of Goods by Sea Act 1924 is illegal and in the absence of the name of the owner or the master of the vessel brings into operation s.230(2) of the Contract Act and makes the agent liable for the short delivery of goods supplied by a vessel. It is submitted this will also be an instance of fundamental breach.[5]

Goods short when unloaded from ship.—Where goods were shipped by a foreign vessel from the port of Odessa to a port in India and on delivery there was a shortage in quantity and the plaintiff, a Central Government concern, sued the agent for damages, it was held that the following conditions must be fulfilled before the agent can be sued under s. 230 of the Act:

(1) that the contract, the breach of which was sued on, must be entered into by the agent.
(2) that the principal cannot be sued in India;
(3) that s. 86 of the Civil Procedure Code is not an absolute bar to a suit in India.

In the absence of averments to the above effect the plaint was taken off the file under 0.7, rule 11 C.P.C.[6]

Principal undisclosed.—The rule under this head is so well settled that it will suffice to refer to recent Indian cases without going back here to the ultimate authorities. The qualifications expressed in the following sections to s. 234 inclusive are now the part of the doctrine requiring most attention. The decisions establishing them contain ample proof of the rule. The same principles are followed in Indian Courts. The honorary secretary, therefore, of a school alleged to have been maintained by an association in London is personally liable for the rent of a house hired by him in his name for the purposes of the school.[7] But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not disclose the name of the principal, the knowledge being in such a case equivalent to disclosure.[8] Thus the secretary of a club cannot be sued personally for work done for the club, unless he has pledged his personal credit.[9] And similarly he cannot sue a member on behalf of the club for goods supplied to him.[10] But the presumption that an agent is personally bound by a contract when the name of the principal is not disclosed may be rebutted, and where the contract is in writing, the whole of the contract is for that purpose to be examined.[11] The mere fact, however, that the agent has signed himself as such will not rebut the presumption of personal liability.[12] But if the

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4 *Gnanasundara* v. *Breton Export Co. of N.Y.* (1964) A.M. 113; *Mohankrishnan* v. *Chimanlal Desai & Co.* (1960) A.M. 452 refd. to. See *Radhakrishna* v. *Tayaballi* (1962) A.S.C. 538 (1962) Supp. 1 S.C.R. 81.

5 *British India Steam Navigation Co. Ltd.* v. *Shanmughevilas Cashew Industries* (1974) 2 Ker. 150, 157-8; *West Steamship Co.* v. *S.K. Ramalingam Chettiar* (1960) A.SC. 1058.

6 *Union of India* v. *Chinoy Chablani & Co.*, 80 Cal. W.N. 819, 822.

7 *Bhojabhai* v. *Hayen Samuel* (1898) 22 Bom. 754.

8 *Mackinnon* v. *Lang* (1881) 5 Bom. 584.

9 *North-Western Provinces Club* v. *Sadullah* (1898) 20 All. 497; *Kanwar Rauzor* v. *Hebbert* (1981) Punj. Rec. no. 15.

10 *Michael* v. *Briggs* (1890) 14 Mad. 362. It is needless to refer to the authorities which settled the law in England.

11 *Soopromonian Setty* v. *Heilgers* (1879) 5 Cal. 71; *Mackinnon* v. *Lang* (1881) 5 Bom. 584; *Hasonbhoy* v. *Clapham* (1882) 7 Bom. 51, 65; *Deo* v. *Narayan*, 116 I.C. 669; 1929 A.N. 170 (merely on facts).

12 *Gubhoy* v. *Avetoom* (1890) 17 Cal. 449. See *Pater* v. *Gordon* (1872) 7 M.H.C. 82, 84, and *cp. Hough* v. *Manzanos* (1879) 4 Ex.D. 104. In the case of negotiable instruments, however, it would seem that

agent appears, on the face of the written contract, to be liable personally, he will not be allowed to adduce oral evidence to show that he did not contract in his personal capacity.[13] If a person who has contracted as agent, when sued personally pleads that his principal was *W* and fails to establish this plea, he will be personally liable, as the burden of proving the identity of his principal falls upon him.[14]

In a contract between an agent of an undisclosed principal and another person, the liability is of the agent alone under s. 230(2) Contract Act. The question of joint responsibility does not arise in such a case.[15]

A bought note headed "Radhakrishna Shivdutt Rai A/c Khaitan & Sons Ltd." is a clear indication of Radhakrishna Shivdutt Rai acting as agents of a disclosed principal and as such they have no right of action in their own name.[16] In such a case the mere use of the word "we" in the body of letters is not indicative of the firm acting as principals and on their own behalf.[17]

Where the usual presumption is negatived by an agent contracting for an unnamed principal in such terms as to exclude his own liability, he may nevertheless show afterwards, if the fact be so, that he is himself the principal,[18] or the other party on discovering that fact may sue him.[19]

Where an ancestral business is carried on by some only of the members of a joint Hindu family as managers, a contract made by the managers in their own name may be enforced by them personally without joining the other members as parties to the suit. The managing members are in such a case in the position of agents for undisclosed principals.[20]

A merchant in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable for failure to deliver the goods. The firm is in such a case merely an agent to place the merchant's order with the manufacturers in Europe, and by so doing it does not enter into any contract with the merchant for sale on behalf of the manufacturers, and it cannot therefore be held liable as an agent acting on behalf of undisclosed principals. The section refers to contracts "entered into by him on behalf of his principal," and the placing of the order does not amount to such a contract. The result is the same if the goods are ordered through a branch in this country of a firm of commission agents in another country.[21]

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to

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no presumption of the agent's personal liability could arise at all if he signs his name to the instrument as agent: Negotiable Instruments Act, 1881, s. 28. *Cp. Mackinnon* v. *Lang* (1881) 5 Bom. 584, 588, and notes, "contract to the contrary," on s. 230, above.

13 *Soopromonian Setty* v. *Heilgers* (1879) 5 Cal. 71, 79. See Evidence Act, 1872, s. 92.

14 *Hersom* v. *Bernett* (1954) 3 W.L.R. 737, (1954) 3 All E.R. 370.

15 *J. Thomas & Co. (Jute & Gunnies) Pvt. Ltd.* v. *Bengal Jute Baling Co. Ltd.* (1979) A. Cal. 20, 27.

16 *Radhakrishna Shivdutt Rai* v. *Tayaballi* (1962) A.S.C. 538, 544; (1962) Supp. (I) S.C.R. 81; *Gadd* v. *Houghton* (1876) 1 Ex.D. 357 refd. to.

17 *Radhakrishna Shivdutt Rai* v. *Tayaballi* (1962) A.S.C. 538; (1962) Supp. (I) S.C.R. 81; *H.C. Brandt & Co.* v. *H.N. Narris & Co. LTd.* (1917) 2 K.B. 784 (C.A.) Dist. Bowstead on Agency para. 116 (12th Ed.), page 266 dist.

18 *Schmaltz* v. *Avery* (1851) 16 Q.B. 655; but see s. 236, below.

19 *Carr* v. *Jackson* (1852) 7 Ex. 382.

20 *Gopal Das* v. *Hari Das* (1905) 27 All. 361.

21 *Mahomedally* v. *Schiller* (1889) 13 Bom. 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below." The defendants' reply was that they had received an intimation from their home firm that the order had been placed. See also *The Bombay United Merchants' Co.* v. *Doolubram* (1888) 12 Bom. 50, 62; see also *K.G. Khosla* v. *Dy. Com. C.T.* (1966) A.S.C. 1216.

find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract; but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of this section will apply.[22] Thus if the principal is undisclosed, and the note says "sold for you to my principals," *i.e.*, I, your broker, have made a contract for my principals, the buyers, the broker is merely an intermediary, and he is not personally liable to his employer.[23] For the same reason he is not liable if the contract says "bought for you from my principals," [24] and the terms "sold by order and for account of *G* to selves for principal," the broker signing as broker, do not bind him personally, nor therefore entitle him to sue in his own name for failure to deliver.[25] But the broker is personally liable if the contract says "bought of you for my principals," for here the contract is one of purchase by the broker on behalf of undisclosed principals.[26]

If either or both parties, although on the face of the contract they do not appear to be other than principals, had, in fact, acted as agents of third parties, the actual principal may sue or be sued on the contract although they are neither named nor indicated; but the contract must be such that the personality of the contracting parties is not material.[27]

Principal not liable.—There is a rather curious class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy.[28] A person taking a house for starting a hospital is personally liable under the contract if the hospital is an undisclosed principal and has not come into existence or is not registered.[29] Other cases have occurred where the principals were uncertain bodies of persons, or otherwise incapable of being sued by the description in the contract; but these would hardly be instructive in the different circumstances of Indian society,[30] and it must be remembered that decisions turning on or involving the "solemnity" of an English deed are to be used here with great caution.

Deed executed in agent's name.—According to English law, no person who is not a party to a deed can be sued upon the contract contained in it. But it seems that the technical rule of English law has no operation in this country, so that the principal may sue and be sued upon a deed even though it may not have been executed in his name.[31]

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22 *Patiram* v. *Kankanarrah Co.* (1915) 42 Cal. 1050, 1065-66; 31 I.C. 607; *Jivraj* v. *Chainkaran* (1944) Nag. 749, 1944 A.N. 279.

23 *Southwell* v. *Bowditch* (1876) L.R. 1 C.P.D. 374.

24 *Patiram* v. *Kankanarrah Co.* (1915) 42 Cal. 1050; 31 I.C. 607.

25 *Nanda Lal Roy* v. *Gurupada Haldar* (1924) 51 Cal. 588; 81 I.C. 721; A.I.R. 1924 Cal 733. *Semble,* a usage of the local market to treat brokers as principals is not admissible.

26 *Southwell* v. *Bowditch* (1876) L.R. 1 C.P.D. 374, at p. 379.

27 *Carberry* v. *Gardiner* (1936) 36 S.R. (N.S.W.) 559; *Higgins* v. *Senior,* 8 M. & W. 834, 844; and Pollock on Contracts (9th Ed.) 108; and Fry: Specific Performance, paras 258, 259 refd. to.

28 *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174; *Re Empress Engineering Co.* (1880) 16 Ch. D. 125; *Lakshmishankar* v. *Motiram* (1904) 6 Bom. L.R. 1106.

29 *Mahabir Prasad* v. *Satyanarain* (1963) A.P. 131.

30 In *Furnivall* v. *Coombes* (1843) 5 M. & Cr. 736; 63 R.R. 455, an express term that a covenant should not bind the covenantors personally was held to be inoperative because no one else could be bound; followed, *Watling* v. *Lewis* (1911) 1 Ch. 414. *Chatturbhuj* v. *Moreshwar,* 1954 S.C.R. 817; (1954) A.SC. 236; *Union of India* (1962) A.SC. 113; (1962) 2 S.C.R. 880, *Ghosh Singh Partners Ltd.* v. *Union of India* (1959) A. Cal. 287.

31 *Chinnaramanuja* v. *Padmanabha* (1896) 19 Mad. 471, dissenting from *Raguonathdas* v. *Morarji* (1892) 16 Bom. 568. The opinion of the Madras Court is clearly preferable on grounds of convenience. Even in England, s. 56, Law of Property Act, 1925, provides that a person may take a benefit under a deed though not a party to it. See also the forerunner of this enactment s. 5, Real Property Act, 1845.

Goods intercepted by Government.—Where there is an express undertaking to pay by the defendant for goods to be supplied by the plaintiff to third parties, at the instance of the defendant, the defendant is not a *del credere* agent but is liable to pay the plaintiff in spite of interception of goods by Government. In such a case, the defendant as agent is liable to pay the full price and not merely the compensation received from Government. He is not liable for interest.[32]

Sovereign States as principals.—Sovereign States and their rulers would seem to come within the description of possible principals who cannot be sued; but there is a special rule for this case, and it is settled for sufficient reasons of good sense and policy, that an agent contracting even in his own name on behalf of a Government is not to be considered as personally a party to the contract. No man would accept public office at such risk as a different rule would involve.[33] As regards British India, the law was that the Ruling Chief of an Indian State might be sued in a competent Court in India in certain cases with the consent of the Central Government.[34] Where no such consent was given, it has been held that a suit might be brought against the agent appointed by the Ruling Chief of an Indian State for the purposes of the business in respect of which the suit was brought.[35] Under Article 299(1) of the Constitution, 'all contracts made in exercise of the executive power of the Union or of a State shall be made by the President, and all such contracts shall be executed on behalf of the President by such persons and in such manner as he may direct or authorise.' If this form is not observed, s. 230(3) applies.[36]

Parties—Foreign Sovereign Contract.—Where goods purchased by a Government Corporation were not discharged at the port of discharge and the vessel was delayed and the sellers applied for a writ out of jurisdiction for demurrage for delay but before the service of the writ the Corporation was dissolved and its assets taken over by Government and it claimed sovereign immunity, it was held that the English Courts will not issue their process against a foreign sovereign for debt or damages. Since the cause of action had arisen out of jurisdiction, English Courts would not give leave to serve a writ.[37]

Cases under Art. 299(1) of the Constitution.—The Supreme Court held that a contract which was not in accordance with the requirements of section 175(3) of Government of India Act was not binding on the Governor-General though the officer signing the contract would be liable under section 230(3) of Contract Act.[38] But this must be read subject to the provisions of the Constitution.[39] According to the Calcutta High Court, section 230(3) of the Contract Act is applicable to cases where the principal being liable under the contract cannot for some reason be sued but not to cases where the principal cannot be sued because in law he is not liable under the contract, e.g. Article 299(1) of the Constitution.[40] The agent is not sued on account of his own liability but that of the principal who cannot be sued.[41]

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32 *Merchant & Co.* v. *Pura Goluckdih Co.* (1960) A.P. 364; *Rusholme & Botton & Robberts Hadfield* v. *S.G. Read & Co. (London)* (1955) 1 All E.R. 180 reld. on; *Thomas Gabriel & Sons* v. *Churchill & Sim* (1914) 3 K.B. 1272 dist.

33 *Gidley* v. *Lord Palmerston* (1822) 3 Brod. & B. 275; 24 R.R. 668; see this and other authorities collected in *Palmer* v. *Hutchinson* (1881) 6 App. Ca. at p. 626; *Grant* v. *Secretary of State for India* (1877) 2 C.P.D. 445, at p. 461.

34 See s. 86 of the Code of Civil Procedure, 1908. But see the 26th Amendment.

35 *Abdul Ali* v.*Goldstein* (1910) Punj. Rec. no. 43; 4 I.C. 902.

36 *Chatturbhuj Vithaldas* v. *Moreshwar Parashram,* 1954 A.S.C. 236, 243, although it was held that there was no contract with Government. *Contra State of U.P.* v. *Murari Lal* (1971) A.SC. 2210.

37 *Thai Europe Tapioca Service Ltd.* v. *Government of Pakistan* (1975) 3 All ER 961, 965 (C.A.); *Rahimtoolah* v. *HEH Nizam Hyderabad* (1957) 3 All ER 441, 463, applied; The Porto Alexandre (1918-19) All ER Rep. 615 doubted.

38 *Chatturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.S.C. 236; *Union of India* v. *Gangadhar Mimraj* (1962) A.P. 372; 41 Pat. 881. See *Bhikraj Jaipuria* v. *Union of India* (1962) A.S.C. 113; (1962) 2 S.C.R. 880.

39 But under the constitution 299(2) the officer is not personally liable on a contract with Government.

40 *Ghosh Singh Partners Ltd.* v. *Union of India* (1959) A. Cal. 287; *Chatturbhuj* v. *Moreshwar* (1954) S.C.R. 817; (1954) A.S.C. 236 reld. on.

41 *Ghosh Singh Partners Ltd.* v. *Union of India* (1959) A. Cal. 286.

Void Contracts.—The Supreme Court in *Chaturbhuj Vithaldas* v. *Moreshwar*[42] held in an election case that the want of proper form as required by Art. 299(1) of the Constitution was a technical defect for which s. 230(3) of the Act was provided as a remedy. The Court also observed that there is nothing to prevent ratification particularly if it is for the benefit of the Government.In a later case of breach of contract it was observed that it was well established that a contract between the Dominion of India and a private individual was not the proper form as required by S. 175(3) of the Government of India Act, 1935, the contract is void and the Dominion cannot be sued for breach of contract. There is no question of estoppel or ratification in such a case.[43] In this case *Chattarbhuj's case* was not referred to.

The Supreme Court held in later cases that a contract entered into a form not in conformity with Art. 299(1) is void and is, therefore, incapable of being ratified and the principle of estoppel does not apply. If there is no contract in law, "it is difficult to see how section 230(3) of the Contract Act would become applicable." On the applicability of section 235 the Supreme Court reserved its opinion. Further, it was held that the contract cannot be enforced against the Government Officer who entered into the contract on behalf of the Government. Therefore, the contract must be such that it can be ratified if section 230(3) of the Act is to be made applicable.[44] It may however be added here that in the cases of "promissory estoppel" discussed earlier Art. 299 was held no bar to make the State liable.[45]

Negotiable instruments.—Where a negotiable instrument is signed by a duly authorised agent in the name of his principal, the latter may be rendered liable on the instrument.[46] But where the instrument is signed by the agent in his own name without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, he is liable personally except to those who induced him to sign upon the belief that the principal only would be held liable.[47] The question may arise whether a principal whose name does not appear on a negotiable instrument can be made liable on the instrument as a party thereto. In England it is provided by the Bills of Exchange Act that the principal is not liable in such a case.[48] There is no specific provision in the Negotiable Instruments Act, and it is a question whether, having regard to ss. 233 and 234, below, the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name.[49] In the case of a joint Hindu family, it has been held that the payee may sue not only the maker, but his coparceners, provided the plaint includes a demand in respect of the original debt, and the debt was contracted for the benefit of the family.[50] But the liability of the other coparceners in such a case does not rest on any principles of agency, but upon the personal law to which the parties are subject.[51]

Defendant's right where agent sues in own name.—Where an agent sues in his own name on a contract made on the principal's behalf, statements made by the principal, as well as his own statements, may be used in evidence against him as admissions,[52] and the defendant is en-

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42 (1954) SCR 317; (1954) A.SC. 236, 243.

43 *Mulamchand* v. *State of Madhya Pradesh* (1968) 3 SCR 214; (1968) A.SC. 1213, 1222; *Seth Bhikraj Jaipuria* v. *Union of India* (1962) 2 SCR 880; (1962) A.SC. 113; *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1 SCR 876; (1962) A.SC. 779; *Bengal Coal Co. Ltd.* v. *Union of India* (1971) A. Cal. 219 (later Supreme Court case folld); (1971) 2 Cal. 42; *Smt. Raj Kumari Soni* v. *State of Himachal Pradesh* (1972) A.HP. 1,4 (Case of tenancy of premises).

44 *The State of UP* v. *Murari Lal & Bros. Ltd.* (1971) A.SC. 2210, 2212; (1972) 1 S.C.R.1; *Chatturbhuj Vithaldas* v. *Moreshwar* (1954) S.C.R. 811; (1954) A.SC. 236 explained. (A case of Elections); *State of West Bengal* v. *B.K. Mondal & Sons* (1962) Supp. 1, SCR 876; (1962) A.SC. 779; *Mulamchand* v. *State of Madhya Pradesh* (1968) 3 SCR 214; (1968) A.SC. 1218 followed.

45 *Motilal Padamput Sugar Mills* v. *State of U.P.* (1979) A.SC. 621, 643, (1979) 2 SCR 641.

46 Negotiable Instruments Act, 1881, s. 27.

47 *Ib.*, s.28.

48 S. 23: "Bills and notes form an exception to the ordinary rule that when a contract is made by an agent in his own name evidence is admissible to charge the undisclosed principal, though not to discharge the agent"; Chalmers thereon, at p. 77.

49 *Krishna* v. *Krishnasami* (1900) 23 Mad. 597, at p. 600.

50 *Ib.*

51 *Ib.* at pp. 604, 607.

52 *Smith* v. *Lyon* (1813) 3 Camp. 465; 14 R.R. 810.

titled to avail himself of any defence, including that of set-off, which would have been available against the agent if he had been suing on a contract made on his own behalf, even though the defence would not have been available in an action by the principal on the contract.[53] The defendant is also entitled to discovery to the same extent as if the principal were a party to the proceedings.[54]

Effect of settlement with principal.—As a general rule, the right of an agent to sue personally on a contract made on the principal's behalf ceases on the intervention of the principal, and a settlement between the principal and the third party constitutes a good defence to an action by the agent.[55] But if the agent has a lien on the subject-matter of the contract as against the principal, his right to sue has priority to the right of the principal as long as the claim secured by the lien remains unsatisfied;[56] and in such a case the defendant cannot in an action by the agent set up any settlement with or set-off against the principal which would operate to the prejudice of the claim secured by the lien,[57] unless the agent is estopped by his conduct, or by the terms of the contract, from disputing the validity of the settlement or right of set-off.[58]

Rights of parties to a contract made by agent not disclosed.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

First Paragraph.—The first para deals with a contract where the person making a contract with an agent of another neither knows nor has reason to suspect that he is an agent.[59]

"Discloses himself."—The High Court of Bombay is of opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and that it does not arise where the disclosure is made by some other person or the information reaches him from some other source.[60] The expression "if the principal discloses himself before the contract is completed" in the second paragraph

53 *Gibson* v. *Winter* (1833) 5 B. & Ad. 96; 39 R.R. 411 (in an action by a policy broker, a payment by way of set-off was held a good defence, though it would not have been a good payment as against the principal).

54 *Willis* v. *Baddeley* (1892) 2 Q.B. 324.

55 *Atkinson* v. *Cotesworth* (1825) 3 B. & C. 647; 27 R.R. 450: *Rogers* v. *Hadley* (1863) 2 H. & C. 227; 133 R.R. 652.

56 *Drinkwater* v. *Goodwin* (1775) Cowp. 251 (sale by factor in his own name of goods on which he had a lien for advances).

57 *Atkyns* v. *Amber* (1796) 2 Esp. 493 (defendant not entitled, in action by broker for price of goods sold in own name on which he had made advances, to set off debt due from principal); *Robinson* v. *Rutter* (1855) 4 E. & B. 954; 99 R.R. 849 (action by auctioneer for price of goods sold: plea that defendant had paid the principal held bad); *Grice* v. *Kenrick* (1870) L.R. 5 Q.B. 340 (action by auctioneer for price of goods sold: settlement with the principal which did not operate to the prejudice of the plaintiff held a good defence).

58 *Coppin* v. *Walker* (1816) 2 Marsh. 497; 17 R.R. 505; *Coppin* v. *Craig* (1816) 2 Marsh. 501; 17 R.R. 508 (in these cases an auctioneer, having sold goods which were described as the property of a named principal, allowed purchasers to take the goods away without giving them notice not to pay the principal).

59 *Goshto Bihari* v. *Surs' Estate Ltd.* (1960) A. Cal. 752; *Maganbhai* v. *Chetan Lal* (1968) A. Raj. 81.

60 *Lakshmandas* v. *Lane* (1904) 32 Bom. 356; the reference to *Karim Chowkidar* v. *Sundar Bewa* (1896) 24 Cal. 207, at 1. 3 of p. 362 of the report, is wrong; the correct reference should be *Grenon* v. *Lachmi*

must be read in the context of the first, i.e. where the agent made the contract with a person who did not know nor had reason to suspect that he was an agent.[61] The principle of this section is further developed in the special rules as to undisclosed or dormant partners; in such cases the real difficulty is often to know whether the acting partner was in fact acting on behalf of the firm. See Pollock and Mulla's Commentaries on s. 19 of the Indian Partnership Act, 1932.

The High Court of Calcutta has held that there is nothing in this section to debar a principal from proceeding against his agent under s. 211, if the facts of the case entitle him to do so.[62]

Performance of contract with agent supposed to be principal.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration.

A, who owes 500 rupees to *B*, sells 1,000 rupees, worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set off *A*'s debt.

Rights of undisclosed principal.—Like previous learned commentators on these two sections, we are at a loss to discover any difference between them, except that s. 231 expresses the same matter more fully. There is a clause very like s. 232 in the Indian Law Commissioners' draft, but nothing corresponding to s. 231. We are inclined to conjecture that s. 231 was an amendment intended to replace the section as first drawn, and that finally both clauses were retained either by inadvertence or by way of abundant caution. The difficulty thus raised is not serious, for there is no doubt about the substance of the law; but it has been judicially discussed. In *Premji* v. *Madhowji*[63] Marriott J. said: "I do not think s. 232 is a repetition of the first paragraph of s. 231. It is, I think, a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. S. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party." It is submitted, however, that the ground is completely covered by the saving clause in the first paragraph of s. 231, and no further qualification is added by s. 232. The illustration to s. 232 would have been quite as appropriate to s. 231. In the case now cited it was contended that the object of s. 232 was to reproduce the law as supposed to be laid down in *Thomson* v. *Davenport*[64] and *Armstrong* v. *Stokes*,[65] namely, that the right of the other contracting party to hold the principal liable is subject to the qualification that the principal has not paid the agent, or that the state of accounts between the principal and agent has not been altered to the prejudice of the principal. But this contention did not prevail, and it was said that the only qualification imposed upon the rights of the other contracting party was that specified in s. 234. Almost at the same time, in fact, the Court of Appeal in England,[66] overruling, or refusing to accept literally, the wider dicta in

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Narain (1896) 24 Cal. 8, at p. 10; *Kapurji Magniram* v. *Panaji Devichand*, 53 Bom. 110; 113 I.C. 341; 1929 A.B. 177.

61 *Goshto Bihari* v. *Surs' Estate Ltd.* (1960) A. Cal. 752; *Lakshmandas Narayandas* v. *Anna R. Lane*; 32 Bom. 356 reld on; *Abdul Karim Basma* v. *Weekes* (1950) 2 All E.R. 146 (P.C.) refd. to (a case under Statute of frauds).

62 *Makhanlal Basak* v. *Bashudharanjan* (1934) 61 Cal. 504; 152 I.C. 33; 1934 A.Cal. 721.

63 (1880) 4 Bom. 447, 456.

64 (1829) 9 B. & C. 78; 32 R.R. 578; and in 2 Sm.L.C.

65 (1872) L.R. 7 Q.B. 598.

66 *Irvine* v. *Watson* (1880) 5 Q.B.D. 414, 417.

Thomson v. *Davenport* and *Armstrong* v. *Stokes*,[67] approved the more guarded judgment of Parke B. and the Court of Exchequer in *Heald* v. *Kenworthy*.[68] "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be *unjust*[69] for him to do so. But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." Otherwise, "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly."

On similar grounds, if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name.[70]

Undisclosed Foreign Principal.—Where the plaintiffs authorised their English agents to create privity of contract between them and the defendants and the English agents did so the plaintiffs are entitled to sue the defendants under the contract, the contract being for the sale of machines which had failed to accord with the contract description and were not of merchantable quality. It was also held that there was no trade usage in existence to the effect that the foreign principal of an English agent did not authorize the agent to establish the privity of contract between him and third parties.[71]

The result is that these two sections and s. 234, taken together, fairly represent modern English law as understood in the Court of Appeal.

Equities between agent and third party.—An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities; that is, the third party may use against the principal any defence that would have availed him against the agent.[72] "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right to set-off which he would have had against the agent".[73] "The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George* v. *Clagett*.[74]... That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal".[75]

The application of the rule is limited to liquidated demands,[76] but it "is not confined to the sale of goods. If *A* employs *B* as his agent to make any contract for him, or to receive

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67 See foregoing notes. The authority of *Armstrong* v *Stokes* is reduced to that of a decision on special circumstances.
68 (1855) 10 Ex. 739, 746; 102 R.R. 800, 805.
69 Referring to some of the language used in *Thomson* v. *Davenport*.
70 *Ferrand* v. *Bischoffshein* (1858) 4 C.B.N.S. 710, 717; 114 R.R. 908, 913. The decision shows that nothing less than positive misleading will do.
71 *Teheran-Europe Co. Ltd.* v. *S.T. Belton (Tractors) Ltd.* (1968) 2 W.L.R. 523, 530.
72 *George* v. *Clagett* (1797) 7 T.R. 359; 4 R.P. 462; *Sims* v. *Bond* (1833) 5 B. & Ad. 389, 393; 39 R.R. 511, 515.
73 *Per* Willes J. in *Dresser* v. *Norwood*, 14 C.B.N.S. 574, at p. 589.
74 *Supra*.
75 *Turner* v. *Thomas* (1871) L.R. 6 C.P. 610, at p. 613, *per* Willes J.
76 *Ib*.

money for him, and *B* makes a contract with *C* or employs *C* as his agent, if *B* is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by *C* to be acting as an agent for anyone, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal. If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences."[77]

In England it is not necessary for the third party who dealt with the agent as a principal to go beyond showing that he believed him to be a principal. Means of knowledge or "reason to suspect" appears to be material only as tending to negative the alleged belief.[78] The words of both ss. 231 and 232, however, are quite clear on this point. But there must be actual belief that one is dealing with a principal. Ignorance or doubt whether the apparent principal is a principal or an agent is not enough; for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such.[79]

The second paragraph of s. 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable.

Right of person dealing with agent personally liable.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C* or both, for the price of the cotton.

In cases where the agent is personally liable.—As to the cases where an agent is personally liable, see s. 230 and commentary thereon, above.

The question arises whether or not this section represents a departure from the recognized and accepted principle of English law that the liability of principal and agent is alternative and not joint.[80] Coutts-Trotter C.J. in *Kuttikrishnan Nair* v. *Appa Nair,*[81] held that, though the wording of the section was very unfortunate, it was intended to reproduce the English law: "I have come to the conclusion that what the section means is that the person dealing with the principal through the agent may at this election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on this point that the section can only be construed as meaning that he may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability." This is contrary to the view expressed in an earlier Bombay case,[82] where it was said that the section created a joint liability, and if the illustration only showed that the agent and the principal might be joined in one suit, an illustration could not control the plain meaning of the section itself. A Division Bench in Madras have more recently dissented from Coutts-Trotter C.J. in the case cited above, Leach C.J., observing: "There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule, which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter, but we are not called upon to consider that question here".[83]

77 *Montagu* v. *Forwood* (1893) 2 Q.B. 350, at p. 355, *per* Bowen L.J. Here the defendants were employed by apparent principals, who were in fact agents for the plaintiffs, to collect a general average contribution from underwriters.

78 *Borries* v. *Imperial Ottoman Bank* (1873) L.R. 9 C.P. 38.

79 *Cooke* v. *Eshelby* (1887) 12 App. Ca. 271. The decision has been criticised, but, being in the House of Lords, is final.

80 *Morel* v. *Westmoreland* (1904) A.C. 11; *Moore* v. *Flanagan* (1920) 1 K.B. 919; See also Bowstead on Agency, 12th Ed., p. 212.

81 (1926) 49 Mad. 900, at p. 902; 97 I.C. 475; 1926 A.M. 1213.

82 *Shivlal Motilal* v. *Birdichand* (1917) 19 Bom. L.R. 370; 40 I.C. 194.

83 *Shamsuddin Ravuthar* v. *Shaw Wallace & Co.* (1939) Mad. 282; 184 I.C. 153; (1939) A.M. 520.

The criticism of the learned judges on the language of the section and of the illustration is certainly justified; and it may well be that the framers of the Act did intend to reproduce existing English law. But it is difficult to give the wording of the section a meaning other than that which commended itself to Leach C.J. and his brother judge in Madras. The section itself, whatever may be the case with the illustration, is concerned with substantive law only; Coutts-Trotter C.J., seems to treat it as setting out the creditor's procedural rights. On this construction the creditor may hold either principal or agent as severally liable in the alternative, or at his option hold them jointly liable. If he elects to hold them jointly liable, he can sue them both; but if he elects to sue one only he must be deemed to have given up his rights against the other, since in that case the liability is alternative and not joint.

For the liability of joint-promisors see notes to s. 43, above.

Judgment against the Agent.—Where by a contract an agent is personally liable and judgment obtained, no suit will lie against the principal on the same debt even if the judgment is wholly or partly unsatisfied. This applies even if the judgment is set aside by consent but will not apply if it is set aside on merits.[84]

Creditor's election.—A person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so, and that whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only, and not the less so in cases where the agent is personally liable, for the law which superadds the liability of the agent does not detract from the liability of the principal.[85] A company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator authorised by the company to borrow for the purposes of the winding up.[86] And, upon the same principle, a loan made to the secretary, treasurer, and agent of a company authorised to raise moneys for the company may be recovered from the company.[87] But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied,[88] and though the creditor was not aware of the existence of a principal when he sued the agent.[89] It was held in 1883 in a Madras case that where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the reason given being that nothing short of a judgment against the agent could amount to a binding election on the part of the creditor to abandon the right to proceed against the principal.[90] This however is contrary to the later cases cited above and it is submitted that it is not good law in India.

There may, however, be a deliberate intention shown from the beginning of the transaction, or at some later stage, to give credit to the agent alone: in that case there is no right of action against the principal;[91] and the third party must elect to sue an undisclosed principal, if he means to preserve his rights against him, within a reasonable time after ascertaining him.[92] The question whether the creditor has elected to give credit to him to the exclusion of the principal is one of fact.[93] Invoicing the goods to the agent and calling upon him to pay for them,[93] or taking and renewing his acceptances in payment of the price,[94] are not conclusive of such an

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84 Bowstead on Agency 14th ed, Art. 86. Chitty on Contracts (24th ed.) para 2055 Vol. II

85 *Calder* v. *Dobell* (1871) L.R. 6 C.P. 489. The question was whether the circumstances showed an election to charge the agent exclusively.

86 *In re Ganges Steam Car Co.* (1891) 18 Cal. 31.

87 *Purmanundass* v. *Cormack* (1881) 6 Bom. 326.

88 *Shivlal Motilal* v. *Birdichand, supra,* note (33); *Bir Bhaddar* v. *Sarju Prasad* (1887) 9 All. 681.

89 *Shivlal Motilal* v. *Birdichand, supra,* note 33.

90 *Raman* v. *Vairavan* (1883) 7 Mad. 392, citing *Curtis* v. *Williamson* (1874) L.R. 10 Q.B. 57.

91 *Paterson* v. *Gandasequi* (1812) 15 East, 62; *Addison* v. *Gandasequi* (1812) 4 Taunt 574; 13 R.R. 368, 689, and in 2 Sm. L.C.

92 *Smethurst* v. *Mitchell* (1859) 1 E. & E. 622; 117 R.R. 374. *Cp. Dawidson* v. *Donaldson* (1882) 9 Q.B.D. 623.

93 *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.

94 *Robinson* v. *Read* (1829) 9 B. & C. 449; *Whitwell* v. *Perrin* (1858) 4 C.B.N.S. 412; 114 R.R. 785.

election. The next section is apparently intended to cover all forms of election, whether by estoppel or otherwise.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

This section seems to be derived from S.A. § 291, rather than from any definite English authority. We may take it, however, as giving the true reason of a rule which, about the time when the Act was passed, was too widely laid down in England, but was afterwards corrected in the Court of Appeal (see the commentary on ss. 231, 232, above).

This section was applied where the purchaser of goods gave notice to the vendor's agent that he, the agent, would be held responsible if the goods were not as represented by him.[95]

Liability of pretended agent.

235. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Implied warranty of authority.—This section is in accordance with the English law as established by *Collen* v. *Wright*.[96] It applies not only to the case of a person who represents that he has authority from another when he has no authority whatever, but to the case of a person who represents that he has a certain authority from another when he has authority of another description.[97] The duty is grounded on an implied warranty by the agent that he has authority, and the action, being in contract, lies even if the agent honestly believed he had authority, and against executors (in which case an action in tort for deceit did not lie in England) at common law.[98] The doctrine has been fully confirmed by later authorities and by the House of Lords.[99] An agent who purports to report the other party's intentions does not thereby make himself that party's agent to deal with his original principal. It may be a breach of his original duty as agent if his report is incorrect, but he is not liable under the rule in *Collen* v. *Wright* on an implied warranty of authority from the other party to conclude the transaction.[1]

The word "untruly" may perhaps imply (as is held in England) that the representation must be of matter of fact.[2]

A person, wrongly pretending to be a partner of a firm signed an acknowledgement of liability, is liable to pay the amount to the creditor under section 235 of Contract Act.[3]

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95 *Madhav Ganga Prasad* v. *Gouri Shankar* (1949) I Cut. 453, 1950 A. Or. 42.
96 (1857) 7 E. & B. 301, in Ex. Ch. 8 E. & B. 647; 110 R.R. 602, 611; see *Hasonbhoy* v. *Clapham* (1882) 7 Bom. 51, 66.
97 *Ganpat Prasad* v. *Sarju* (1911) 9 All.L.J. 8; 13 I.C. 94.
98 The law was changed by the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41).
99 *Starkey* v. *Bank of England* (1903) A.C. 114. It is needless for Indian purposes to cite intermediate cases.
1 *Chr. Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (1905) A.C. 302.
2 *Beattie* v. *Lord Ebury* (1872) L.R. 7 H.L. 102; *Weeks* v. *Propert* (1873) L.R. 8 C.P. 427; *Shet Manibhai* v. *Bai Rupaliba* (1899) 24 Bom. 166, 170. As to the distinction between representations of fact and of law, see notes on s. 18, above.
3 *Bheck Chand* v. *Prabhuji* (1963) A. Raj. 84; (1963) 13 Raj. 84.

A public servant acting on behalf of the Government is not deemed to warrant his authority any more than to make himself personally liable on the contract,[4] and for the same reason of policy.

If a man goes through the form of contracting as an agent, but warns the other party that he has at the time no authority, he is obviously not liable under this section.[5] It seems a nice question whether there is in such a case anything which the named principal can ratify, or anything more than an offer to him, liable to revocation like any ordinary proposal.

Representation must be effective.—The liability of a pretended agent under this section does not arise, unless the representation that he is the agent of another is false, and also induces the person to whom the representation is made to deal with him as such agent. A representation by the defendant to the plaintiff that she is the duly authorised agent of her minor son does not render her liable under this section, if the plaintiff knows that the son is a minor. For a minor cannot appoint an agent (s.183, above), and consequently no warranty such as would support a suit could arise out of such a representation.[6]

Measure of Damages.—In England, the action being founded on contract, and not on tort, the measure of damages is the loss sustained as the consequence of the breach of the implied warranty. In other words, the person acting on the misrepresentation is entitled not only to recover any loss actually sustained through being misled, but also any profit which he would have gained if the representation had been true.[7] Thus, if an agent contracts, without authority, to buy goods at a price in excess of their value, and the principal repudiates the contract as unauthorised, the measure of damages recoverable against the agent is the difference between the contract price and the market value of the goods.[8] Similarly, where an agent, who was instructed to apply for shares in a certain company, applied for shares in another company by mistake, and they were allotted to the principal, who repudiated them shortly afterwards in the winding up of the company, it was held that, the principal being solvent and the shares valueless, the measure of damages payable by the agent to the liquidator was the full amount payable on the shares.[9] If the third person reasonably[10] takes proceedings against the principal for the enforcement of the unauthorised transaction, the damages recoverable against the agent include the costs and expenses incurred by the third person in respect of the proceedings.[11]

It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty.[12]

Limitation.—It has been held by the High Court of Madras that a suit for damages against a person for untruly representing himself to be the agent of another is governed by art. 55 of Sch. of the Limitation Act of 1963.[13]

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4 *Dunn* v. *Macdonald* (1897) 1 Q.B. 555, C.A.
5 *Halbot* v. *Lens* (1901) 1 Ch. 344.
6 *Shet Manibhai* v. *Bai Rupaliba* (1899) 24 Bom. 166, citing *Beattie* v. *Lord Ebury*, L.R. 7 Ch. 777; L.R. 7 H.L. 102. A minor's guardian is not in all respects his agent, and the section is not in terms applicable to a guardian, *Mst. Mida* v. *Kishan Bahadur* (1934) All. L.J. 350; 151 I.C. 820; 1934 A.A. 645.
7 *Firbank* v. *Humphreys* (1886) 18 Q.B.D. 54, *Richardson* v. *Williamson* (1871) L.R. 6 Q.B. 276; *Meek* v. *Wendt* (1888) 21 Q.B.D. 126; *Godwin* v. *Francis* (1870) L.R. 5 C.P. 295, is a case where the damages claimed were held to be too remote.
8 *Simons* v. *Patchett* (1857) 7 E. & B. 568; 110 R.R. 730.
9 *Ex parte Panmure* (1883) 24 Ch. D. 367.
10 See *Pow* v. *Davis* (1861) 1 B. & S. 220; 124 R.R. 530.
11 *Spedding* v. *Nevell* (1869) L.R. 4 C.P. 212; *Hughes* v. *Greame* (1864) 33 L.J.Q.B. 335.
12 See *Vairavan Chettiar* v. *Avicha Chettiar* (1915) 38 Mad. 275, 278; 21 I.C. 65.
13 *Vairavan Chettiar* v. *Avicha Chettiar, supra.*

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named. In the former case the agent cannot substitute himself for the principal,[14] though the other party may by words or by conduct, such as acting on the contract after knowledge that the nominal agent was the real principal, deprive himself of the right to object; and it has been suggested, though not decided, that the agent might be allowed to take up the contract for himself on condition of being subject to all defences available against either himself or the named principal.[15] But where the principal is not named the third party is contracting with the principal, whoever he may be, and there is no obvious reason why he should be presumed willing to deal with any unknown person in the world, provided that he is capable of being sued, and unwilling to deal with the nominal agent, the only person he knows in the matter. Accordingly a person who made a charter-party as agent for an unnamed freighter has been allowed to show that he was the freighter himself.[16]

It does not seem possible, however, to read any such distinction into perfectly general language of the present section; and, indeed, the English rule is not clear of doubt, as the authorities (including some dicta which it would be useless to cite here) are not uniform, and the rule has never been settled by a Court of appeal. The High Court of Calcutta has held that this section is not restricted to cases where an agent purports to act for a named principal.[17] If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, the present section at once applies, and he cannot sue on the contract.[18]

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, *e.g.*, made a charter-party "as owner of the ship A," another person cannot be allowed to sue on the contract as an undisclosed principal.[19]

Liability of principal inducing belief that agent's unauthorised acts were authorised.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations.

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

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14 *Bickerton* v. *Burrell* (1816) 3 M. & S. 383.

15 *Rayner* v. *Grote* (1846) 15 M. & W. 359; 71 R.R. 709.

16 *Schmaltz* v. *Avery* (1851) 16 Q.B. 655; 83 R.R. 653.

17 *Sewdutt Roy Maskara* v. *Nahapiet* (1907) 54 Cal. 628; *Nanda Lal Roy* v. *Gurupada Haldar* (1924) 51 Cal. 588; 81 I.C. 721; and see *Shree Shree Gopal Shreedhar* v. *Shasheebhushan* (1932) 60 Cal. 111; 142 I.C. 485; 1933 A. Cal. 109.

18 *Ramji Das* v. *Janki Das* (1912) 39 Cal. 802; 17 I.C. 973.

19 *Humble* v. *Hunter* (1848) 12 Q.B. 310; 76 R.R. 291. But this does not extend to the term "charterer," which is consistent with agency for an undisclosed principal: *Rederi Aktienbolaget Transatlantic* v. *Fred. Drughorn* (1918) 1 K.B. 394 C.A., affirmed in H.L. (1919) A.C. 203, nor does it extend to the term 'tenant' *Danziger* v. *Thompson* (1944) K.B. 654. The rule in *Humble* v. *Hunter* itself has not escaped criticism: see *per* Lord Shaw in the *Drughorn case* at p. 209, and *per* Scott L.J. in *Epps* v.

(b) *A* entrusts *B* with negotiable instruments indorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

Ostensible authority.—This section must, in point of fact, overlap s. 188 (above) in many cases, but the principles are distinct. Under s. 188 the question is of the true construction to be put upon a real, though perhaps not verbally expressed, authority. Here the liability is by estoppel, and independent of the apparent agent having any real authority at all; the question is only whether he was held out as being authorised; and this includes the case of secret restrictions on any existing authority of a well-known kind. It is a "well-established principle that, if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority".[20]

Section 237 of the Contract Act deals with the case where there is relationship of principal and agent, and the agent has acted without authority of the principal. The principal is bound by the unauthorised acts of the agent if by words or conduct he induces a third party to believe that the unauthorised acts of the agent are within the scope of the agent's authority.[21] "Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby": S.A. § 127. "If a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.... It is clear that he (the agent) may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not.... If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction-room, can it be supposed that he sent them thither merely for safe custody?".[22] Similarly, where a transaction undertaken by an agent on behalf of his principal is within his express authority the principal is bound without regard to the agent's motives, and inquiry whether the agent was abusing his authority for his own purposes is not admissible.[23] A clerk of a Co-operative Credit Society functioning as a clerk of the Society was held to have ostensible authority to receive payments and an agent of the Society to act as such.[24]

Very many illustrations of the principle are to be found in the English authorities, of which the following may be given as typical examples.[25] Where a principal wrote to a third person saying he had authorised the agent to see him, and, if possible, to come to an amicable arrangement, and gave the agent instructions not to settle for less than a certain amount, it was held that he was bound by a settlement by the agent for less than that amount, the third person having no knowledge of the verbal instructions.[26] An agent was authorised, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, and it was held that the principal was bound by a loan on such exceptional terms made by a third person who had no notice that the agent was exceeding his authority, although no emergency had in fact arisen.[27] Where a solicitor was authorised to sue for a debt, it was held

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v. *Rothnie* (1945) K.B. 562, 565. But in the *Drughorn Case*, Lord Haldane approves it, at p. 206. See also 61 L.Q.R. 130 and 62 L.Q.R. 20.

20 Cockburn C.J. in *Edmunds* v. *Bushell* (1865) L.R. 1 Q.B. 97, 99. See *Chhoteylal Pannalal* v. *R.K. Railway* (1932) 54 All. 557; 138 I.C. 439; 1932 A.A. 540.

21 *Kamal Singh Dugar* v. *Corporated Engineers Ltd.*, 1963 A.Cal. 464; *Ram Pertab* v. *Marshall*, 26 Cal. 701 (P.C.) dist.

22 Lord Ellenborough C.J., *Pickering* v. *Busk* (1812) 15 East, 38; 13 R.R. 364, 366. *Cp.* s. 27 of the Sale of Goods Act, 1930.

23 *Hambro* v. *Burnard* (1904) 2 K.B. 10, C.A., following *Bank of Bengal* v. *Fagan* (1849) 7 Moo. P.C. 61, 74; 83 R.R. 15, 24.

24 *Ramchandaran* v. *Co-operative Societies Act* (1963) A.M. 105; (1962) 2 M.L.J. 407.

25 See Bowstead on Agency, 11th ed., pp. 172, *sqq.*

26 *Trickett* v. *Tomlinson* (1863) 13 C.B.N.S. 663; 134 R.R. 688. See also *National Bolivian Navigation Co.* v. *Wilson* (1880) 5 App. Cas. 176, 209; *Whitehead* v. *Tuckett* (1812) 15 East, 400; 13 R.R. 509.

27 *Montaignac* v. *Shitta* (1890) 15 App. Cas. 357. And see *Bryant* v. *Quebec Bank* (1893) A.C. 179.

that a tender to his managing clerk was equivalent to a tender to the client, though the clerk was forbidden to receive payment, he not having disclaimed the authority at the time of the tender.[28] A broker having on several occasions been permitted by his principal to draw bills in his own name for the price of goods sold, the principal was held bound by a payment to the broker by means of such a bill, accepted by a purchaser who had previously paid in a similar manner for goods bought by him.[29] But in *Kamal Singh's case* it was held that payment of price to the broker is not price paid to the seller. Therefore, a contract to pay the price to the seller is not performed by payment to the broker unless authorised expressly or impliedly.[30] Merely because in a previous contract between the parties the broker was authorised to receive payment is no proof of authority to receive in a subsequent contract.[31] The Supreme Court of Pakistan has held that any limitation on the authority of an agent does not affect the rights of third parties who are unaware of the restrictions and if the circumstances are such as to confer an apparent authority on the agent.[32] The principal can always waive the restriction but he cannot after such waiver plead want of authority of his agent.[33] By a charter-party it is provided that the shipmaster, who is appointed by the owners, shall act as agent of the charterers only in signing bills of lading and ordering necessaries. The owners are liable on bills of lading signed by the master, and for the price of necessaries ordered by him, if the persons shipping the goods or supplying the necessaries have no notice of the charter-party.[34]

Illustration (b) seems to be founded on S.A. § 228: "If an agent is entrusted with the disposal of negotiable securities or instruments, and he disposes of them by sale or pledge or otherwise, contrary to the orders of his principal, to a *bona fide* holder without notice, the principal cannot reclaim them".[35] It must be understood in the illustration that the instruments are not handed to *B* merely for safe custody.

The Privy Council case of *Ram Pertab* v. *Marshall,*[36] which, however, was not decided with reference to the section, affords an additional illustration. In that case the principal was held liable upon a contract entered into by his agent in excess of his authority the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

The same principle is applied in the class of cases where it is held that persons dealing with the incorporated companies, though they must take notice at their peril of disabilities imposed on the corporation by its special Act of Parliament, memorandum, or other public document of constitution, are entitled to assume that the directors or managers are duly exercising their authority according to the company's internal regulations. But this subject is much too special to be pursued in a commentary like the present.[37]

Notice of excess authority.—No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that the act is unauthorised. This proposition is so obvious that it would be superfluous to cite authorities, several of which relate to dealings with money and negotiable instruments,[38] in support of it. One case,

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28 *Moffat* v. *Parsons* (1814) 1 Marsh. 55; 15 R.R. 506.
29 *Townsend* v. *Inglis* (1816) Holt, 278; 17 R.R. 636. And see *Hazard* v. *Treadwell* (1730) 1 Str. 506.
30 *Kamal Singh Dugar* v. *Corporated Engineers Ltd.* (1963) A. Cal. 454; *Link Moeller & Co.* v. *Jameson & Co.* (1885) 2 T.L.R. 206 refd. to.
31 *Ibid.*
32 *Sarshar Ali* v. *Roberts Cotton Association Ltd.* P.L.D. (1963) 1 S.C. 244 (Pak).
33 *Ibid.*
34 *Manchester Trust* v. *Furness* (1895) 2 Q.B. 539; *The Great Eastern* (1868) L.R. 2 Ad. & E. 88.
35 See *London Joint Stock Bank* v. *Simmons* (1892) A.C. 201; *Goodwin* v. *Robarts* (1876) 1 App. Ca. 476; (1874-80) All E.R. Rep. 628.
36 (1899) 26 Cal. 701. See also *Fazal Ilahi* v. *East Indian Railway* (1921) 43 All. 621, 634; 64 I.C. 52; 1922 A.A. 361; *Rai Bahadur Bansi Lal* v. *Kabulchand* (1945) Nag. 204, 221 I.C. 343, 1945 A.N. 121; *Moosa Bhog* v. *Kristiah,* 1952 A. Hyd. 79.
37 See Pollock on Contract, in Appendix, 13th ed., pp. 561 *sqq.*
38 See Bowstead on Agency, 12th ed., pp. 188 *sqq.*

however, where the notice was only constructive, may be mentioned. An agent, who was appointed by a power of attorney, borrowed money on the faith of a representation by him that the power gave him full authority to borrow, and misapplied it. The agent produced the power, which did not authorise the loan, but the lender did not read it, and made the advance in reliance on the agent's representation. It was held that the lender must be taken to have had notice of the terms of the power, and that the principal was not bound by the loan.[39]

"On behalf of his principal."—A principal is not bound by any act done by his agent which he has not in fact authorised, unless it is done in the course of the agent's employment on his behalf,[40] and is within the scope of the agent's apparent authority.[41]

Effect, on agreement, of misrepresentation or fraud by agent.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations.

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable as between *B* and *C* at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

Course of employment.—The accordance of this section with the modern common law well shown in a judgment delivered in the Privy Council by Lord Lindley: "The law upon this subject cannot be better expressed than it was by the acting Chief Justice (of New South Wales) in this case. He said: 'Although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board in *Mackay* v. *Commercial Bank of New Brunswick*,[42] *Swire* v. *Francis*,[43] and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank*,[44] which is the leading case on the subject. It was distinctly approved by Lord Selborne, in the House of Lords, in *Houldsworthy* v. *City of Glasgow Bank*,[45] and has been followed in numerous other cases".[46]

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39 *Jacobs* v. *Morris* (1902) 1 Ch. 816.

40 *McGowan* v. *Dyer* (1873) L.R. 8 Q.B. 141, where the managing director of a company obtained payment of a private debt out of certain funds, in breach of an understanding between the debtor (who was also indebted to the company) and a surety for his debt to the company, and it was held, in an action by the company against the surety, that the company was not responsible for the conduct of the managing director in the matter.

41 Full illustrations, see Bowstead on Agency, 12th ed., pp. 183, *sqq*. For an Indian one, *Morarji Premji* v. *Mulji Ranchhod Ved & Co.* (1923) 48 Bom. 20; 77 I.C. 266; 1924 A.B. 232, of which the practical moral is that cheques to bearer are not safe, even if crossed. The rule is too well recognised to need authorities in support.

42 (1874) L.R. 5 P.C. 394.

43 (1877) 3 App. Ca. 106.

44 (1867) L.R. 2 Ex. 259.

45 (1880) 5 App. Ca. 317, at p. 326.

46 *Citizen's Life Assurance Co.* v. *Brown* (1904) A.C. 423, 427.

In the passage here referred to as now the leading authority, Willes J., delivering the judgment of the Exchequer Chamber, said:

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.[47] That principle is acted upon every day in running down cases. It has been applied also (in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by-laws, and the like). In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in".[48] The words "for the master's benefit," which occur in this judgment, were applicable to the case before the Court, but must not be taken as restricting the scope of the rule, though there was for some time considerable authority for that reading. If the act belongs to an authorised class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit. A solicitor's managing clerk, having authority to transact conveyancing business on behalf of the firm, took a client's instructions to sell some property (by his own advice, given with fraudulent intent) and got the deeds from her (which he might properly have done). Then he procured her execution of instruments, being in fact conveyances to himself, which the client supposed (as intended by him) to be merely formal papers; and having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purposes. The House of Lords[49] held that this was a fraud committed by the manager in the course of his employment, for which the principal was answerable. It is clear from the judgments that the rule applies to ostensible as well as actual authority. It was followed and applied *Uxbridge Permanent etc. Society* v. *Pickard;*[50] even where the servant had been guilty of forgery, and where the plaintiff was not a client of the defendant. There *C,* the managing clerk of the defendant solicitor, induced the plaintiff to advance money to a confederate Cox on the false allegation that Cox was a client of the defendant firm about to purchase a property, regarding which *C* produced false title deeds.

Fraudulent Bills.—If an agent, acting within the scope of his authority, draws bills fraudulently, the principal is liable, even if not ratified by him.[51]

Bank Lockers.—A hirer of a locker in a bank has some control over it by having one key with him. But if the locker can be operated without that key and the manager of the bank fraudulently opens the locker and misappropriates the valuables, the bank as principal is liable, as manager was acting in the course of the business of the bank whether the fraud was for the benefit of the principal or himself.[52] Or the liability of the bank towards the hirer of a locker in the bank is that of a bailee as was held in some American cases.[53]

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47 See *Laughter* v. *Pointer* (1826) 5 B. & C. 547, at p. 554; 29 R.R. at pp. 320, 321.

48 L.R. 2 Ex. 259, at pp. 265, 266.

49 *Lloyd* v. *Grace, Smith & Co.* (1912) A.C. 716, reversing the decision of the C.A. (1911) 2 K.B. 489; *Dina Bandhu Saha* v. *Abdul Latif Molla* (1922) 50 Cal. 258; 68 I.C. 439 1923 A.Cal. 157; *Mst. Suga Kuer* v. *Brijraj Ramniwas,* 1937 A.B. 526; 168 I.C. 986; *Rai Bahadur Bansi Lal* v. *Kabulchand* (1945) Nag. 204, 1945 A.N. 121, 221 I.C. 343.

50 (1939) 2 K.B. 248, C.A.

51 *Bezonji Byramji & Co.* v. *Central Bank of India Ltd.* (1963) A.A.P. 348; *Llyod* v. *Grace, Smith & Co.* (1912) A.C. 716; (1911-12) All E.R. Rep. 51.

52 *National Bank of Lahore* v. *Sohan Lal* (1962) A. Punj. 534; (1962) 1 Punj. 566; *Llyod* v. *Grace Smith & Co.* (1912) A.C. 716; (1911-12) All E.R. Rep. 51 reld. on.

53 *National Bank of India* v. *Sohan Lal* (1962) A. Punj. 534; *Sporsen* v. *First National Bank of Poulsho,* 233 Pac. Rep. 641; *Blair* v. *Riley,* 175 N.E.R. 210 (Not a relationship of landlord and tenant).

Misrepresentation which will make the principal liable to an action for trespass, deceit, or other substantive wrong will, of course, be a sufficient cause for the other party to avoid an agreement induced by it.

Illustration (a) seems to include both the case of the agent knowing but the principal not knowing the truth of the matter misrepresented, and the less obvious one of the agent making a statement without authority, but believing it to be true, while the principal in fact knows it not to be true. In English law, where the principal has not authorised the agent to make the statement, the principal having knowledge that the statement if made would be false, and the agent makes the statement innocently, there is no liability, but it is otherwise if the principal deliberately employs an innocent agent, suspecting that a question would be asked and hoping it would be answered in a certain way.[54] It is clear law that if both principal and agent be innocent there is no liability.[55] As Devlin J. has said both judicially[56] and extra-judicially:[57] 'You cannot add an innocent state of mind to an innocent state of mind, and get as a result a dishonest state of mind'. His Lordship was, however, of the opinion that the Court of Appeal in *London County Properties Ltd.* v. *Berkley Property etc. Co.*''[58] had decided the contrary,[59] but that very Court dispelled his Lordship's doubts in *Armstrong* v. *Strain*.[60]

In *Briess* v. *Woolley*,[61] the House of Lords held principals liable for fraudulent misrepresentations made by a person, who had not yet been appointed their agent at the time of the representations, on the ground that they were continuing representations and that the principals were liable for the fraudulent failure of their agent after his appointment to rectify the false impression he had created. *R* was the managing director of N.P. Co., manufacturers of synthetic cream. *R* approached *B* with a view to *B*'s acquiring the shares in the N.P. Co. *R* fraudulently concealed that during his management the cream had been persistently watered. Subsequently the shareholders in the N.P. Co. appointed him their agent to negotiate a sale to *B*, who ultimately purchased the shares. The shareholders were held liable to *B* for the fraud of *R*, even on the assumption that *R* made no further misrepresentation after his appointment as agent of the shareholders.

Illustration (b) is taken from a modern decision where the real question was as to the extent of the master's apparent authority. It would perhaps have been more appropriate to s. 237. ''The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship, but is subject to several well-known limitations... With regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods:'' but it is not usual for the master to give a bill of lading for goods not put on board. On the contrary, ''the general usage gives notice to all people that the authority.... is limited to such goods as have been put on board''.[62] It has been held by the House of Lords, for similar reasons, that a company's secretary who issues a false certificate of title to shares for his own purposes does not bind the company either as in fact exercising a general authority or by way of estoppel or ''holding out''.[63]

Fuller illustration of the kinds of acts done by agents which are deemed to be ''in the

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54 *Cornfoot* v. *Fowke* (1840) 6 M. & W. 358, 55 R.R. 655.
55 *Ibid.; Gordon Hill Trust, Ltd.* v. *Segall* (1941) 2 All E.R. 379; C.A.; *Armstrong* v. *Strain* (1952) 1 K.B. 232, C.A.
56 *Armstrong* v. *Strain* (1951) 1 T.L.R. 856, 872.
57 53 L.Q.R. 344, 362.
58 (1936) 2 All E.R. 1039.
59 (1951) 1 T.L.R. 856; 863; 53 L.Q.R. 344, 347.
60 (1952) 1 K.B. 232, 243, 245.
61 (1954) 2 W.L.R. 832 (1954) 1 All E.R. 909.
62 *Grant* v. *Norway* (1851) 10 C.B. 665, at pp. 687, 689; 84 R.R. 760, 762.
63 *Ruben* v. *Great Fingall Consolidated* (1906) A.C. 439, affirming the decision of the C.A. (1904) 2 K.B. 712. See also *Whitechurch* v. *Cavanagh* (1902) A.C. 117.

course of their business for their principals'' must be sought in special treatises on the Law of Principal and Agent, or in works on the Law of Torts.

The difficulties, which for some time were thought serious, arose partly from reluctance to hold any one answerable for fraud or wilful wrong to which he had not actually been consenting,[64] partly from a fallacious opinion that it was impossible for a corporation to be liable for fraud or any other wrong which, in an individual, implies a specific belief or intention. It seems no harder to suppose a corporation capable of deceiving than to suppose it capable of being deceived; and if any innocent individual must answer for the fraud of his agent, there is really less hardship in applying the same rule to a corporation.[65]

Admissions by Agent.—S. 18 of the Evidence Act provides that statements made by an agent to a party to any proceedings, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised to make them, are admissions: and s. 21, that admissions are relevant and may be proved as against the person who makes them. The Contract Act is silent on the subject; but the following brief statement of the English law, on which the provisions of the Evidence Act are evidently founded, may be usefully added here.

Statements made by an agent, though not expressly authorised, are admissible against the principal if they have reference to the business on which the agent is employed on the principal's behalf at the time when they are made, and are made in the ordinary course of that employment.[66] If an agent, employed to buy goods, acknowledges the receipt of them, that acknowledgement is evidence against the principal that they have been duly delivered.[67] An acknowledgement by a wife, who manages a business on behalf of her husband, and purchases the goods required, as to the state of accounts between her husband and the persons supplying the goods, is evidence against the husband, and, if it is in writing and signed by the wife, will interrupt the operation of the Statute of Limitations.[68] Where a station-master, in the ordinary course of his duty, made a statement to the police as to a porter having absconded, the statement was admitted in evidence against the company in an action with reference to a parcel which had been lost in transit.[69] But it is not within the scope of an agent's implied or ostensible authority to make statements concerning bygone transactions; and, therefore, where a servant of a railway company, in answer to a question why he had not sent on certain cattle consigned to the company for carriage, said that he had forgotten them, it was held that this admission was not relevant against the company in an action for damages for the delay, because it was made a week after the alleged cause of action arose.[70] Nor are unauthorised statements made by an agent concerning matters in regard to which he is not employed on the principal's behalf at the time when he makes them,[71] or which are not made in the ordinary course of that employment,[72] admissible in evidence against the principal, except where the principal express-

64 See, for example, *per* Bramwell B. in *Swift* v. *Jewsbury* (1874) L.R. 9 Q.B. 301, at p. 315. Lord Bramwell maintained to the last that a corporation could not be sued for malicious prosecution. See now *Citizens' Life Assurance Co.* v. *Brown,* cited, *supra,* note 93.

65 In modern English criminal law, a corporation has been held libale for a crime that requires an intent to deceive or to defraud, when the only intent is that of a servant of the corporation: *D.P.P.* v. *Kent & Sussex Contractors* (1944) K.B. 146; *R* v. *I.C.R. Haulage* (1944) K.B. 541. See 62 L.Q.R. 345.

66 *Ellis* v. *Thompson* (1838) 3 M. & W. 445; 49 R.R. 679. As to statements in bills of lading signed by shipmaster, see *M'Lean* v. *Fleming* (1871) L.R. 2 H.L. Sc. 128; *Smith* v. *Bedouin S.N. Co.* (1896) A.C. 70; *Lishman* v. *Christie* (1887) 19 Q.B.D. 333; Powstead on Agency (12th Ed.), pp. 239-40.

67 *Biggs* v. *Lawrence* (1789) 3 T.R. 454; 1 R.R. 740. And see *British Columbia, etc., Co.* v. *Neetleship* (1868) L.R. 3 C.P. 499 (letters written by shipmaster admitted as evidence against the owners of the receipt of goods).

68 *Anderson* v. *Sanderson* (1817) 2 Stark. 204; 19 R.R. 703. *Cp. Meredith* v. *Footner* (1843) 11 M. & W. 202; 63 R.R. 581.

69 *Kirkstall Brewery* v. *Furness Railway Co.* (1874) L.R. 9 Q.B. 468.

70 *Great Western Ry. Co.* v. *Willis* (1865) 18 C.B.N.S. 748; 144 R.R. 652.

71 *Parkins* v. *Hawkshaw* (1814) 2 Stark. 239; 19 R.R. 791; *Wilson* v. *Turner* (1808) 1 Taunt 398; 9 R.R. 797; *Petch* v. *Lyon* (1846) 9 Q.B. 147; 72 R.R. 205.

72 *Barnett* v. *South London Tramways Co.* (1887) 18 Q.B.D. 815 (representation by secretary of tramway company that certain money was due from the company); *Garth* v. *Howard* (1832) 8 Bing. 451; 34 R.R. 753; *Meredith* v. *Footner* (1843) 11 M. & W. 202; 63 R.R. 581.

ly referred the person to whom the statements are made to the agent for information in the particular matter.[73] A report made by an agent to his principal for his information cannot be used as evidence against the principal by third persons.[74]

Privilege from distress of goods in hands of agent.—Where an agent carries on a trade or business in which the public are invited to entrust their goods to him for the purpose of being sold or otherwise dealt with in the course of that trade or business, goods entrusted to him for any such purpose are, while on his premises,[75] or on other premises hired by him for any such purpose,[76] absolutely privileged from distress for rent. The rule does not extend to agents generally, but only to those, such as factors and auctioneers, who carry on a trade or business of a public nature;[77] nor does the privilege attach to goods which at the time of the distress are on premises neither occupied nor hired by the agent, though they may have been sent there to be dealt with in the ordinary course of his trade or business.[78]

Bribery of agent.—The rights of the principal against an agent in respect of bribes received in the course of the agency are dealt with the commentary to s. 216. In addition to what is said there it may be mentioned that the receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time.[79]

As against the person promising or giving anything in the nature of a bribe to an agent, the principal may avoid any contract made or negotiated by the agent, or in the making of which the agent was in any way concerned, whether he was in fact influenced by the bribery or not, it being conclusively presumed against the briber that he was so influenced.[80] Where *A*, having entered into a contract for the sale of a pair of horses to *B*, subject to a certificate of soundness from *B*'s agent, secretly offered the agent a certain sum if the horses were sold, and the agent, having accepted the offer, certified that they were sound, it was held that *B* was not bound by the contract, whether the agent was or was not influenced by the bribe.[81] Nor is it necessary that the bribery should have any direct relation to the particular transaction. A gift made in order to influence an agent generally in favour of the giver is sufficient to render any transactions entered into by the agent voidable against the giver at the principal's option.[82]

Where an agent of a Building Society—a Director and also an employee—in connivance with one *M* by taking a bribe from him caused him to buy approved land which *M* purchased at the agent's instance for a lesser price and sold to the Society at an exaggerated price and the Society sued the agent (1) for the bribe received and (2) damages, the Privy Council held that the principal was entitled to two alternative remedies against the bribed agent and the briber (a) for the payment of the amount of the bribe as money had and received and (b) for damages quantified by the difference between the original purchase price paid by *M* and the price paid

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73 *Williams* v. *Innes* (1808) I Camp. 364; 10 R.R. 702; *R.* v. *Mallory* (1884) 13 Q.B.D. 33, 15 Cox 456; *R.* v. *Westwood* (1913) 8 Cr. App. R. 273, 280.

74 *Langhorn* v. *Allnutt* (1812) 4 Taunt. 511; 13 R.R. 663 (letters from an agent to his principal concerning transactions entered into on his behalf); *Re Devala Provident Gold Mining Co.* (1883) 22 Ch.D. 593 (statement made by the chairman of a company at a meeting of shareholders); *Reyner* v. *Pearson* (1812) 4 Taunt. 622; 13 R.R. 723.

75 *Williams* v. *Holmes* (1853) 8 Ex. 861; 91 R.R. 802 (auctioneer); *Gilman* v. *Elton* (1821) 6 Moo. C.P. 243; 23 R.R. 567 (factor); *Findon* v. *McLaren* (1845) 6 Q.B. 891; 66 R.R. 588 (commission agent).

76 *Brown* v. *Arundell* (1850) 10 C.B. 54; 84 R.R. 457 (room hired by auctioneer, though hired only for the purpose of a particular sale).

77 *Tapling* v. *Weston* (1883) 1 C. & E. 99 (agent for the sale of the goods of two particular manufacturers only).

78 *Lyons* v. *Elliott* (1876) 1 Q.B.D. 210 (goods sent by *A* to be sold by auction together with *B*'s goods on *B*'s premises not privileged).

79 *Boston Fishing Co.* v. *Ansell* (1888) 39 Ch.D. 339.

80 *Shipway* v. *Broadwood* (1899) 1 Q.B. 369 (in this case the bribery was discovered in the course of an action to enforce the contract); *Odessa Tramways Co.* v. *Mendel* (1877) 8 Ch. D. 235; *Bartram* v. *Lloyd* (1904) 90 L.T. 357.

81 *Shipway* v. *Broadwood, supra.*

82 *Smith* v. *Sorby* (1875) 3 Q.B.D. 552, n.

by the Society and the principal had to elect but at the time the judgment was entered. In this case the election was damages, being more beneficial. He could not get both reliefs (a) and (b) but could elect between the two.[83]

A local Authority invited tenders for supply of Coal and a supplier paid 1 Shilling a ton to the Manager as bribe, it was held that the Authority could recover the bribe from the Manager and also the same amount as damages from the briber.[84] But an assured was held not entitled to recover from the brokers the commission allowed them by the underwriters for prompt payment because he knew that some payment may be made.[85]

The principal may, if he thinks fit, affirm any contract which is voidable on the ground of bribery. In such case, and also where avoidance of the contract is impossible owing to his not having discovered the bribery soon enough, the principal is entitled to recover from the briber, as money had and received, the amount given or promised as a bribe if ascertained;[86] or to sue him and the agent, who are liable jointly and severally, for any loss sustained by reason of having entered into the contract, the damages being ascertained without reference to any sum which may have already been recovered from the agent as money received to the principal's use.[87]

An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe, whether he was induced by the promise to depart from his duty to the principal or not.[88] Such a promise, being founded on a corrupt consideration, cannot be enforced by law.

Right of principal to follow property into hands of third persons.—Where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorised,[89] the principal is entitled, as against the agent and third person, subject to any enactment to the contrary,[90] to recover the property, wheresoever it may be found.[91]

Personal liability of agent to repay money received to principal's use.—An agent is not, as a general rule, personally liable to repay money received by him for the use of his principal, though he may not have paid it over to the principal, and the circumstances are such that the person paying the money is entitled, as against the principal, to have it repaid.[92] Where a solicitor received a deposit at a sale by auction as agent for the seller, and the sale was not completed owing to the seller's default, it was held that no action could be maintained against the solicitor for the return of the deposit, even if he had not paid it over to the seller.[93]

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83 *Mahesan* v. *Malaysia Government Officers Cooperative House Building Society* (1978) 2 All E.R. 405, 410, 411, 412 (P.C.) *Dicta in Salford Corpn.* v. *Lever* (1891) 1 Q.B. 168, 177, 180 disappd.

84 *Salford Corporation* v. *Lever* (1891) 1 Q.B. 168; *Green* v. *Tughan* (1913) 30 TLR 64.

85 *G.W. Insurance Co.* v. *Cunliffe* (1874) 9 Ch.App. 525 *Baring* v. *Stanton* (1870) 3 Ch. D. 502. Cf - *Queen of Spain* v. *Parr* (1869) 39 L.J. Ch. 73.

86 *Hovenden* v. *Millhoff* (1900) 83 L.T. 41; *Industries & General Mortgage Co. Ltd.* v. *Lewis* (1949) 2 All E.R. 573.

87 *Mayor of Salford* v. *Lever* (1891) 1 Q.B. 168; *Grant* v. *Gold, etc., Syndicate* (1900) 1 Q.B. 233.

88 *Harrington* v. *Victoria Dock Co.* (1878) 3 Q.B.D. 549.

89 As to ostensible authority, see s. 237 and commentary.

90 See, for instance, s. 178, and the commentary thereon, above, as to sales and pledges by persons in possession of goods or of the documents of title thereto.

91 *Lang* v. *Smyth* (1831) 7 Bing. 284; 33 R.R. 462; *Farquharson* v. *King* (1902) A.C. 325; *Colonial Bank* v. *Caddy* (1890) 15 App. Cas. 267; *In re European Bank* (1870) L.R. 5 Ch. 538; *Mussammat Ram Kaur* v. *Raghbir Singh* (1920) 2 Lah. L.J. 516; *Kerala Valley Tea Co.* v. *Lachminarayan,* (1939) A.Cal. 14; 68 Cal.L.J. 94; 180 I.C. 141.

92 *Cary* v. *Webster* (1731) 1 Str. 480; *Davys* v. *Richardson* (1888) 21 Q.B.D. 202; *Taylor* v. *Metropolitan Ry. Co.* (1906) 2 K.B. 55.

93 *Ellis* v. *Goulton* (1893) 1 Q.B. 350, following *Bamford* v. *Shuttleworth* (1840) 11 A. & E. 926; 52 R.R. 542. An auctioneer receiving a deposit is, however, personally answerable, because he is in the position as a stakeholder: *Gray* v. *Gutteridge* (1827) 3 C. & P. 40; 31 R.R. 343; *Edwards* v. *Holding* (1814) 5 Taunt. 815; 15 R.R. 662; *Haji Mohammed Khaja* v. *Akber Ali,* 1955 A. Hyd. 150.

But an agent is personally liable to repay money paid to him under a mistake of fact,[94] unless he has paid it over to the principal in good faith, or dealt to his detriment with the principal in the belief that the payment was a valid one, before receiving notice of the intention of the payer to demand repayment.[95] Merely crediting the principal in account is not sufficient to discharge the agent. There must be an actual change of circumstances to the agent's detriment in consequence of the payment.[96] Similar principles apply where the money is paid in respect of a voidable transaction,[97] or for a consideration which totally fails,[98] or under duress,[99] or in consequence of any fraud or wrong to which the agent is not a party.[1] If the money is obtained by duress, or by means of any fraud or wrong, to which the agent is a party or privy, he is personally liable to repay it whether he has paid it to the principal or not.[2] Payment over is no defence in the case of wrong-doers.[3] An agent is also personally liable, notwithstanding that he may have paid the money over in good faith, if it was paid to him in regard to a contract made in his personal capacity.[4]

Money received by agent from a third person by fraud.—Where an agent receives money from a third person by fraud, and pays it to the principal in his account with him, the third person is not entitled to recover it from the principal unless the latter knew or had means of knowledge that it was plaintiff's money.[5]

The plaintiff made a deposit with a bank but the person receiving the deposit issued a forged receipt and misappropriated the money. But it was found that the person abovementioned was acting as an agent within the scope of the authority and employment of the bank and the bank was therefore liable.[6]

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94 *Newall* v. *Tomlinson* (1871) L.R. 6 C.P. 405; *Buller* v. *Harrison* (1777) Cowp. 565.
95 *Holland* v. *Russell* (1863) 4 B. & S. 14; 129 R.R. 635; *Shand* v. *Grant* (1863) 15 C.B.N.S. 324.
96 *Buller* v. *Harrison, supra,* note 39; *Cox* v. *Prentice* (1815) 3 M. & S. 344; 16 R.R. 288.
97 *Holland* v. *Russell, supra,* note 40.
98 *Ex parte Bird* (1851) 4 De G. & S. 273.
99 *Owen* v. *Cronk* (1895) 1 Q.B. 265.
1 *East India Co.* v. *Tritton* (1824) 5 D. & R. 214; 27 R.R. 353.
2 *Oates* v. *Hudson* (1851) 6 Ex. 346; 86 R.R. 326; *Wakefield* v. *Newbon* (1844) 6 Q.B. 276; 66 R.R. 379; *Padget* v. *Priest* (1787) 2 T.R. 97; 1 R.R. 440.
3 *Sharland* v. *Mildon* (1846) 5 Hare, 469; 71 R.R. 180; *Ex parte Edwards* (1884) 13 Q.B.D. 747.
4 *Gurney* v. *Womersley* (1854) 4 E. & B. 133; 99 R.R. 390; *Newall* v. *Tomlinson* (1871) L.R. 6 C.P. 405. As to when an agent is to be considered as contracting personally, see commentary to s. 230, *ante.*
5 *Morarji Premji* v. *Mulji Ranchhod Ved & Co.* (1923) 25 Bom.L.R. 1014, 1022, 1023; 77 I.C. 266; 1924 A.B. 232.
6 *Federal Bank Ltd.* v. *Geevarghese* (1974) 1 Ker. 171.

CHAPTER XI

OF PARTNERSHIP

This chapter of the Act, comprising ss. 239 to 266, has been repealed by the Indian Partnership Act, 1932, s. 73 and Sch. II.

A commentary on the Indian Partnership Act has been published by the learned authors as a separate volume.

SCHEDULE

(NOTE.—*This Schedule has been repealed by the Repealing and Amending Act, 1914.)*

ENACTMENTS REPEALED

Statutes

No. and year of Statute	Title	Extent of Repeal
Stat. 29 Car. II. c. 3 (*b*)	An Act for prevention of frauds, and prejuries.	Sections 1,2,3,4, and 17.
Stat. 11 & 12 Vict. c. 21 (*c*)	To consolidate and amend the law relating to insolvent debtors in India.	Section 42.

Acts

No. and year of Act	Title	Extent of Repeal
Act XIII of 1840	An Act for the amendment of the law regarding factors by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 4 Geo. IV. c. 83 as altered and amended by the stat. 6 Geo. IV. c. 94.	The whole.
Act XIV of 1840	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 9 Geo. IV. c. 14.	The whole.
Act XX of 1844	An Act to amend the law relating to advances *bona fide* made to agents entrusted with goods by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 5 & 6 Vict. c. 39 as altered by this Act.	The whole.
Act XXI of 1848	An Act for avoiding wagers....	The whole.
Act V of 1866 (*d*)	An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India.	Sections 9 and 10.
Act XV of 1866	An Act to amend the law of partnership in India.	The whole.
Act VIII of 1867	An Act to amend the law relating to horse-racing in India.	The whole.

(*b*) Short title, "The Statute of Frauds." See the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

(*c*) The Indian Insolvency Act, 1848.

(*d*) Short title, "The Policies of Insurance (Marine and Fire) Assignment Act, 1866". See the Indian Short Titles Act XIV of 1897.

INTRODUCTORY

Position of Specific Relief in English Procedure

Specific relief, as a form of judicial redress, belongs to the law of Procedure, and, in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct Part or other division of the Civi Procedure Code. This has not happened in India because in England, some centurie ago, the King's ordinary Civil Courts of law had in general[1] no other instrument o coercion than distraint on property (though by a series of statutes, many of then early, imprisonment was authorised in aid of the preliminary stages of process; hence the so-called imprisonment for debt which makes a large figure in English prose fiction down to the middle of the nineteenth century). Payment of money was the only satisfaction the suitor could obtain from the Court of Common Pleas, or other Courts which shared or imitated its jurisdiction, in the regular course of justice. Therefore in many cases where money compensation, even if available, was not an adequate satisfaction, the King's justice was in default. It is now familiar learning to all students of legal history that in the early stages of judicial institutions we constantly find the power of Courts to enforce decisions or even to compel the appearance of parties rudimentary if not wholly wanting. There is therefore nothing to be surprised at in the limited scope of common law remedies in the Middle Ages. The question why it was not enlarged until the latter part of the nineteenth century has its interest; an interest, however, not material for any practical purpose in India. The reader may take it as a fact that down to the eighteenth century any such proposal, at any rate coming from official quarters, would have been looked on with suspicion. Meanwhile the Chancellor, exercising the King's reserved power of doing justice in an extra-ordinary way where the ordinary means failed, had undertaken to make the defect good. The Chancellor's justice, in a proper case, would compel a man actually to perform what he had undertaken, not merely to pay damages for breaking his promise. Disobedience to the Chancellor's order was contempt of the King, a personal offence punishable by imprisonment until the command, in theory a special royal command, was obeyed. Such was the sanction of all equitable jurisdiction. A very obstinate party might choose to remain in prison rather than execute a conveyance, and sometimes did. Only in quite recent times have the Courts acquired power to do, without any concurrence of a party in default, that which he ought to have done.

Hence were derived both the strength and the weakness of Courts of Equity. They could do much that a Court of Common Law could not do; but they had to justify their action on the ground that the suitor showed some special cause for seeking a kind of relief which was originally conceived as extraordinary. This was especially so in cases where the plaintiff had a legal right, a right for which the Com-

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1 The earlier mediaeval actions for the recovery of land were practically obsolete after the Restoration at latest; the action of ejectment which took their place has a peculiar history; the action of detinue professed by the form of the judgment to give specific relief, with the value of the goods and damages as an alternative but specific delivery could not be enforced. None of these actions, it will be observed, was founded on contract.

mon Law provided some remedy, but the Common Law was inadequate in the sense of not being fitted to do full justice in the case. The doctrine and practice of Specific Performance belong to this class (see more on Ch. II of the Act).

In consulting English authorities it must be remembered that as Courts of Common Law could not give specific relief in their ordinary civil jurisdiction till after the middle of the nineteenth century, so Courts of Equity had no power to award damages.[2] Accordingly a plaintiff who sought specific relief might not claim damages in the alternative; if he failed, his only remedy was to commence an action in the appropriate common law jurisdiction. "He may make what he can of it at law" was a current phrase. Attention to this peculiarity will often explain the practical bearing of arguments that otherwise might seem obscure.

The authors were of the view that the law relating to Specific Relief could well be part of the Code of Civil Procedure and the Transfer of Property Act, but such a drastic reform was not worth the labour. Accordingly the Act of 1877 has been repealed and the Specific Relief Act of 1963 has been passed with suitable modifications and alterations.

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2. Sometimes they contrive to go near it: Fry on Specific Performance, § 1299.

THE SPECIFIC RELIEF ACT, 1963

(47 OF 1963)

(*13th December,* 1963)

AN ACT TO DEFINE AND AMEND THE LAW RELATING TO CERTAIN KINDS OF SPECIFIC RELIEF

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:—

PART I

PRELIMINARY

Short title, extent and commencement.

1. [1] (1) This Act may be called the Specific Relief Act, 1963.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date[3] as the Central Government may, by notification in the official Gazette, appoint.

Commencement of the Act.—The Act came into force on the 1st March 1964.[3]

Extent.—The Act applies to the whole of India except Jammu and Kashmir. The repealed Act did not apply to the Scheduled Districts, but this Act does, for it was felt that if the Transfer of Property Act applied to the Scheduled Districts there was no reason why this Act should not. Specific Relief Act applies to Sikkim.[4]

Illustrations.—The Indian Legislature has given up the practice of inserting illustrations in Acts, and the Law Commission of India were of the view that the illustrations in the repealed Act had not, on the whole, served to clarify the provisions of that Act.

1963 Act not exhaustive and complete code.—The Supreme Court has held that the 1963 Specific Relief Act is not exhaustive containing the whole law on the subject. As the preamble would indicate it is an Act to define and amend the law relating to certain kinds of Specific relief. It does not purport to lay down the law relating to specific relief in all its ramifications although on a matter it defines, it might be exhaustive.[5]

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3 1-3-1964; *vide* Notification No. S.O. 189, dated 13-1-1964, Gazette of India, Part II, section 3(ii), page 214.

4 Durga Prasad v. Paldem Lama (1981) A. Skm. 41.

5 *Hungerford Investment Trust Ltd.* v. *Haridas Mundra* (1972) A.S.C. 1826, 1832: (1972) 3 S.C.R. 690; *Kishore Chand Shiv Charan Lal* v. *Badaun Electric Supply Co. Ltd.* (1944) A.A. 66, 77.

Definitions.

2. [3] In this Act, unless the context otherwise requires,—

(a) "obligation" includes every duty enforceable by law;

(b) "settlement" means an instrument (other than a will or codicil as defined by the Indian Succession Act, 1925) whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;

(c) "trust" has the same meaning as in section 3 of the Indian Trusts Act, 1882, and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act;

(d) "trustee" includes every person holding property in trust;

(e) all other words and expressions used herein but not defined, and defined in the Indian Contract Act, 1872, have the meanings respectively assigned to them in that Act.

Obligation.—If obligation and enforceable duty are to be synonymous, why use the longer word, which is also the less accurate? In Roman law "obligation" is confined to duties between definite persons; in old English law it was confined to one special kind of instrument; modern scientific writers for the most part use it in the Roman sense. Such, however, is the definition.[6]

Trust.—In sec. 3 of the repealed Act "trust" was defined as including every species of express, implied or constructive fiduciary ownership. Trust, however, has been defined in Trusts Act, 1882, and the Law Commission were of the view that it was desirable to have parity between the provisions of the two enactments. Sec. 3 of the Trusts Act, 1882, is as follows: A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

Express, implied or constructive trust.—Trusts, according to English law, are either (1) express, or (2) constructive or implied. An express trust is one which is created by the actual terms of some instrument or declaration. A constructive or implied trust arises when property, not impressed for the time being with any express trust, is acquired or held by a person in circumstances which render it obligatory upon him to hold it for the benefit of some other person as beneficiary.[7] The expressions "express trust," "implied trust", and "constructive trust" are not used in the Indian Trusts Act, 1882. What are called express trusts in English law are called merely "trusts" (defined in s. 3), and are dealt with in ss. 4 to 79, while what are called constructive or implied trusts in English law are called "obligations in the nature of trusts," and are dealt with in ss. 80 to 96. The Indian Trusts Act may thus be divided into two parts, one dealing with the express trusts of the English law and the other with the constructive or implied trusts of that law.

The illustrations to sec. 3 of the Act of 1877 are useful and abrogation of their legislative authority must not be supposed to cast any doubt on their correctness and they are reproduced:

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6 *Parul Bala Roy* v. *Srinibash* 1952 A. Cal. 364; *Fatik Lal Pal* v. *Kalipada Das,* 82 Cal. W.N. 601, 609.
7 *Soar* v. *Ashwell* (1893) 2 Q.B. 390, 396.

Illustrations.

(a) *Z* bequeaths land to *A*, "not doubting that he will pay thereout an annuity of Rs. 1,000 to *B* for his life." *A* accepts the bequest. *A* is a trustee, within the meaning of this Act, for *B*, to the extent of the annuity.

[This is an instance of what is known in the English law as precatory trust. A precatory trust is one created by precatory words, such as expressions of confidence, request, or desire that property will or shall be applied for the benefit of certain named individuals. For another instance, see the Indian Trusts Act, 1882, s. 6, ill. (a).]

(b) *A* is the legal, medical or spiritual adviser of *B*. By availing himself of his situation as such adviser, *A* gains some pecuniary advantage which might otherwise have accrued to *B*. *A* is a trustee, for *B*, within the meaning of this Act, of such advantage.

(c) *A*, being *B*'s banker, discloses for his own purpose the state of *B's* account. *A* is a trustee, within the meaning of this Act, for *B*, of the benefit gained by him by means of such disclosure.

(d) *A*, the mortgagee of certain leaseholds, renews the lease in his own name. *A* is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

[This is dealt in the Transfer of Property Act, 1882, s. 64, and the Indian Trusts Act, 1882, s. 90.]

(e) *A*, one of several partners, is employed to purchase goods for the firm. *A*, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. *A* is a trustee for his co-partners within the meaning of this Act, of the profit so made.

(f) *A*, the manager of *B*'s indigo factory, becomes agent for *C*, a vendor of indigoseed, and receives, without *B*'s assent, commission on the seed purchased from *C* for the factory. *A* is a trustee, within the meaning of this Act, for *B*, of the commission so received.

(g) *A* buys certain land with notice that *B* has already contracted to buy it. *A* is a trustee, within the meaning of this Act, for *B*, of the land so bought.[8]

(h) *A* buys land from *B*, having notice that *C* is in occupation of the land. *A* omits to make any inquiry as to the nature of *C*'s interest therein. *A* is a trustee, within the meaning of this Act, for *C*, to the extent of that interest.

A agrees to sell certain land to *B*, and puts him in possession under the agreement. *B* is ready and willing to complete the purchase and take a registered conveyance from *A*. Before any conveyance is executed, *A* sues *B* for possession of the land. According to a Full Bench of the Madras High Court, *A* is entitled to possession, the reason given being that under s. 54 of the Transfer of Property Act, 1882, an agreement for sale of immovable property does not of itself create any interest in or charge on such property and that the provisions of the section are imperative.[9] On the other hand, it has been held by a Full Bench of the Bombay High Court,[10] that *A* is not entitled to possession. According to that Court s. 54 of the Transfer of Property Act does not exhaust the relations which flow from a contract for sale of immovable property according to the Indian Statute Law, and *A* stands in a fiduciary relation to *B* having regard to the provisions of s. 40 of that Act, s. 91 of the Indian Trusts Act, and s. 3 of the Specific Relief Act, 1877, read with ill.(g) thereto. Scott C.J. said.

"Where a vendor who has contracted to sell immovable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognised that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out."

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8 *Gangaram* v. *Laxman* (1916) 40 Bom. 498; 37 I.C. 360; *Mathai Thommen* v. *Thomas Mathew* 1952 A.T.C. 199, 200.

9 *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) 29 Mad. 336 (F.B.).

10 *Bapu Apaji* v. *Kashinath Sadoba* (1917) 41 Bom. 438; 39 I.C. 103 (F.B.); *Laxmanrao* v. *Bhagwansingh* (1921) 45 Bom. 434; 60 I.C. 581.

The Supreme Court has held that a buyer of land, with notice of a previous contract of sale by the vendor, of which specific performance could be enforced, holds the property for the benefit of the latter. See s. 91 of Trusts Act.[11]

A mortgagor by selling the mortgaged property to the mortgagee can put an end to the mortgagor's estate and convert the mortgage into a sale and all rights, title and interest vest in the mortgage-purchaser as an absolute owner. Even if the sale is voidable and not binding on a subsequent purchaser the character of possession based on assertion of ownership if it continues for the statutory period ripens into title of full ownership and is not affected by a decree of specific performance.[12]

Where a person, purchasing a cinema projector by instalments, forfeited the projector on failure to pay instalments, but failed to redeliver it to the seller, it was held that he was a trustee for the purposes of s. 8 of the Act, as he was in a fiduciary position.[13]

Trustee.—A promoter of a company is neither an agent nor a trustee for the company under incorporation but when he does certain things for the benefit of the company, e.g. purchase of immovable property, he stands in a fiduciary capacity and the benefit passes to the company when incorporated.[14]

The policy holders of an insurance Co. are not beneficiaries nor is the Insurance Company in the position of a trustee for them. It may be that the policy holders may have a right to intervene if the life fund is likely to be wasted or dissipated. But a proposed construction of a building was held not to be such waste or dissipation.[15]

Sale.—Transfer of a leasehold property where the sale price was nil but the consideration was the payment of rent reserved and to fulfil all conditions is not a sale (within R.S.C. Ord. 14 A. r. 1).[16]

Savings.

3. [4] Except as otherwise provided herein, nothing in this Act shall be deemed—

(a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(b) to affect the operation of the Indian Registration Act, 1908, on documents.

This section is substantially the same as s. 4 of the repealed Act; also see s. 27A of that Act.

Cl.(b).—Sec. 27A of the repealed Act enabled an unregistered agreement of lease to be admissible in evidence in a suit for specific performance, but there is no section corresponding to that section in this Act. The omission has been explained by the Law Commission in their report. In their report on the Registration Act they had made recommendations for the exclusion of 'agreement of lease' from the definition of lease in section 2 and for the omission of clause (c) from section 49.[17] "In the result, a person will be entitled to enforce specific performance of an agreement to lease even if it has to be gathered from an unregistered lease deed." No rescission can be applied for in the absence of default in payment of purchase money fixed in the decree.[18]

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11 *Lalji Jetha* v. *Kalidas* (1967) 1 S.C.R. 873; (1967) A.SC. 978.
12 *Ibid; Subbaiya Pandaram* v. *Mohammad Mustapha* 50 I.A. 295, 299; (1923) A.P.C. 175; and *Dagadbhai* v. *Sakharam* (1946) A.B. 149 appld.; *Bhogilal* v. *Ratilal* (1939) A.B. 261 refd. to.
13 *Subbarayulu* v. *Annamalai* (1946) Mad. 174, 1945 A.M. 281.
14 *Weavers Mill Ltd.* v. *Balkis Ammal* (1969) A.M. 462 6 Halsburys Laws of England (3rd Ed.) para 194, p. 94 refd. to.
15 *Duraiswami* v. *United India Life Assurance Co. Ltd.* (1956) A.M. 316.
16 *Robshaw Brothers Ltd.* v. *Mayer* (1956) 3 All E.R. 833.
17 See the Sixth Report of the Law Commission, para. 21, p. 10.
18 *Hungerford Investment* v. *Haridas Mundra* (1971) A. Cal. 182.

Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.

4. [7] Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

This corresponds with s. 7 of the repealed Act. The drafting alterations have been made as the result of Pollock & Mulla's criticism of the form of that section, which had stated the principle in negative form.

Under the repealed s. 7 it was argued that to direct a magistrate to furnish copies of the proceedings in a case before him amounted to granting specific relief to enforce a penal law. This contention was negatived.[19] and under the present section such a contention cannot arise.

A suit by a Municipal Committee for mandatory injunction for demolition of an illegal construction is maintainable.[20]

Where the employer unilaterally changes the terms and conditions of service of the employees without following the procedure prescribed by the Industrial Disputes Act, 1947 (ss 10 & 12), the Civil Court has jurisdiction to grant an injunction restraining the employer from disregarding the due procedure prescribed under the Industrial Disputes Act. There is no power given to the Labour Court to grant this relief.[21]

PART II

SPECIFIC RELIEF

CHAPTER I

RECOVERING POSSESSION OF PROPERTY

Recovery of specific immovable property.

5. [8] A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

This section corresponds with s. 8 of the repealed Act and except for the substitution of "prescribed" for "provided", there is no change.

Code of Civil Procedure.—That is to say by a suit for ejectment on the basis of title.[22]

Suit by person dispossessed of immovable property.

6. (9) (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought.—

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19 *Bank of Bengal* v. *Dinonath Roy* (1882) 8 Cal. 166.
20 *Commissioner of Rashira Municipality* v. *Anil Kumar Mustaffi* 83 Cal. W.N. 888, 891.
21 *Premier Automobile Ltd.* v. *Kamlakar Shantaram* (1974) 76 Bom. L.R. 47; *Bombay Gas Co.* v. *Gopal Bhiva* (1964) A.SC. 1223 reld on; *Pigment Lakes etc.* v. *Sitaram* (1968) 71 Bombay L.R. 452; *State of Bombay* v. *K.P. Krishna*, 2 Bom. L.R. 127 refd. to.
22 *Lachhman* v. *Shambhu Narain* (1911) 33 All. 174, 180; 7 I.C. 495 (F.B.).

(a) after the expiry of six months from the date of dispossession; or
(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recovery possession thereof.

The Law Commission recommended the omission of s. 9 of the repealed Act, which corresponds to this section, but it is a salutary provision and has been retained.

S. 6 of Specific Relief Act 1963 corresponds to s. 9 of the repealed Act which in turn was based on s. 15 of 1859 Limitation Act. In those provisions also, the Government i.e. State property or public rights were excluded from their purview. But that does not entitle the Government to dispossess a person in possession except under due process of Law.[23]

Specific Relief Act—Special Act.—Specific Relief Act is a Special Act within the expression under s. 29(2) Limitation Act, inasmuch as s. 6(2) S.R. Act prescribes its own limitation for suits under that Section and there is nothing in that Act which excludes the applicability of s. 4 (Sic. 3), of the Limitation Act. Therefore s. 4 (Sic 3) read with s. 29(2) of that Act applies to a suit under S. 6 Specific Relief Act.[24]

Sections 8 & 9 (Ss. 5 & 6 of 1963 Act) compared:—

The difference between a suit for possession simpliciter and a suit for possession under s. 9 (s. 6 of new Act) is this that in the latter case a plaintiff to succeed need only prove dispossession within 6 months and the defendant cannot plead superior title. But in the former a defendant can defeat the suit by proving superior title to the land.[25] The High Courts of Allahabad[26] and Calcutta[27] have held that s. 8 of the old Act contemplates a full-fledged title suit, that in a suit under s. 9 of the old Act (s. 6 of 1963) the question is one of possession without the question of right or title being determined; and that the two sections are mutually exclusive. A decree under s. 9 can be given if the suit is based on dispossession within six months even where the plaintiff also alleges title. But in such a suit the Court cannot also decree the removal of huts put up on the land by the defendant as there is no decision on title.[28] But the Supreme Court has held that the provisions of ss. 8 & 9 of the old Act are not mutually exclusive. S. 8 (s. 5 of 1963) does not limit the kinds of suit but only lays down that after the expiry of six months the procedure laid down by the Code of Civil Procedure should be followed. Under s. 9 of the old Act (s.6 of 1963) the plaintiff need not prove title but when a period of six months has expired the defendant can raise the question of title and the plaintiff must prove better title or fail. Section 8 does not bar a suit on the basis of prior possession within 12 years.[29] If the plaintiff "proves that he was dispossessed within 12 years he can maintain his action."

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23 *Chandra & Co.* v. *State of Rajasthan* (1981) A.Raj. 217.
24 *Sai Dahi* v. *Amulakhbhai* (1974) A. Guj. 106.
25 *Yar Mohammad* v. *Lakshmi Das* (1959) A.A.1; (1958) 2 All. 394 (F.B.).
26 *Lachhman* v. *Shambhu Narain* 33 All. 174; *Tilak Chandra* v. *Fatik Chandra* 25 Cal. 803 refd. to. But see *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165.
27 *Ananta Kumar Sarkar* v. *Meghu Kurmi* 61 C.W.N. 347. *Lachhman* v. *Shambhu Narain,* 33 All. 174; rel. on.
28 *Ananta Kumar Sarkar* v. *Meghu Kurmi* 61 C.W.N. 347; *Sona Mia* v. *Prakash Chandra Bhattacharya* 44 C.W.N. 895 folld. *Tilak Chandra* v. *Fatik Chandra* 25 Cal. 803 dist.
29 *Nair Service Society* v. *K.C. Alexander* (1968) A.S.C. 1165; *Lachhman* v. *Shambhu Narain* 33 All 174 (F.B.) overruled. *Mustapha Sahib* v. *Santha Pillai* 23 Mad. 179; 182 appd; *Asher* v. *Whitlock* (1865) 1 Q.B. 1; *Mt. Sundar* v. *Mt. Parbati* (1888) 16 I.A. 186; *Ismail Ariff* v. *Mahomed Ghous* (1893) 20 I.A. 99; Pollock & Wright: On Possession p. 19; *Wise* v. *Ameeruun Nisa* (1879) 7 I.A. 73; & *Smith* v. *Oxenden*, 22 E.R. 675; refd. to; *Perry* v. *Clissold* (1907) A.C. 73 accepted.

In *Alexander's Case*[30] the plaintiff brought a suit for possession of lands alleging his possession for 70 years and forcible dispossession by the defendants. The defendant denied this forcible possession and pleaded that a suit for possession did not lie without proof of title and a prior trespasser could not eject a later trespasser and a mere possessory suit after the expiry of six months was not possible under section 9 of the Specific Relief Act (section 6 of the new Act). The High Court held in appeal that the plaintiff was in possession before the suit and could maintain a suit based on prior possession without proof of title and therefore could eject the defendants. On appeal the Supreme Court upheld the decision of the High Court.

Restitution of dispossessed holder.—This section affirms an important principle of substantive law. Disputed rights are to be decided by due process of law and not otherwise, and existing peaceable possession will be protected against disturbance without regard to the question of its origin.[31] The only way to do this with effect is to restore the dispossessed holder, without prejudice to the ultimate rights of any adverse claimants, including the dispossessor himself. Those rights, however, must be asserted in a Court of justice and the question of title dealt with in regular course. Inasmuch as dispossession is commonly a notorious and easily proved fact, and matters of title involving legal argument cannot be dealt with in a suit under this section, the decision in such a suit is not subject to appeal.

The distinction between summary or comparatively summary process for the protection of possessor and litigation for the final settlement of titles between contending claimants is familiar in English law and goes back to the Middle Ages, although there is now no formal difference in the procedure. It does not necessarily involve the doctrine, fully worked out in England only in our time, that possession itself has all the incidents of title as against all men who have not a better right. We cannot undertake to develop that proposition here. One of the learned authors has endeavoured elsewhere to state it with as little technical detail as possible.[32]

English law permits though it does not encourage a person who is actually entitled to the possession of immovable property (not one who erroneously, however honestly and plausibly, thinks himself entitled) and is out of possession to re-enter without breach of the peace if he can. This concession to self-help was inevitable in days when the superior courts were closed for a great part of the year and twenty miles were counted a long day's journey. Such cases are not now frequent though not wholly unknown,[33] we do not think it useful to make further reference to them here, still less to the peculiar and difficult questions raised on the medieval statutory prohibition of forcible entry.

Possession, title and evidence.—The Act assumes the general rules of law concerning possession to be known; whether because the draftsman supposed them to be simple and obvious, or because he knew them to be so much otherwise that any attempt at definition in a short compass would be perilous, it boots not to inquire. The most that can be done here is to recall a few of the elementary principles which are material to be borne in mind in practice.

Possession in fact is manifested by the exercise of such exclusive control as the object is capable of. It need not always be complete or immediate visible control; in the case of wild uncleared land payment of taxes may be sufficient evidence of possession, as being the only practicable act of dominion,[34] and where a continuous parcel of land is held under one and the same claim of title, acts of control or enjoyment done in one part of it are relevant to show possession of the whole.[35] But where a tenant of the defendant is cultivating a piece of land,

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30 *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165.

31 See *Glenwood Lumber Co.* v. *Phillips* (1904) A.C. 405, 410; *Yellayi Sannaya* v. *Sannaya Julu* 1940 A.P.C. 193; 189 I.C. 878; *Sona Mia* v. *Prokash Chandra* 1940 A.Cal. 464; 44 C.W.N. 895; 191 I.C. 803; *Dala* v. *Moda* 1951 A.Ajm. 88.

32 Pollock, First Book of Jurisprudence, 6th ed. 1929, pp. 184-192. See *Perry* v. *Clissold* (1907) A.C. 73.

33 *Lows* v. *Telford* (1876) 1 App. Ca. 414.

34 *Kirby* v. *Cowderoy* (1912) A.C. 599.

35 The classical authority is Parke B's judgment in *Jones* v. *Williams* (1837) 2 M. & W. 326; 46 R.R. 611; approved, *Lord Advocate* v. *Blantyre* (1879) 4 App. Ca. 770, 791. On salvor's possession of a sunken wreck, *The Tubantia* (1924) P. 78.

the plaintiff does not obtain possession merely by placing a plough and some manure upon the land.[36] For ss. 8 and 9 of the old Act the possession contemplated is juridical possession. Thus where the person in possession is a servant, an appointee or deputee of another, the possession is of the master or the person appointing or deputing the other person and therefore the former cannot sue under s. 9 of the Specific Relief Act.[37]

The Common Law generally attributes possession in law to the person exercising control in fact on his own account, whether for a greater or a lesser interest, provided that the control is intended to be exclusive.[38] The only practical exception is where the custodian is acting merely on behalf of a person whose orders he is bound to obey. Such a custodian is called a servant or bailiff in law, whether answering or not answering that description in popular language. This is hardly a real exception.

It is a rare but possible case that possession is in dispute between claimants neither of whom can be said to possess in fact in such case it is a very ancient rule that possession follows title, that is, the law attributes possession to the claimant whose title is the better. This applies both to immovable and movable property.[39]

"Without Consent of".—Taking possession of the property of a limited company with the consent of the directors and not of the company in its general meeting does not make the possession as one "without his consent" and therefore does not fall within s. 6 of Sp. R. Act.[40]

Limitation.—A suit under this section should be brought within six months from the date when the dispossession occurs.[41]

Object of the section—This section corresponds with s. 15 of the Indian Limitation Act XIV of 1859.[42] The object is to discourage people from taking the law into their own hands, however good their title may be.[43] The section was enacted to prevent persons ousting a man from possession except by process of law. It provides a summary and speedy remedy through a medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised,[44] the remedy, independent of the Act, of a suit founded on a claim of possessory title is not excluded.[45]

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36 *Sunderbai* v. *Mavji Arjan* 1949 A. Kutch 9.

37 *Sobha* v. *Ram Phul* (1957) A.A. 394; *Nritto Lal* v. *Rajendra Narain Deb* 22 Cal. 562 (folld.).

38 Otherwise in Roman law; therefore comparison of the Common Law with Roman or Romanised learning should be undertaken only by first-hand students of the Roman authorities, and even by them with special caution.

39 It has frequently been applied to transfers between husband and wife: *Ramsay* v. *Margrett* (1894) 2 Q.B. 18; *French* v. *Gething* (1922) 1 K.B. 236. It has been applied as between a man and his mother-in-law: *Antoniadi* v. *Smith* (1901) 2 K.B. 589. It would apply to a man living openly with his mistress: *per* Goddard L.J. in *Youngs* v. *Y.* (1940) 1 K.B. 760, 769.

40 *Onama Glass Works* v. *Ram Harak* (1966) A.MP. 282.

41 A defendant who has been added as a party on his own application cannot afterwards resist a decree on the ground that he was so added more than six months after the alleged dispossession: *Bhaudin* v. *Ibrahim* (1928) 30 Bom.L.R. 1405; 112 I.C. 786; 1928 A.B. 526. A suit barred under this section does not necessarily affect the plaintiff's title and he may still bring a proper suit for the establishment of his title: *Abdul Aziz* v. *Sk. Amir* 1941 A.N. 130; 193 I.C. 805.

42 As to cases decided under that section, see Broughton's Code of Civil Procedure, 1859, pp. 572-573.

43 *M.C. Batra* v. *Lakshmi Insurance Co. Ltd.* (1956) A.A. 709; *Krishnarav* v. *Vasudev* (1884) 8 Bom. 371, 375; *Rudrappa* v. *Narsingrao* (1905) 29 Bom. 213.

44 *Wali Ahmed* v. *Ajudhia Kandu* (1891) 13 All. 537, 558, 562. An unsuccessful defendant's remedy is a suit for declaration of his title: *Badri Das* v. *Mst. Dhanni* 1934 A.A. 541; 150 I.C. 738; *Gouranga Chandra* v. *Satish Chandra* 1955 A. Trip. 13.

45 *Ram Dayal* v. *Saraswati* (1926) 49 All. 191; 99 I.C. 568.

Scope of the section.—Section 5 of the Act provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment *on the basis of title*. S. 6 gives a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law, for recovery of possession *without establishing title*, provided that his suit is brought within six months of the date of dispossession. The second paragraph of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree, sue to establish his title and to recover possession.[46] The two sections give alternative and distinct remedies. If a suit is brought under s. 6 for recovery of possession, no question of title can be raised or determined in that suit or in working out of the judgment.[47] The object of the section is clearly to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely proving previous possession and wrongful dispossession without proving title, but that is not his only remedy. He may, if he so chooses, bring a suit for possession on the basis of his title.[48] A State Government cannot by force or show of force evict a person in possession of immovable property.[49] But if he does so he cannot change his ground and ask for judgment under this section, which does not apply to such a suit.[50]

Failure to prove title in a suit for possession based on title.—Accordingly when a plaintiff sues for possession on the basis of title and fails to establish title, he is not entitled to a decree for possession under the first paragraph of this section even if he can prove possession within six months anterior to his dispossession.[51] Where a suit which is really based upon title is dealt with by the Court of first instance as a suit under this section, and an appeal is preferred from the decree, the appellate Court should send the suit back to the Court of first instance to be dealt with as a suit based upon title.[52]

Who may sue under this section.—It is only a person who has had "juridical" possession who may sue under this section. Therefore, a trespasser who has been dispossessed is not entitled to sue under this section.[53] For the same reason a person claiming that he was in possession "as representing his father and his uncle" cannot sue under this section[54] nor can a servant, appointee or deputee of another.[55] One who was in joint possession may, on dispossession, sue to be restored to joint possession.[56]

Landlord and Tenant.—A suit under s. 6 is maintainable between landlords and tenants

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46 Dismissal of a suit under this section does not of itself raise any presumption that the defendant was in fact in possession: *Iragala Kotayya* v. *Uddanti Subbayya* 1929 A.M. 784; 120 I.C. 384.

47 Where the defendant reaps crops after decree for possession he may not set up title as a defence to a suit for the value of the crops: *Munna Singh* v. *Ausun Singh* (1919) 41 All. 108; 48 I.C. 492. For a case of a consent decree in a suit under this section, see *Zakarali* v. *Israr Hussain* (1946) Nag. 640, 225 I.C. 499, 1947 A.N. 53.

48 *Lachman* v. *Shambhu Narain* (1911) 33 All. 174 180; 7 I.C. 495 (F.B.); see *Ananta Kumar Sarkar* v. *Meghu Kurmi* 61 C.W.N. 347; *Halim Yasin* v. *Mustakim Alaf* 1942 A. Pesh. 8.

49 *State of Pepsu* v. *Mohinder Singh* (1958) A. Pnj. 325. (A case under Art. 226).

50 *Ganesh Rai* v. *Bhushi Rai* (1924) 46 All. 903; 82 I.C. 324, and cases referred to in next para; *Ganesh* v. *Dasso* 1927 A.A. 669; 25 All. L.J. 857; 103 I.C. 428; *Murugappa Naicker* v. *Padmanabha Mudaliar* 1945 A.M. 265; *Beni Madho* v. *Prag* 1949 A.A. 510; *Rai Sahib Chandanmul* v. *State of Orissa* (1972) A. Or. 40 (F.B.). (No suit against State Government.).

51 *Lachman* v. *Shambhu Narain* (1911) 33 All. 174; 7 I.C. 495; *Ramasami* v. *Paraman* (1902) 25 Mad. 448; *Thanamma* v. *Ramaswami* 1953 A.T.C. 157.

52 *Narain Das* v. *Het Singh* (1918) 40 All. 637; 46 I.C. 925.

53 *M.C. Batra* v. *Lakshmi Insurance Co. Ltd.* (1956) A.A. 709 (possession for a short duration); *Ajodhia Parshad* v. *Ghasiram* (1937) A.N. 326 (refd. to); *Shobha* v. *Ramphul* (1957) A.A. 399; *Amiruddin* v. *Mahamad* (1891) 15 Bom. 685; *Sunderbai* v. *Mavji Arjan* 1949 A. Kutch 9. But see *Tamizuddin* v. *Ashrub Ali* (1904) 31 Cal. 647, at p. 656.

54 *Nritto Lall* v. *Rajendra Narain Deb* (1895) 22 Cal. 562; folld. in *Sobha* v. *Ram Phul* (1957) A.A. 394.

55 *Shobha* v. *Ramphul* (1957) A.A. 399.

56 *Ballabh Das* v. *Gaur Das* (1940) All. 225, 189 I.C. 92, 1940 A.A. 261.

where the question of title is not raised because the questions of title are irrelevant and the defendant cannot raise it.[57]

Though a tenant may hold over after the expiry of the period of tenancy, his possession is still juridical, and he is entitled to sue his landlord for possession under this section, if forcibly dispossessed by him.[58] In a suit under s.9 of the old Act the question of title is irrelevant and the provisions of s. 326 of *Qanoon Mal* of Gwalior State being similar to those of s. 9, a tenant whose tenancy has terminated has juridical possession which is protected by statute. Such a tenant if forcibly dispossessed by the landlord can bring a suit under s. 9 (s. 6 of 1963) against the landlord.[59] A tenant of Municipality even after the expiry of his lease cannot be evicted forcibly in the absence of any specific provision in the Municipal Act nor can a person put in possession by the Municipality after forcible eviction defend his possession by relying on s. 53-A of the Transfer of Property Act, as a person inducted into possession by a transferor without any right in law to do so cannot claim benefit of that provision.[60] A landlord getting possession from the tenant by collusion with the lessee's agent is liable to be sued under s. 9.[61] If a tenant of a landlord is dispossessed the landlord can bring a suit under s. 9.[62] When a tenant is dispossessed by a third person, he is the proper party to sue under this section.[63] But if the tenancy has terminated after the date of dispossession, the landlord may sue under this section;[64] likewise if the tenant will not sue, the landlord may sue and join the tenant as a defendant.[65] There is a view that the right of the landlord to sue is not confined to these two cases.[66] Where the lessor refusing to extend the lease took possession at the termination of the lease and the lessee gave vacant possession by removing his things, the latter cannot resort to proceedings under s. 9,[67] of the old Act (s. 6 of 1963).

Joint Possession.—In order to succeed in his suit for possession the plaintiff must show that he was in possession before the alleged trespassers got into possession. Thus where a joint owner put the alleged trespassers in possession, the other joint owner is not dispossessed-thereby and cannot sue for possession under s. 6.[68]

Heirs.—Possessory title is an heritable right and is good against every other person's right

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57 *Bai Dahi* v. *Amulakhbhai* (1974) A. Guj. 106; *Shiavex Cambata* v. *Sunderdas* 52 Bom. L.R. 381; (1950) A.B. 343, reld. on.

58 *Rudrappa* v. *Narsingrao* (1905) 29 Bom. 213. See also *K.K. Verma* v. *Union of India* (1954) Bom. 950; 1954 A.B. 358, 360 appd. in *Yashwant Singh* v. *Jagdish Singh* (1968) A.SC. 620.

59 *Yeshwant Singh* v. *Jagdish Singh* (1968) A.SC. 620. *K.K. Verma* v. *Union of India* 1954 Bom. 950, 957; (1954) A.B. 358, 360 appd. *Yar Mohammad* v. *Lakshmidas* (1958) 2 All. 394, 404, 1959 A.A. 1, 4 (F.B.) and *Wali Ahmad Khan* v. *Ayodhya Kundu* 13 All. 537, 556 quoted with approval; *Chinna Pillai* v. *Govindaswami* (1969) A.M. 191; applying *Neyveli Lignite Corporation* v. *Narayana Iyer* (1964) 1 Mad. 676; (1965) A.M. 122. *Mayaram* v. *Santram* (1965) A.A. 409 (Reference to title irrelevant).

60 *Chinna Pillai* v. *Govindaswami* (1969) A.M. 191.

61 *Krishnaji* v. *Mahmud Hussain* (1959) A. My. 127.

62 *Raghubar Dayal* v. *Hargovind* (1958) 8 Raj. 113; (1958) A.Rj. 287.

63 *Virjivandas* v. *Mahomed Ali Khan* (1881) 5 Bom. 208, 211-12; *Official Receiver* v. *Hira* 1950 A.Ajm. 38. There is no real authority to the contrary; *Veeraswami Mudali* v. *Venkatachala Mudali* 1926 A.M. 18; 92 I.C. 20; 50 Mad. L.J. 102. A suit by a landlord in which tenants in possession have not joined is not maintainable: *Ramanendra* v. *Basavayya* 1934 A.Mad. 558; 151 I.C. 878.

64 *Jagannatha* v. *Rama Rayer* (1905) 28 Mad. 238; *Sailesh Kumar* v. *Rama Devi* 1952 A.P. 339; *Abdullah Khan* v. *Faizullah* 1950 A. Pesh. 9.

65 *Ratanlal Gelabhai* v. *Amarsingh Rupsan* (1929) 53 Bom. 773; 122 I.C. 54, 1929 A.Bom. 467; *Bhojraj* v. *Sheshrao* (1948) Nag. 422, 1949 A.N. 126.

66 So held in bench decisions in Allahabad and Pepsu: *Jadunath Singh* v. *Bishunath Singh* (1951) 2 All. 16; *Gobind Ram* v. *Mst. Mewa* 1953 A. Peps. 188, dissenting from *Veeraswami* v. *Venkatachala* 1926 A.M. 18, and observing that the termination of the lease was not made the ground of decision in *Sailesh Kumar* v. *Rama Devi* 1952 A.P. 339, nor was the tenant's refusal to sue the basis of *Ratanlal* v.*Amarsing* (1929) 53 Bom. 773, or of *Jadunath* v. *Bishunath* (1951) 2 All. 16.

67 *Neyveli Lignite Corporation Ltd.* v. *Narayana Iyer* (1965) A.M. 122; (1964) Mad. 676 folld. in *Chinna Pillai* v. *Govindaswami* (1969) A.M. 191.

68 *Debi Singh* v. *Bhim Singh* (1971) A.D. 316; *Kalulal* v. *Shri Mannalal* (976) A. Raj. 708

except that of the true owner. Therefore the heirs are entitled to sue for recovery of possession.[69]

Who may be sued under this section.—*A*, alleging that *B* and *C* dispossessed him of certain land, sues them for possession under this section. *B* alleges that the land belongs to *D* and that he is *D*'s manager. *C* alleges that he is the lessee of the land under *D*. The suit is properly brought against *B* and *C*, they being the persons who, *A* alleges, dispossessed him. *D* is not a necessary party to the suit.[70]

Against Government.—The exclusion of the State from the purview of s. 6 does not empower the State or its officials to dispossess a citizen in 'judicial possession' of property except under due process of law.[71]

"Dispossessed."—The mere cutting of a couple of bundles of grass does not necessarily amount to dispossession within the meaning of this section,[72] nor can *A* be said to be dispossessed by *B*, if *B* prevails upon *A*'s tenants not to pay the rent to A, and receives the rent himself,[73] nor can a purchaser whose attempts to gain possession are resisted be said to be dispossessed.[74]

Immovable property.—There is a conflict of decisions as to whether the expression "immovable property" in this section includes incorporeal rights, *e.g.*, a right to fish in a *khal* the soil of which does not belong to the person claiming the right. The High Courts of Bombay[75] and Madras[76] have held that it does. On the other hand, it bas been held by a Full Bench of the Calcutta High Court that it does not.[77]

"Otherwise than in due course of law."—A person is said to be dispossessed "otherwise than in due course of law" if he is disposessed by another acting of his own authority and without the intervention of a Court of law. The words "due course of law" are not merely equivalent to the word "legally," for a thing which is perfectly legal may still be by no means a thing done "in due course of law." The expression "due course of law" means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus though a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over, he may not dispossess him *of his own authority*. If he does so, it is competent to the tenant to sue the landlord for possession under this section.[78]

"Notwithstanding any other title that may be set up in such suit."—If the suit is brought within the prescribed period, that is, within six months from the date of dispossession, even

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69 *Phiraya Lal Kapur* v. *Jia Rami* (1973) A.D. 186, 188; *Govind Dutta* v. *Jaynarain Dutta* (1952) A.P. 314 folld.

70 *Virjivandas* v. *Mahomed Ali Khan* (1881) 5 Bom. 208, 214, 217.

71 *Chandra & Co.* v. *State of Rajasthan* (1981) A.Raj. 217, 224; (1979) A.S.C. 1628 reld. on.

72 *Virjivandas* v. *Mohomed Ali Khan* (1887) 5 Bom. 208, 221; nor it would seem, for any purpose.

73 *Jarini Mohun* v. *Ganga Prasad* (1887) 14 Cal. 649.

74 *Sundarbai* v. *Mavji Arjan* 1949 A.Kutch. 9.

75 *Bhundal* v. *Pandol* (1888) 12 Bom. 221 (right of fishery); *Mangaldas* v. *Jewanram* (1899) 23 Bom. 673 (right of way).

76 *Krishna* v. *Akilanda* (1890) 13 Mad. 54 (right of ferry).

77 *Fadu Jhala* v. *Gour Mohun Jhala* (1892) 19 Cal. 544 (F.B.); *Natabar* v. *Kubir* (1891) 18 Cal. 80 (right of fishery); *Fuzlur Rahman* v. *Krishna Prasad* (1902) 29 Cal. 614 (*hat*, possession whereof is held by collecting tolls or rents).

78 *Rudrappa* v. *Narsingrao* (1905) 29 Bom. 213; *Jogendra Chandra* v. *Birendra Lal* A.I.R. 1935 Cal. 454; 39 C.W.N. 394; 156 I.C. 924; *Mst. Rajwanta* v. Mahabir Rai (1931) 53 All. 414; 129 I.C. 559; A.I.R. 1931 All. 205. Dispossession under a decree of a revenue Court or in execution of a decree in course of law: 53 All. 414 *(Supra); Murlidhar* v. *Jainti Prosad* A.I.R. (1932) All. 703; 1932 All. L.J. 812; 139 I.C. 366. *Anoopchand* v. *Amerchand* A.I.R.1951 Mys. 101 (a case in which a Court official unauthorisedly dispossessed the plaintiff). See also *Balkrishna Ayyar, In re* A.I.R. 1950 Mad. 753, where after dispossession by defendant, the *tehsildar* was in possession under s. 145 of the criminal Procedure Code.

the rightful owner is precluded from showing his title to the land.[79] A person who has been dispossessed within six months, can successfully sue under s. 9 (s. 6 of 1963) and his reference to his title to the property is irrelevant.[80] The bar of superior title which cannot be set up in the suit itself cannot be pleaded in execution of a decree under s. 9 of the old Act.[81] A defendant, who alleges himself to be the true owner, cannot obtain an injunction restraining execution proceedings, but must first surrender possession and then assert any right he may have.[82] It is not a defence to a suit under this section—

(1) by a mortgagee against the mortgagor, that the mortgage and possession under it were obtained by the mortgagee by fraud.[83]

(ii) by a tenant against the landlord that the tenant was holding over at the date of dispossession.[84]

A Muhamedan widow who enters into possession of the property of her husband in lieu of dower debt gets a heritable right and her heirs can retain possession till the debt is paid.[85] According to the Allahabad High Court a reversioner who repudiates the sale by a widow by dispossessing the alienee from the widow cannot on the basis of mere possessory title be sued under s. 9 because he is the true owner. It is submitted that such reversioner cannot forcibly eject the alienee without getting the alienation set aside. Besides title is not relevant in such suits.[86]

Order under Criminal Procedure Code, s. 145.—In proceedings instituted under s. 145 of the Criminal Procedure Code it is found by the Criminal Court that *B* and not *A* was in possession of certain land, and an order is made under that section declaring *B* to be entitled to retain possession thereof until evicted therefrom in due course of law. The order is no bar to a suit by *A* against *B* for possession under the present section. It is a mistake to suppose that after such an order *A's* only remedy is to institute a suit to have his *title* declared and possession given to him.[87]

Limits of decree under this section.—A decree under this section should be confined to directing delivery of possession to the plaintiff. The court has no power under this section to direct the defendant to pay to the plaintiff the cost of removing huts and filling up of excavations,[88] nor to award mesne profits[89] nor renewal of hutments.[90]

A division bench of the Allahabad High Court has held that if a person gets a decree for possession under s.6, the other party in possession can sue for declaration of title with conse-

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79 *Enaetoollah* v. *Kishen Soondar* (1867) 8 W.R. 386, 389; *Ismail Ariff* v. *Mahomed Ghous* (1893) 20 Cal. 834, 842-843; L.R. 20 I.A. 99, 106-107; *Rajai Singh* v. *Suraj Bali* A.I.R. 1942 Oudh 179: *Ganga Din* v. *Gokul Prasad* A.I.R. 1950 All. 407. (But see *Beni Madho* v. *Prag* A.I.R. 1949 All. 510).

80 *Maya Ram* v. *Sant Ram* (1965) A.A. 409

81 *Parmanand* v. *Sm. Chhimmawati* (1955) A.A. 64

82 *Parmanand* v. *Sm. Chhimmawati* A.I.R. 1955 All. 64.

83 *Sayaji* v. *Ramji* (1881) 5 Bom. 446.

84 *Rudrappa* v. *Narsingrao* (1905) 29 Bom. 213. If a suit be barred by the provisions of Tenancy Act, s. 9 would not be available to the plaintiff: *Khusnud Husain* v. *Janki Prasad* (1931) 53 All. 532; A.I.R. 1931 All. 663; 132 I.C. 801.

85 *Zaibun Nisa* v. *Nazim Hassan* (1962) A.A. 197.

86 *Anant Bahadur* v. *Ashthbhuja Bux* (1960) A.A. 227.

87 *Jwala* v. *Ganga Prasad* (1908) 30 All. 331; *U Kyaw Lu* v. *U Shwe So* (1928) 6 Ran. 667; 114 I.C. 543 1929 A.R. 21.

88 *Tilak Chandra* v. *Fatik Chandra* (1898) 25 Cal. 803. Court cannot direct removal of structures erected by defendant: *Sona Mia* v. *Prokash Chandra* 1940 A.Cal. 464; 44 C.W.N. 895; 191 I.C. 803 *Ananta Sarkar* v. *Meghu Kurmi* 61 C.W.N. 347.

89 *Ma Ngwe Bwin* v. *Maung Po Maung* (1927) 5 Ran. 123; 101 I.C. 630; 1927 A.R. 142.

90 *Ananta Sarkar* v. *Meghu Kurmi*, 61 C.W.N. 347; *Lachhman* v. *Shambu Narayan*, 33 All. 174 reld. on; *Tilak Chandra* v. *Fatik Chandra*, 25 Cal. 803 refd. to:

quental relief of injunction restraining the decree holder from executing his decree. Reference was made to sub-s. (4) of s. 6 and to s. 41(a) & (l) of Specific Relief Act (1963).[91]

Suit brought more than six months after dispossession.—If a suit is brought under this section within six months from the date of dispossession, all that the plaintiff has to prove to entitle him to a decree is previous possession; he has neither to allege nor prove title. If the suit is not brought until after six months from the date of dispossession, the plaintiff cannot recover on the strength merely of his previous possession; he can recover only if he proves his title to the land.[92] But what if the suit is one for possession against a *trespasser*, that is, one who has no title to the land? Is it necessary in such a case for the plaintiff to succeed that he should prove his title, or is it sufficient if he proves his previous possession? On this point there is a conflict of decisions between the High Courts of Bombay, Allahabad, Madras and Patna on the one hand, and the High Court of Calcutta on the other hand. According to the Bombay,[93] Allahabad,[94] Madras,[95] Patna[96] and Kerala[97] High Courts, the plaintiff is entitled to succeed if he proves his previous possession; it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession; for the plaintiff to succeed he should allege and prove his title, at the least possessory title, i.e, possession for twelve years.[98] The distinction between the two conflicting views may be explained by an illustration: *A*, alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by *B*, who never had any title to the land at all, sues *B*, 8 months after the date of dispossession for possession. *A* has no title to the land at all, but it is proved that he had been in possession as alleged. *B* also has no title of any kind to the land.[99] Is *A* entitled to a decree? According to the Bombay, Allahabad, Madras and Patna decisions, he is. These Courts proceed upon the principle of English Law,[1] also recognised in India,[2] that possession is a good title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses, and they hold that this principle is not in any way affected by the provisions of the present section. According to the Calcutta High Court. *A*'s possession being for a period less than 12 years, he is not entitled to possession, though *B* has no title. According to that Court, the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section, and that unless the suit is brought within 6 months from the date of dispossession, he is not entitled to any relief. It is submitted that the correct view is the one taken by the Bombay, Allahabad, Madras and Patna High Courts in accordance with English doctrine as now settled, and that the present section cannot be held to take away any remedy available to a party on the strength of his previous possession. This view was accepted by the

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91 *Chuni* v. *Sullahar* (1972) A.A. 418; *Mari Doddaamma Markundi* v. *Santaya Ramakrishna* (1922) A.B. 216; 24 Bom. L.R. *Parmanand* v. *Smt. Chhimma Wati* (1955) A.A. 64 Overruled. 768, applied.

92 *Wise* v. *Ameerunnissa* (1880) L.R. 7 I.A. 73, 80-81. *Narayanan* v. *Mathayi* (1966) A. Ker. 179; See *Mustapha Sahib* v. *Santa Pillai* 23 Mad. 179, 182; See *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165 Cp. *Mashal Singh* v. *Ahmed Husain* (1927) 50 All. 86; 103 I.C. 363; 1927 A.A. 534.

93 *Krishnarav* v. *Vasudev* (1884) 8 Bom. 371; *Hari* v. *Dhondi* 8 Bom. L.R. 96.

94 *Wali Ahmed* v. *Ajudhia Kandu* (1891) 13 All. 537 appd. in *Yashwant Singh* v. *Jagdish Singh* (1968) A.SC. 620; *Umrao Singh* v. *Ramji Das* (1914) 36 All. 51; 22 I.C. 622.

95 *Narayan Row* v. *Dharmachar* (1903) 26 Mad. 514. *Mustapha Sahib* v. *Santha Pillai* 23 Mad. 179.

96 *Subodh Gopal* v. *Province of Bihar* 1950 A. Pat. 222.

97 *Narayanan* v. *T. Mathayai* (1966) A. Ker. 179.

98 *Nisa Chand* v. *Kanechiram* (1899) 26 Cal. 579; *Debi Churn* v. *Issar Chunder* (1882) 9 Cal. 39; *Ertaza Hossein* v. *Bany Mistry* (1882) 9 Cal. 130; *Purmeshar* v. *Brijo Lall* (1890) 17 Cal. 256. Contra *Somnath Berman* v. *Dr. S.P. Raju* (1970) A.SC. 846; *Debi Churn* v. *Issar Chunder* (1882) 9 Cal. 39 & *Purmeshar* v. *Brijo Lall* (1890) 17 Cal. 256 and *Nisa Chand* v. *Kanechiram* (1899) 26 Cal. 579 overruled.

99 See (1891) 13 All. 537, 539, and Limitation Act, Art. 142.

1 *Perry* v. *Clissold* (1907) A.C. 73; *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1.

2 *Pemraj* v. *Narayan* (1882) 6 Bom. 215, 223; *Sundar* v. *Parbati* (1889) 12 All. 51, 56; L.R. 16 I.A. 186, 193; *Ismail Ariff* v. *Mahomed Ghous* (1893) 20 Cal. 834, 842-843; L.R. 20 I.A. 99,106,107; *Mst. Mahan* v. *Mohan Singh;* 1935 A.L. 547; 158 I.C. 261.

Supreme Court in *Nair Service Society* v. *K.C. Alexander*[3] and in *Somnath Burmen* v. *Dr. S.P. Raju*.[4] In the latter case it was held that "s. 9 is in no way inconsistent with the position that as against a wrong-doer prior possession of the plaintiff in an action of ejectment is sufficient title even if the suit be brought more than six months after the act of dispossession complained of and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third party.[5]

In India acquisition of title by prescription being a lawful mode of acquisition of title a person in peaceful possession is entitled to retain possession against all except the lawful owner. Such right is heritable and transferable which is protected by ss. 9 and 42 of the Specific Relief Act (1877). (ss. 6 & 34 of the two Acts of 1963).[6]

Suit after 6 months by trespasser.—As against a trespasser, a person suing more than six months after his dispossession for a declaration of title and possession can succeed on the basis of his prior possession which has not ripened into prescriptive title.[7] But a person in possession for a short time cannot claim possession even against trespasser more than 6 months after the dispossession.[8] The Mysore High Court has held that as between the trespassers the one who was in previous possession and was dispossessed by the later trespasser can sue on his possessory title; this was a case of easement in regard to a water channel.[9]

Non-occupancy raiyat.—A non-occupancy *raiyat,* who has been dispossessed from his holding, may bring a possessory action under this section, within 6 months from the date of dispossession, or he may bring an action upon title, in which case the suit may be brought either within 3 or 12 years as provided for in art. 113 or art. 64 of the Limitation Act. It is a mistake to suppose that he has no right or title to his land, and that the only remedy open to him is that provided by the present section. He has a title to the land, his title being that of a tenant of the land.[10]

The High Court of Allahabad has held that in the case of dispossession from agricultural land a suit lies under s. 9 of the Specific Relief Act, 1877 and s. 242 of U.P. Tenancy Act is no bar.[11] But the Madhya Pradesh High Court has held that a dispossessed *bhumiswami* cannot file a suit under s. 9 of the old Act (s. 6 of 1963). He must resort to the remedy under s. 250 of the M.P. Land Revenue Code.[12]

Appeal.—The term "suit" in this section includes a proceeding in execution of a decree passed in a suit under this section; no appeal therefore lies from an order made in execution proceedings.[13]

Revision.—Under s. 9 of the repealed Act interference in revision was generally confined to exceptional cases.[14] The law has not been altered in this respect.

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3 (1968) A.SC. 1165.
4 (1970) A.SC. 846.
5 Ibid 849; cases at notes 93, 94, 95, 96 approved. Calcutta view n. 98 overruled; Srinath v. *Kali Bhawani,* (1972) A.P. 138.
6 *Ponnusami* v. *Pappammal* (1958) A.M. 497; *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165.
7 *Narayanan* v. *T. Mathayi* (1966) A.Ker. 179; *Nisa Chand* v. *Kanechiram* (1899) 26 Cal. 579; 3 C.W.N. 568 dist; *Mustapha Sahib* v. *Santha Pillai* 23 Mad. 179 reld. on; *Hari* v. *Dhondi* 8 Bom. L.R. 96 refd. to; *Nair Service Society* v. *K.C. Alexander* (1968) A.SC. 1165; *Somnath Berman* v. *Dr. S.P. Raju* (1970) A.SC. 846.
8 *Mohd. Hanif Mia* v. *Haladhar Lahkar* (1959) A.Asm. 236; *Nisa Chand* v. *Kunechiram* 26 Cal. 579; 3 C.W.N. 568 folld. Pollock & Mulla: Indian Contract Act (8th Ed.) p. 753 not accepted.
9 *Hajisa Imamsa* v. *Kalyanrao* (1961) A.My. 86.
10 *Tamizuddin* v. *Ashrub* (1904) 31 Cal. 647 (F.B.).
11 *Yar Mohammad* v. *Lakshmi Das* (1959) A.A. 1; (1958) 2 All. 394; (F.B.) *Jag Narain* v. *Bhagwati Prasad* (1958) A.A. 48 overruled; *Ram Lakhan* v. *Mt. Tulsha* (1954) A.A. 199.
12 *Nathu* v. *Dilbande Hussain* (1967) A.MP. 14 (D.B.).
13 *Kanai Lal* v. *Jatindra Nath* (1918) 45 Cal. 519; 42 I.C. 711.
14 See *Abdul Bari* v. *Asrab Ali* A.I.R. 1953 Ass. 158; *Abdullah Khan* v. *Faizulla Khan* A.I.R. 1950 Pesh. 9.

Recovery of specific movable property.

7. [10] A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Explanation 1.—A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation.2.—A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

This section corresponds with s.10 of the repealed Act and except for verbal alterations is the same in its legal effect. The illustrations to s. 10 are reproduced.

Illustrations.

(a) *A* bequeaths land to *B* for his life, with remainder to *C*. *A* dies. *B* enters on the land, but *C*, without *B*'s consent, obtains possession of the title-deeds. *B* may recover them from *C*. [Common learning in England].

(b) *A* pledges certain jewels to *B* to secure a loan. *B* disposes of them before he is entitled to do so. *A*, without having paid or tendered the amount of the loan, sues *B* for possession of the jewels. The suit should be dismissed, as *A* is not entitled to their possession, whatever right he may have to secure their safe custody. [See *Donald* v. *Suckling* (1866) L.R. 1 Q.B. 585.]

(c) *A* receives a letter addressed to him by *B*. *B* gets back the letter without *A*'s consent. *A* has such a property therein as entitles him to recover it from *B*. [*Oliver* v. *Oliver* (1861) 11 C.B.N.S. 139; 132 R.R. 505].

(d) *A* deposits books and papers for safe custody with *B*. *B* loses them and *C* finds them, but refuses to deliver them to *B* when demanded. *B* may recover them from *C*, subject to *C*'s right, if any, under Section 168 of the Indian Contract Act, 1872.

(e) *A*, a warehouse-keeper, is charged with the delivery of certain goods to *Z*, which *B* takes out of *A*'s possession. *A* may sue *B* for the goods.

Illustrations.—It will be observed that the foregoing illustrations are illustrations in the strictest sense, examples of the various cases to which the procedure can be applied. So far as they state or involve propositions of substantive law those propositions have no special connection with the Act.

As to ills. (d) and (e), see Contract Act, 1872, s. 180 above.

Recovery of specific movable property.—Ss. 10 and 11 of the repealed Act (Ss. 6 & 7 of 1963) embody the English rules as to detinue. An action in detinue would lie only for some *specific* article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party.[15]

Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession.

8. [11] Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;

15. *Fadu Jhala* v. *Gour Mohan Jhala* (1892) 19 Cal. 544, 566; 571; *Murugesa* v. *Jotharam* (1899) 22 Mad. 478, 480.

(b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation.—Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume—

(a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;

(b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

This section corresponds with s. 11 of the repealed Act, except that an Explanation has been added.

The illustrations to s.11 and the commentaries of the learned authors are reproduced.

Illustrations

of clause (a)—

A, proceeding to Europe, leaves his furniture in charge of *B*, as his agent during his absence. *B*, without *A*'s authority, pledges the furniture to *C*, and *C*, knowing that *B* had no right to pledge the furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A*'s trustee.

[Here it is not material whether the furniture has, 'any peculiar or intrinsic value' or not: *Wood* v. *Rowcliffe* (1844) 3 Hare 304; (1847) 2 Ph. 383; 64 R.R. 303].

of clause (b)—

Z has got possession of an idol belonging to *A*'s family, and of which *A* is the proper custodian. *Z* may be compelled to deliver the idol to *A*.

[Cp. Fry on Specific Performance, §§ 79-82].

of clause (c)—

A is entitled to a picture by a dead painter and a pair of rare China vases. *B* has possession of them. The articles are of too special a character to bear an ascertainable market-value. *B* may be compelled to deliver them to *A*.

[The China vases are derived from *Falcke* v. *Gray* (1859) 4 Drew 651; 113 R.R. 493. Whether the painter is alive or dead seems immaterial.]

Restitution of chattels—It is hard to see on principle why the right should be confined to special categories. The framers of the Act seem to have forgotten that the Indian Courts are not merely Courts of English equitable jurisdiction. In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of detinue. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common-law judgments, this could not in practice be enforced. Then a Court of Equity, when applied to for relief, had to be satisfied that the remedy in damages to the value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiff under a trust for example, was involved. Under a more logically developed system the burden would be on the

defendant to show cause why it should not be just and equitable to award specific restitution.[16]

Explanation.—The above commentary led to the enactment of the explanation and has clarified the question of burden of proof. Under clause (a) the onus is on the plaintiff to prove the fiduciary relationship and under clause (d) to prove the wrongful transfer. The explanation deals with the onus under clauses (b) and (c), which is placed upon the defendant, who has to prove that compensation in money would be an adequate relief and that it would not be extremely difficult to ascertain the actual damage caused by the loss of the chattel.

Possession.—A plaintiff is not entitled to a decree under this section unless he alleges and proves that the defendant is in possession.[17]

Execution.—As to the execution of a decree for specific movable property, see the Code of Civil Procedure, 1908, 0.21, r. 31.

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16. The whole of this paragraph received the entire approval of a bench of the Madras High Court in *Subbarayalu* v. *Annamalai* (1946) Mad. 174.

17 *Venkatasubba Rao* v. *The Asiatic S.N. Co.* (1916) 39 Mad. 1, 10-11; 39 I.C. 840 [F.B.]

CHAPTER II

SPECIFIC PERFORMANCE OF CONTRACTS

Introduction to Chapter II.—The jurisdiction of the English Court of Chancery to decree specific performance of contracts was founded, as we have already said, on the want of an adequate remedy at law. If the conception of equitable remedies had been maintained with logical strictness, the Court would have held itself bound to examine each individual case with an open mind before deciding whether an extraordinary remedy was called for. But after the Court of Chancery was recognised as a regular and ordinary Court it was impossible to affect such an attitude, and it became the settled rule that in certain classes of cases the nature of the case itself was ground enough for the Court's interference.

Presumption as to contracts to convey land.—Accordingly we find that a contract for the sale or letting of land is presumed to be a fit subject-matter for the exercise of the jurisdiction we are now considering. It is said indeed that the remedy of specific performance is discretionary: the residual amount of truth in this at the present day is that the plaintiff must show himself actively willing to perform his part of the contract, and that some defences are admissible which are not or under the older practice were not admitted in an action at common law for damages.[1] None the less the broad result, in the modern doctrine of Courts of equity, is that specific performance is a normal remedy in suits on contracts for the sale or letting of land, but is awarded on contracts of other species only when exceptional circumstances make it proper to do so. One reason why this doctrine does not in general extend to a sale of goods is that regularly a complete contract for the sale of ascertained goods transfers the property at once to the buyer, who thereupon has all the ordinary legal rights and remedies of an owner: see ss. 19,20 of the Sale of Goods Act, 1930. Another and more extensive one is that where the goods are of a kind purchasable in the market, whether the contract is for specific goods or not, compensation in money is an adequate remedy; the successful plaintiff can, if he chooses, employ the damages awarded to him in buying goods equivalent to those contracted for.

Further, it was held that if the vendor of property was compellable in a Court of Equity to perform his contract, he must also be entitled to come to the Court, though merely seeking payment of his purchase-money; this was commonly accounted for as being required by the principle of "mutuality" "in order to give a right corresponding with that which is given to a purchaser".[2]

Treatment of the subject in English books.—The literature of specific performance has been swelled, in England, with much matter that really belongs to the general law of contract; the reason being that Courts of Equity were little concerned, at least until very recent times, with matters of current commercial business, and equity practitioners regarded only those species of contracts which usually occurred in dealings with land and with trust estates. Instead, therefore, of assuming as a matter of course that there were general and known conditions for the validity of any contract, and a plaintiff claiming specific performance must first show that those elementary conditions were satisfied, they expected the text-writer who provided for their particular convenience to explain all that a plaintiff in a specific performance suit had to prove, as if there were no other kinds of contracts in the world. Part III of Sir Edward Fry's classical treatise is entitled "Defences to the Action" and covers nearly 400 pages. It may be said without much hesitation that from two-thirds to three-quarters of its contents are concerned merely with the general law of contracts as understood in Courts of Equity. One may add that many rules and principles which were supposed to be mysteries of equity have now turned out to be very good common law. But, as Sir Edward Fry said in the preface of his

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1 *Cp.* Pollock, Law of Fraud in British India, 1894, pp. 124-128.

2 See Lord Cranworth in *Webb* v. *Direct London & Portsmouth Rly Co.* (1852) 1 D.M. & G. at p. 528; 91 R.R. at p. 157.

first edition more than eighty years ago, the text-writer had to consider what a lawyer—that is, a practising lawyer in the old Court of Chancery—would expect to find in his book.

Treatment in Indian Law.—In India we are free from these anomalies. The substantive rules determining the existence of a valid contract are laid down in the Contract Act, and explained and further illustrated in their places in the foregoing commentary; it will therefore be sufficient to refer to the appropriate sections of the Contract Act, so far as convenient, for matters which are presumed by the rules more particularly relating to specific performance, but are not part of them. One could wish, however, that the Specific Relief Act had not in many places adopted the language of old-fashioned English books.

Moreover the doctrine of the English Courts relating strictly to the remedy of specific performance has been purposely simplified in India, and further (though not yet enough) lightened by the suppression of technical subtleties and difficulties created partly by the Statute of Frauds and partly by the artificial methods of reasoning to which the Court of Chancery resorted to defend or enlarge its jurisdiction. A certain number of Indian practising lawyers have had to read to these technicalities in English books;[3] the best thing they can do is to forget them as thoroughly as possible for Indian purposes. The Privy Council has, it is true, interpreted the sections of the Specific Relief Act, both as to substantive law and practice, in the light of the principles recognised by the English Courts; but where there is an express divergence, then the Act will be strictly adhered to, whatever be the English law.[4]

Specific Performance.—The right to sue for specific performance cannot be equated with a cause of action at law. In equity all that is required is to show circumstances which will justify the intervention by a Court of Equity. The order for specific performance falls into two parts: the first can be of a declaratory nature and the second contains consequential directions. The first is suitable to a case where the time for performance has not arrived even at the date of the order. In such a case in the event of subsequent non-performance the Court would not require the issue of a fresh writ before making the consequential directions for specific performance. The Court will not of course compel a party to perform his contract before the contract date arrives and would give relief from any order in the event of an intervening circumstance frustrating the contract.[5]

Either party to a contract to sell land is entitled to sue in equity for specific performance of the agreement. This right is, in general, founded on a breach of contract, but not in the same manner as the right to sue at law. The Court has no jurisdiction to award damages at law except in case of a breach of the contract; while the equitable jurisdiction under an agreement to be specifically performed is not limited to the cases in which at law damages could be recoverable.[6] A decree for specific performance is in the nature of a preliminary decree and can be enforced by the plaintiff as by the defendant. Such a decree does not terminate the suit.[7]

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3 A concise and rational view of the English doctrine in its English form may be found in F.W. Maitland. Equity and the Forms of Action, Camb. 1920, Lect. 19.

4 *Ardeshir Manna* v. *Flora Sasson* (1928) 55 I.A. 360; 52 Bom. 597; 111 I.C. 413; 1928 A.P.C. 208; *Akshayalingam* v. *Avayambalammal* (1932) 56 Mad. 796; 144 I.C. 621; 1933 A.M. 386.

5 *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374, 377 (P.C.). *Roberts* v. *Bumb* (1943) 2 D.L.R. 613. *Roy* v. *Kloepfer Wholesale Hardware Co. Ltd.* (1951) 3 D.L.R. 122 appd. on appeal (1952) 1 D.L.R. 158 and by S.C. of Canada (1952) 2 S.C.R. (Can) 465. American Restatement of the Law. Vol. 2 s. 360, Williston on Contract. Vol. 5, pp. 3708-3709. Williams on Vendor & Purchaser, Vol. 2, p. 1001 (4th Ed.). Per Vaisey J. in *Marks* v. *Lilley* (1959) 1 W.L.R. 749, 752.

6 Williams on Vendor & Purchaser Vol. 2 (4th Ed.) p. 1001 quoted with approval in *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374, 377; P.C. see Vaisey J. in *Marks* v. *Lilley* (1959) 1 W.L.R. 749, 752.

7 *Anandilal* v. *Gunendra* (1966) A.Cal. 107; *Heramba Chandra* v. *Jyotish Chandra* (1932) A.Cal. 579; 59 Cal. 501; and *Abdul Shaker Sahib* v. *Abdul Rahiman* 46 Mad. 148; (1923) A.M. 284 reld. on. See Williams on Vendor & Purchaser, Vol. 2 (4th Ed.), p. 1001; quoted in *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374, 377 P.C.; Vaisey J. in *Marks* v. *Lilley* (1959) 1 W.L.R. 749, 752.

Defences respecting suits for relief based on contract.

9. [New] Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

This is a new section which makes it quite clear that in a suit for specific performance of a contract, the defendant may plead any ground which is available to him under any law relating to contracts, such as incapacity of parties, absence of a concluded contract, coercion, fraud, misrepresentation, mistake, illegality, or want of authority to enter into the contract.

Time of the Essence of the Contract.—In *Burjorji's*[8] *case* the Privy Council laid down the principles governing contracts of sale of land when time is or is not of the essence of the contract. Following this decision the Indian Courts have held that time in contracts for sale of immovable property is not of the essence of the contract unless the nature of the property and surrounding circumstances make it so. Equity treats limits of time as subordinate to the main purpose of the parties.[9]

The Privy Council again considered the question as to time being of essence of the contract in *Paul Couvreur* v. *M.G. Shapiro,*[10] an appeal from Palestine, where the facts were these: An agreement for sale was entered into on 22nd December 1934 which was subsequently modified. A deposit of £2,000 was paid and the balance was agreed to be paid on specified dates by instalments. The buyer was unable to fulfil his undertaking and various concessions were made. On 12th January 1938 after the purchaser had paid £9,500 a fresh agreement was entered into cancelling the previous agreement. Under the new agreement £3,100 was to be paid by 12th January 1941. The transaction of sale and transfer was to be prepared and followed up by the purchaser at his own expenses in all respects. He also undertook to prepare the transaction of transfer at the Land Registry at his own expense and to call upon the seller to appear at the Land Registry and effect the transfer. In the meanwhile a Regulation was promulgated by the Commissioner requiring the obtaining of a permit for transfer of land. The vendor did not apply for it, refused as time was of the essence of the contract. The mere fact that mortgage negotiated the contract at an end. The Privy Council held that it was the duty of the purchaser to take steps necessary for effecting the transfer including getting a permit. It laid down two propositions: (i) that reasonable time for getting a permit applies to a contract which falls to be carried out within a reasonable time, (ii) where contract falls to be completed within a fixed period and therefore time is of the essence of the contract, to allow the purchaser reasonable time beyond the fixed period to enable him to do what by the terms of the contract he was required to do, would amount to making a new contract for the parties.

In *Gomathinayagam Pillai* v. *Palaniswami Nadar* the Supreme Court after reviewing the authorities laid down the law thus:

There is a presumption in the case of sale of immovable property that time is not of the essence of the contract. Even where a contract contains a stipulation making time the essence of the contract, the presumption applies and more so where the time for performance has been extended more than once. Similarly incorporating a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.[11]

Intention to make time of the essence of the contract must be in unmistakeable language. It may also be inferred from the nature of the property, agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract.

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8 *Jamshed Kodaram Irani* v. *Burjorji Dhunjibhai* (1916) 43 I.A. 26; 40 Bom 289. See also S. 55 of Contract Act. See *Abdul Hamid* v. *Abbasbhai* (1962) 1 Pak. S.C.R. 86.

9 *Sm. Labanya Ray* v. *P.M. Mookherjee* 68 C.W.N. 611 and the cases discussed under S. 55 of the Indian Contract Act. See *Gomathinayagam* v. *Palaniswami* (1967) 1 S.C.R. 227; (1967) A.SC. 868.

10 (1948) A.PC. 192.

11 *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868; reversing (1966) A.M. 46 on the point of readiness and willingness. *Narayanaswami* v. *Dhanakoti Ammal* (1967) A.M. 220; *Jamshed Kodaram Irani* v. *Burjorji Dhunjibhai* 40 Bom. 289; 43 I.A. 26; (1915) A.PC. 83.

Specific performance will ordinarily be granted notwithstanding the default in carrying out the contract within the agreed period if having regard to the express stipulations, nature of the property and the surrounding circumstances it is not inequitable to grant the relief.[12] Even if time is not originally of the essence of the contract, the vendor can by notice call upon the purchaser to take the conveyance within the time fixed and intimate that in default the contract will be treated as cancelled. And if the purchaser has been guilty of unnecessary[13] delay, the vendor may serve upon the purchaser limiting the time at the expiration of which he will treat the contract at end.[14] If time was not originally of the essence one of the parties is not entitled afterwards by notice to make it so unless there has been some default or unreasonable delay by the other party.[14a]

Gomathinayagam's case was this:

A agreed to sell a piece of land to *B* and *B* paid a part of the consideration as advance and then he paid a further sum and an agreement to complete the sale by a specified date was entered into with a default clause. The time was extended once again. On the non-payment on the due date the vendor gave notice of the breach cancelling the contract and forfeiting the advance and sold the property to another buyer. Purchaser's suit for specific performance was decreed as time was held not to be the essence of the contract.[15]

A vendor accepted a part of the purchase price from the vendee on the stipulated date but the sale could not be registered and the part payment was after the non-registration. That negatives the stipulation of time being of the essence of the contract.[16]

In an auction sale a purchaser paid the initial deposit but failed to pay the balance within time. He paid a portion of the balance to the auctioner. On mortgagee's attempt to resell the property the auctioner-purchaser sued for specific performance which was refused as time was of the essence of the contract. The mere fact that mortgagee negotiated with the mortgagor to sell the property to a third party or he asserted his right to extend the time does not exclude the time not being of the essence.[17]

An agreement for reconveyance when no time-limit is fixed must be enforced within reasonable time.[18] An agreement for lease where payment of Salami within a year was of the essence of the contract, specific performance was not decreed in the absence of the payment within the year.[19]

Where the object of a contract is commercial enterprise, the Court is strongly inclined to hold time to be essential; e.g. agreement to purchase land for construction of a factory.[20]

A contract of a pre-emption expressly given to the mortgage under a deed of usufructuary mortgage can be enforced by a suit for specific performance within the period of limitation. It cannot be pleaded as a defence to a suit for possession by the purchaser of the equity of redemption nor can the mortgagee seek its enforcement in such a suit.[21] If two rights are given under a contract of purchase, the right of pre-emption and the right of repurchase, the latter

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12 *Ibid.*

13 *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868; *Stickney* v. *Keeble* (1915) A.C. 386 appld.

14 *Stickney* v. *Keeble* (1915) A.C. 386 appld. in *Gomathiswami Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868; (1966) A.M. 46 revd. on question of willingness & readiness.

14a *Abdul Hamid* v. *Abbasbhai Abdul Husain* Pak. L.D. (1962) S.C. 1,6; (1962) 1 Pak. S.C.R. 86; *Green* v. *Serin* 13 Ch.D. 589; & *Smith* v. *Hamilton* (1951) 1 Ch. 174 folld.

15 *Palanichami Nadar* v. *Gomathinayagam Pillai* (1966) A.M. 46; (1965) Mad. 613. revd. in (S.C.) *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868, but on the point of readiness & willingness; See also *Abdul Hamid* v. *Abbasbhai* (1962) 1 Pak. S.C.R. 86.

16 *Zakir Sadagar* v. *Dolegobind* (1955) A.P. 201.

17 *Duraikannoo* v. *Sarvana Chettiar* 1963 A.M. 468; 1963 Mad. 376.

18 *Alamelu Ammal* v. *Radhakrishna Naidu* 1964 A.M. 304; *Rajammal* v. *Gopalaswami* (1951) A.M. 797 reld. on.

19 *Nalini Mitra* v. *Bepin Bihari* (1956) A.Cal. 525.

20 *Sriram Cotton Pressing Factory* v. *Narayanswami* (1965) A.M. 352; (1965) 2 Mad. 39; Fry on Specific Performance (6th Ed.) para 1081, p. 505; and S.C. Bannerjee: Law of Specific Relief (T.L.L.) 381 quoted.

21 *Muhammad Yusuf* v. *Smt. Sharifan Bibi* (1962) A.Cal. 457.

does not, in the absence of contract to the contrary, lapse, merely because the right of pre-emption has lapsed.[22]

An agreement to get price fixed by arbitration is not void for uncertainty and can be specifically enforced.[23]

If a person entitled to obtain possession by specific performance by renewal of a lease is already in possession, he need not sue for specific performance but can resist a suit for ejectment. It would not be fair to direct him to sue for specific performance.[24] A suit under s. 77 Registration Act is only concerned with the registration of a document and it is no bar to a suit for specific performance of a contract.[25]

Whether there was a concluded contract of sale or not has to be determined by a consideration of all relevant facts and cannot be concluded by the parties' or solicitors' description of the situation.[26] A deed of sale by the vendor and the agreement of reconveyance were executed as separate documents, the latter not being signed by the vendor also. The transaction is not a mortgage by conditional sale but the two documents formed one single transaction to which both the parties were consenting parties—the consent of the transferor can be assumed and specific performance cannot be denied for want of mutuality.[27]

A promissory note promising to pay £780 for value received or in default to convey property is not contract for sale of land since the words 'for value received' reveal no ascertained or ascertainable price and if those words refer to a past transaction, they would be insufficient to support a contract for sale of land and specific performance cannot therefore be granted.[28]

CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED

Cases in which specific performance of contract enforceable.

10. [12(b) & 12(c)] Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.—Unless and until the contrary is proved, the court shall presume—

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22 *Du Santoy* v. *Symes* (1967) 1 All E.R. 25.

23 *Bai Mangoo* v. *Bai Vijli* (1967) A.Guj. 81; *Damodhar* v. *State of Bombay* (1959) Supp. 2 S.C.R. 180; (1959) A.SC. 639 reld on. *Sree Ambarnath Mills* v. *D.B. Godbole* (1957) Bom. 668; (1957) A.B. 119 dist.

24 *Jairam* v. *Hari Singh* (1967) A. Punj. 159; *Secretary of State* v. *Forbes* 17 I.A. 180 reld, on; and *Distt. Board of Tanjor* v. *Vithilinga Chetty* (1916) A.M. 1224; 31 I.C. 919 dist.

25 *Gulab Singh* v. *Tarabai* (1958) A.MP. 310; *Veeran Ambalam* v. *Vellaiammal* (1960) A.M. 244.

26 *Smt. Labanya Ray* v. *P.M. Mukherjee* 68 C.W.N. 611, 629; *Goshto Bihari* v. *Sur Estate Ltd.* (1960) A.Cal. 752 followed; *Marshall* v. *Berridge* 19 Ch.D. 233, 241 refd. to.

27 *Praj Dutt* v. *Smt. Saraswati Devi* (1982) A.A. 37, 39.

28 *Savage* v. *Uwechia,* (1961) 1 A.E.R. 830 (P.C.); *Tapply* v. *Sheather,* 7 L.T. 298 (Where consideration for the sale of land was clearly expressed) dist.

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

This section corresponds to s. 12(b) and (c) of s. 12 of the repealed Act.

The relevant illustrations are taken from the repealed Act.

Illustrations of clause (a)

A agrees to buy, and *B* agrees to sell, a picture by a dead painter and two rare China vases. *A* may compel *B* specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

[The China vases are suggested by *Falcke* v. *Gray* (1859) 4 Drew. 651; 113 R.R. 493.]

A contracts with *B* to sell to him a horse for Rs. 1,000. *B* is entitled to a decree directing *A* to convey the horse to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contracts with *Z* to make an archway through its railway to connect lands to *Z* severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. *Z* is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.

[See *Storer* v. *G.W.R. Co.* (1842) 2 Y. & C.C.C. 48; 60 R.R. 23].

A contracts to sell, and *B* contracts to buy, a certain number of railway-shares of a particular description. *A* refuses to complete the sale. *B* may compel *A* specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

(See Commentary below.)

A contracts with *B* to paint a picture for *B*, who agrees to pay therefor Rs. 1,000. The picture is painted. *B* is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

A transfers without endorsement, but for valuable consideration, a promissory note to *B*. *A* becomes insolvent, and *C* is appointed his assignee. *B* may compel *C* to endorse the note, for *C* has succeeded to *A*'s liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

[Involved in *Walkins* v. *Maule* (1820) 2 J. & W. 242. There the assignee's endorsement was voluntary, and the Court answered an objection to its validity by saying that he was not only entitled but bound to endorse.]

Stranger to contract.—In a suit for specific performance of a contract of sale of a house, a stranger to the contract cannot seek to be impleaded. That will change the very nature of the suit.[29]

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[29] *Raj K. Mehra* v. *Mrs. Anjali Bhandari* (1981) A.D. 237.

Immovable property.—The wording of this section bears the marks of the peculiar English history. In a rational order the explanation, which is really the most important operative part of the enactment, would come first, and we should be told in a more direct manner that in a suit to enforce a contract to transfer immovable property the Court (the contract being otherwise good and enforceable) will grant specific performance unless special reason to the contrary appears, but for breach of other kinds of contracts only when special reason for it is shown. It is common learning and practice that in plaintiff must have been ready and willing at all times to carry out the contract.[30] But it was held by the Court of Appeal in *Berners* v. *Fleming*[31] that if a vendor sues for performance as he *bona fide* costrues it, and that construction is held to be wrong, he may still have performance according to the true construction of the contract as found by the Court, provided that he has shown willingness to submit to have the agreement actually proved performed. This authority will not apply where the plaintiff has insisted on what he has no right to, until he sees that judgment is likely to go against him,[32] or where his insistence on an interpretation of the contract that, in the event, is held to be erroneous has involved him in a breach of contract which the defendant has treated as a repudiation.[33] See Explanation to s. 16 below.

The benefit of an ordinary contract for the sale of land being assignable, the purchaser's personal qualifications are not material, and the fact that the real buyer was an undisclosed principal is no answer to an action by him for specific performance: *Dyster* v. *Randall.*[34] This decision of P.O. Lawrence J. is contrary to a *dictum* of Fry J. in *Smith* v. *Wheatcroft,*[35] and is unsupported by any authority.[36] It has been accepted as correct by Professors Goodhart and Hamson,[37] who, while conceding that the undisclosed principal has stolen the vendor's consent, and that there is no contract between the undisclosed principal and the vendor, consider that the contract is between the agent and the vendor, but that the undisclosed principal is anomalously allowed to sue, unless the benefit could not be assigned because of the materiality of the personal qualifications of the purchaser,[38] or the burden could not performed vicariously. Rather than accept an admitted anomaly not based on any authority, it seems better to reject *Dyster* v. *Randall,* and accede to the view of Dr. Glanville Williams that if *A* enters into an agreement with *B* thinking that *B* is acting on his own account, whereas *B* is acting for *C* with whom *A* would, to the knowledge of *C*, never contract, a contract with *C* should not be forced upon *A* as he has not in fact dealt with *C* and is unwilling to do so, nor should *B* be allowed to assign to *C* if *B* knew of *A*'s unwillingness.[39] For other cases see under s. 15 *sub-nomine* "Parties indicated by description;" *infra.*

This section is applicable to contracts to transfer immovable property by way of security, if it is proved that relief by way of damages would not be adequate.[40] The presumption that

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30 *Arjuna Mudaliar* v. *Lakshmi Ammal* 1949 A.M. 265; *Parul Bala* v. *Saroj Kumar* 1948 A. Cal. 147; *Alakhram* v. *Kulwantri Bai* (1950) Nag. 386, 1950 A.N. 238; *Shamjibhai* v. *Jagoo Hemchand* 1952 A.N. 220.

31 (1925) Ch. 264, C.A.'

32 *Shamjibhai* v. *Jagoo Hemchand* 1952 A.N. 220, 233, distinguishing *Berners* v. *Fleming,* and following *Bindeshri Parshad* v. *Mahant Jairam Gir* (1887) 9 All. 705, L.R. 14 I.A. 173, P.C.

33 In the two Indian authorities, the plaintiff was the purchaser, and had delayed payment of the purchase-money despite a notice making time of the essence (see s. 55), whereas in the English case the defendant purchaser was still ready to perform at the start of the proceedings, and sought only at a late stage to introduce a claim to repudiate by amendement of his pleadings. See cases under s. 9 *supra.*

34 (1926) Ch. 932, 938.

35 (1878) 9 Ch.D. 223, 230.

36 P.O. Lawrence J. relies upon *Nash* v. *Dix* (1878) 78 L.T. 445, but North J. expressly reserves the point at p. 448.

37 4 Camb. L.J. 320, 345-8.

38 As in *Said* v. *Butt* (1920) 3 K.B. 497—sale of a first-night theatre ticket.

39 23 Can. Bar Rev. 380, 404-5, 409-411.

40 *Hukhumchand Kasliwal* v. *Pioneer Mills Co.* (1926) 2 Luck. 299;99 I.C. 483; 1927 A.O. 55; *Faridunnissa* v. *Etizad Husain* (1930) 125 I.C. 169, merely follows this.

arises under S. 10 that a breach of contract to convey immoveable property cannot be compensated by payment of money is a rebuttable presumption. Therefore a contract of reconveyance will not be enforced where the plaintiff has entered into a contract of sale of the property and it can be adequately compensated by payment of money. It is submitted this case must be confined to its own facts.[41]

According to Patna High Court where a vendee is ready to pay the consideration money in the case of sale he is entitled to maintain a suit for possession. He had already paid a part of the purchase price.[42]

Movable goods.—A contract to deliver specific goods will be enforced by way of specific performance if they are "articles of unusual beauty, rarity and distinction" (Kindersley V.-C., in *Falcke* v. *Gray,*[43] or special value to the party suing by reason of personal or family associations or the like. Normally a picture painted by oneself would have that special sentimental value, which would not be submitted to the estimation of persons who do not share those feelings, but in *Dowling* v. *Betjemann,*[44] a painter recovered merely damages for failure to return a picture he had painted, as he himself in the contract had set a certain value upon it, and his claim became, in the words of Lord Hatherley L.C. 'a mere money demand.' The principle is not confined to cases of contract, and indeed the illustrations of it most commonly quoted are furnished by decisions in which contract was not an element at all.[45] It may be that in a contested case where specific performance is sought the dispute between the parties is only as to what is included in the contract; the decision in such a case is really an authority only on the points of construction which were in dispute.[46] In fact we do not often meet with claims to specific performance of a contract to sell and deliver goods in modern practice. As lately as 1909, in Canada, specific performance was sought (in an action turning mainly on questions of construction) of a continuing contract by a coal company to deliver coal of a specified quality to steel works: this part of the claim was somewhat summarily dismissed by the Privy Council.[47] It was not alleged that coal of the special quality which the steel-working company contracted for, and on which they had a right to insist, could not be obtained elsewhere. Justice, therefore, was done by holding the steel company entitled to rescind the contract and to be compensated in damages for loss already incurred. In *Cohen* v. *Roche,*[48] the plaintiff failed to recover in *in specie* certain antique Hepplewhite furniture though it was of some beauty and distinction, because he was a dealer who had merely bought it for resale. Whether a contract to deliver something produced on the seller's land and not elsewhere can be specifically enforced is a question which, so far as known, has not occurred for decision.

The Court will, if necessary, enforce the specific execution of provisions made by agreement between partners dissolving partnership as to the separate ownership of trade books or the like which were partnership property. No question could be raised at this day about the jurisdiction.[49] Such a division of property is not a sale, but the principle applicable is the same in substance: the objects are of little or no value except to the party entitled, and to him they have a value for which there is no definite measure. We do not speak here of the right to restrain disclosure of trade secrets, which is a different matter.

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41 *Dave* v. *Ramshankar Jivatram* v. *Bai Kailashgiri* (1974) A Guj 69,73.
42 *Tribani Prasad* v. *Basudeo Prasad* (1980) A.P. 200.
43 (1859) 4 Drew. at p. 658; 113 R.R. at p. 496.
44 (1862) 2 John. & H. 544, 70 E.R. 1175.
45 Fry on Specific Performance, §§ 79.
46 Thus in *Thorn* v. *Commrs. of Works* (1863) 32 Beav. 490; 138 R.R. 838, the subject matter of the contract was stone from a disused bridge, sold by the cubic foot; the sellers wanted the buyers to take all they had offered, the buyers to take less. Evidently there was no question of artistic or historical value.
47 *Dominion Coal Co.* v. *Dominion Iron & Steel Co.* (1909) A.C. 293.
48 (1927) 1 K.B. 169.
49 *Lingen* v. *Simpson* (1824) 1 Sim. & St. 600; 24 R.R. 249. The report does not look as if the point was really thought arguable.

As to sale of other kinds of property.—Specific performance of a contract to sell a share in a partnership business may be enforced.[50] It is easy to see that an award of damages in such a case would be merely speculative. The right to be admitted a partner by nomination under a power conferred by the partnership agreement has some similar incidents but is not of the same class.[51] An agreement to sell contained a clause to pay compensation in default by the vendor. The purchaser was put in possession, but the vendor refused to execute the sale deed; it was held that the contract to pay compensation was not an alternative contract and that the purchaser was entitled to specific performance.[52] A suit for possession or declaration of plaintiff's title on the basis of an award cannot be regarded as a suit for specific performance.[53]

Sales of stocks or shares.—A contract to sell Government stock or any stock for which there is a regular market, is not a proper subject for specific performance, for the same reason that a contract to sell and deliver ordinary marketable goods is not. But this does not apply to the transfer of shares in companies for which there is not a notorious market.[54] It is to be observed that in such cases the Court has no administrative difficulties to face, as it only has to order the seller to execute the proper transfer and do whatever is necessary on his part to authenticate it by registration. The jurisdiction is analogous to that which deals, as we have just noticed, with the transfer of a share in a private partnership. As for the details of such transaction, they belong to the special law of companies, and depend largely on local usage.

Machinery being moveable property compensation will ordinarily be adequate remedy and a contract of sale for such property cannot be specifically enforced.[55]

Property which is not an ordinary article of Commerce.—Twisted cement pipes manufactured to specifications at the instance of a purchaser do not fall under that category, nor can s. 10 be relied on by a seller as it applies at the instance of a purchaser.[56]

Coal ash is a commodity of common use and it was not shown that the plaintiff wanted to use it for his own purpose or it was of special value or purpose. Hence no suit for specific performance lies to enforce a contract for the sale of waste coal ash.[57].

Agreements to lend money.—See notes to s. 14(1a) below.

Contracts to execute building or other works.—It is not a convenient course to decree specific performance of a contract such that the execution of the work contracted for would necessarily be prolonged and the work of a kind which a court of justice has not the means of supervising. Therefore it has long been the rule in England that the Court will not usually grant this remedy on a contract for building or engineering work.[58] But there are special circumstances which will induce the Court to make an exception. In one important class of cases a purchaser of land has covenanted, as part of the consideration on his side, to build or execute specified works on that land. Such an undertaking will be enforced if the following conditions are satisfied: (1) the work to be done must be defined with sufficient exactness for the

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50 *Dodson* v. *Downey* (1901) 2 Ch. 620; no dispute as to the jurisdiction, the only question argued and decided being on the purchaser's duty to indemnify the vendor. See s. 14(3) (b) below.

51 See Pollock Mulla, notes on s. 31 of the Indian Partnership Act.

52 *Abdur Rahman* v. *Nasir Ali* 1931 A.L. 657; 132 I.C. 489. See also s. 23 (*Infra*).

53 *Govindlal* v. *Manekchowk Spg. and Wg. Mills* 1934 A.B. 140; 151 I.C. 156.

54 *Duncuft* v. *Albrecht* (1841) 12 Sim. 46; 56 R.R. 46, appears to be the earliest authority. It would hardly be followed now so far as it assumes railway shares not to be marketable. Consolidated stock representing original share or loan capital was at the time unknown *Jainarain Ram Ludhia* v. *Surajmull Sagarmull* (1949) F.C.R. 379, 51 Bom. L.R. 979, 1949 A.F.C. 211; *The Bank of India Ltd* v. *Jamsetji A.H. Chinoy* (1950) 77 I.A. 76, (1950) Bom. 606, 1950 A.P.C. 90.

55 *Hemraj Kapoor* v. *Seventeen Textile Traders* (1961) A.P. 318; *Ramji Patel* v. *Rao Kishore Singh* 56 I.A. 280; (1929) A.PC. 190 applied.

56 *Maheswari & Co. (Pvt.) Ltd.* v. *Corporation of Calcutta* (1975) A. Cal. 165, 168; *James Jones and Sons Ltd.* v. *Earl of Tankerville* (1909) 2 Ch. 440 Disting.

57 *Taj Singh* v. *State of U.P.* (1981) A.A. 103, 105.

58 *Dewan Chand* v. *Union of India* 1951 A. Punj. 426.

Court to know what it is requiring to be performed; (2) the party seeking performance must have a substantial interest of such a nature that damages would not be an adequate compensation; (3) the defendant has by the contract obtained possession of land on which the work is contracted to be done.[59] The law has been so clearly laid down by the Court of Appeal to the effect just stated that it is of little use even in England to go back to the older authorities.[60]

Further specification and illustration of cases in which specific performance is not granted will be found in s. 14, below.

Discretion of the Court."—See notes to s. 20, below.

Decree for specific performance.—As to execution of decrees for specific performance and decrees for the execution of a document, see Code of Civil Procedure, 1908, O. 21, rr. 32, 34.

Suit to obtain the benefit of a lost deed.—Where a writing that has been executed is lost, the proper course of proceeding is not by a suit requiring the defendant to execute a fresh writing, but by a suit to restore the terms of the lost writing. In an Allahabad case, Stuart C.J. observed that there was no doubt that such a suit could be instituted in this country.[61]

Option to purchase.—An option to purchase property given for value is capable of specific performance.[62] As a general rule on the refusal of the purchaser to complete an executory contract for the purchase of land, the vendor is not entitled to sue for the purchase price as a debt. He is entitled to sue for specific performance or damages or both. It is only when the contract is completed by execution that the price becomes a debt.[63]

A agreed to sell his news agency business and his leasehold rights in the shop where it was carried on and dwelling-rooms attached thereto. A deposit was paid and date for completion fixed. The purchaser did not complete the transaction in spite of notices by the vendor, who, treating it as repudiation by purchaser, resold it to another and sued for shortfall, which it was held by the New Zealand Supreme Court to be recoverable.[64]

A suit will lie for specific performance of a contract to direct the vendor to apply for permission under s. 47 of the A.P. (Telengana Area) Tenancy and Agricultural Lands Act and then to execute a sale deed.[65] A suit for specific performance does not lie on the basis of an unregistered sale deed.[66]

Cases in which specific performance of contracts connected with trusts enforceable.

11. [14-17] (1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

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59 Romer L.J. in *Wolverhampton Corporation* v. *Emmons* (1901) 1 K.B. 515, 525.

60 See Kekewich J.'s remarks in *Molyneux* v. *Richard* (1906) 1 Ch. 34, 40. This was the case of a covenant in an ordinary English building lease to build houses of a kind specified by reference to similar works already done.

61 *Maya Ram* v. *Prag Dat* (1882) 5 All. 44, 52.

62 *Commissioner of Taxes (Queensland)* v. *Campin* (1937) 57 C.L.R. 127; *Carter* v. *Hyde* (1923) 33 C.L.R. 115.

63 *McDonald* v. *Dennys Lascelles Ltd.* 48 C.L.R. 457, 475; *Laird* v. *Pim* 151 E.R. 852.

64 *White* v. *Ross* (1960) N.Z.L.R. 247. Williams on Vendor and Purchaser (4th Ed.) p. 1010 ; and Halsbury's Laws of England (2nd Ed.) Vol. 29, p. 375 not accepted. *Holland* v. *Wiltshire* (1954) 90 C.L.R. 409.

65 *Syed Jalal* v. *Targopal Ram Reddy* (1970) A.Ap. 19; *Vasudev Reddy* v. *Venkata Reddy* (1963) A.AP. 232 not appd.; *Ramulu* v. *Anantharamulu* (1966) A.AP. 70; and *Taraporwala* v. *Kazim Ali* (1966) A.AP. 361 approved. See *Mrs. Chandni Vidyavati* v. *Dr. C.L. Katiyal* (1964) 2 S.C.R. 495; (1964) A.SC. 978.

66 *Ramkishen* v. *Muktilal Sarma* (1956) A.Asm. 154.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

This section brings together sec. 12(a) and sec. 21(e) of the repealed Act.

Cl. (2).—The illustrations to sec. 21(e) of the repealed Act are reproduced below.

A is a trustee of land with power to lease it for seven years. He enters into a contract with *B* to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders.

They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, *A* and *B*, empowered to sell trust property worth a lakh of rupees, contract to sell it to *C* for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. *C* cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property—and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

[*Mortlock* v. *Buller* (1804) 10 Ves. 292; 7 R.R. 417, suggested the first and third paragraphs. The second and fourth state plain cases of breach of trust of fiduciary duty.].

Specific performance of part of contract.

12. [14-17] (1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance ; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clasue (b),[67] [pays or has paid] the consideration for the whole of the contract without any abatement; and

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67 Ins. by the Repealing and Amending Act, 1964 (52 of 1964), section 3 and Second Schedule.

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

This is an amalgamation of ss. 14 to 17 of the repealed Act with modifications in the law. The Explanation is substituted for sec. 13 of the repealed Act and together with sub-sec. (1) states the law with clarity.

Sec. 12 constitutes a complete code in respect of a claim for specific performance of part of a contract.

Section 12 involves no question of public policy and hence parties to a contract can and it is open to the parties to waive any benefit under a contract except those rendered void by law e.g. s. 28 Contract Act. Therefore the parties can conclude an agreement not conforming to s. 12 of Act of 1963 (s. 17 of 1877 Act.)[68]

Performance with or without compensation.—This section deals with classes of cases in which specific performance may be granted with or subject to special conditions or restrictions. Such cases are put by English lawyers under the rubric "Specific performance with compensation." In English practice they are confined to contracts for the transfer of immovable property; they are almost always complicated by special terms of agreement, or conditions of sale if the sale was by auction, the effect of which on the general rules has to be considered; and the arguments and judgments of course assume knowledge of English tenures, conveyancing, and habits of dealing. For these reasons alone English decisions on this subject would have to be used with great caution in India; but we shall presently see that Indian legislation has deliberately declined to follow the system of the English courts in its minuter distinctions. Moreover, the general tendency of the earlier authorities is now discredited in their own jurisdiction. In later cases strong remarks have been made by eminent judges on the unfortunate adventures of Courts of Equity in "making bargains for the contracting parties which they never would have made for themselves".[69] So much by the way of warning.

General principles as to compensation.—The principles applicable in different kinds of circumstances in English law have been summed up concisely in a judgment of the Privy Council. The question for the Court is always whether the contract can be executed in substance.

"If a vendor sued and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated. If it is the purchaser who

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68 *Nirmala Sundari Datta* v. *Kumbde* (1976) A. Gan. 58.
69 *Arnold* v. *Arnold* (1880) 14 Ch.D. 270, 279, 284; and see Fry on Specific Performance, § 1217.

is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement of the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract."[70]

The decision in this case was that a purchaser could not have compensation for a misrepresentation as to the quantity of fencing on the land, that being a collateral matter not affecting the description of the thing sold.

The Specific Relief Act does not, of course, define the conditions under which misrepresentation will in general make a contract voidable, for which see ss. 18, 19, of the Contract Act, and commentary, above.

When compensation not admissible.—The chief difficulty in applying the rule here laid down is to know what kind or amount of shortcoming on a vendor's part will be deemed not to admit of compensation in money. As long ago as 1834 the general principle was defined (for it is impossible to anticipate the details of individual cases) in a passage now received as classical:

"Where the misdescription, although not proceeding from fraud,[71] is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether," and this even if there is a special condition to the effect that errors in description shall not annul the contract but shall be matter for compensation. "The purchaser is not bound to resort to the clause of compensation" if the defect is such that he "may be considered as not having purchased the thing which was really the subject of the sale."

So the Court of Common Pleas declared the law in a case where a lease was subject to much more burdensome restrictions as to the use of the premises than appeared in the particulars of sale:[72] and the statement has been approved and followed ever since. The test is whether the purchaser gets substantially what he contracted to buy.[73] If performance with money compensation will not give him satisfaction to that extent, he is not bound to complete. The words of sub-sec. (2) "the part which must be left unperformed bears only a small proportion to the whole in value" do not leave, and doubtless were intended not to leave, so much discretion to the Court as results on the whole from the English authorities.

As in English law, the parties can contract out of the section.[74]

Abatement of Compensation.—After the compensation of a contract by conveyance there can in the absence of fraud be no abatement of compensation in the case of defects subsequently discovered in respect of that transaction.[75]

Sub-sec. (2).—This sub-section corresponds with sec. 14 of the repealed Act and the illustrations to that section are given below:

Illustrations.

(a) *A* contracts to sell *B* a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belong to *A*, and the two remaining *bighas* to a stranger, who refuses to part with them. The two *bighas* are not necessary for the use or enjoyment of the 98 *bighas* , nor so important for such use or enjoy-

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70 *Rutherford* v. *Acton-Adams* (appeal from New Zealand) [1915] A.C. 866; *Gilchester Properties* v. *Gomm* (1948) 1 All. E.R. 493; *Arun Prokash* v. *Tulsi Charan* 1949 A. Cal. 510.

71 As to fraud, see I.C.A. s. 17, and commentary, above. We are not concerned with it here.

72 *Flight* v. *Booth,* 1 Bing. N.C. 370; 41 R.R. 599.

73 So said all the members of the C.A. in nearly the same words, *Fawcett and Holmes' Contract* (1889) 42 Ch.D. 150. The difference between being subject to one lease, as described, and being in fact subject to several distinct leases, is substantial: *Lee* v. *Rayson* (1917) 1 Ch. 613.

74 *Kochuvareed* v. *Mariappa* 1954 A.T.C. 10, 23.

75 *Chacko Joseph* v. *Vargees Markose* (1957) A.Ker. 181.

ment that the loss of them may not be made good in money.[76] *A* may be directed at the suit of *B* to convey to *B* the 98 *bighas* and to make compensation to him for not conveying the two remaining *bighas*; or *B* may be directed, at the suit of *A*, to pay to *A*, on receiving the conveyance and possession of the land, the stipulated purchase-money less a sum awarded as compensation for the deficiency.

(b) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at the valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

[Richardson v. *Smith* (1870) L.R. 5 Ch. 648: here the discretion of the Court is more broadly stated.]

It is to be noted that under this sub-section either party may enforce the contract, and the portion left unperformed must bear a small proportion to the whole *in value,* and of course must admit of compensation in money.[76]

Delivery of possession if small proportion.—Delivery of vacant possession of the premises agreed to be sold is not a small proportion of the contract for the sale and therefore relief cannot be given under s. 14 where such possession is not or cannot be given.[77] But the plaintiff can get under s. 15 of the old Act (s. 12 of 1963) if he is prepared to forego the claim for vacant possession and gives up all claims to compensation.[78]

A contract of reconveyance of the property sold can be specifically performed even though as a result of the U.P. Zemidari Abolition Act the tenure has been converted into Bhumidari rights.[79]

Sub-sec. (3).—Although sub-sec. (3) corresponds with sec. 15 of the repealed Act, it has altered and clarified the law. A distinction is made between the party in default and the party not in default. The party in default is not entitled to specific performance in the circumstances mentioned in sub-clauses (a) and (b), but the party not in default, which of course would be the purchaser, is entitled to specific performance of the part that can be performed, and also entitled to reduction in the consideration for the part which must be left unperformed, provided it admits of compensation in money. If the part which must be left unperformed does not admit of compensation in money, the party seeking specific performance of the part must pay consideration for the whole of the contract.

Explanation.—The explanation would include cases which fall under sec. 56 of the Contract Act. Where, for instance, a part of the property is destroyed after contract by lightning or by rioters or by an act of God, if would cease to exist. In such cases, a party to a contract shall be deemed to be unable to perform the whole of his part of the contract. Such a person would come within the words "party in default":

The Federal Court of Pakistan held that illustration (a) to s. 13 of the repealed Act goes beyond the section. That section relates to partial performance of contracts and does not of itself give any right of specific performance. It does not import the English doctrine of transfer of the equitable estate in the vendee.[80]

If a substantial part of the lease had already expired when the suit for specific performance is filed relief can be given under s. 15 of the Act of 1877 [s. 12(3) of the Act of 1963]. But in this case as the lease would have expired by the time the contract could be specifically performed the Court ordered compensation only.[81] Under s. 15 of the old Act [S. 12(3) of

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76 As if they were, for example, a strip including a material section of frontage: *Arnold* v. *Arnold* (1880) 14 Ch.D. 270.

77 *Sm. Labanya Ray* v. *P.M. Mookerjee* 68 C.W.N. 611, 649.

78 Ibid, 651.

79 *Ganga Singh* v. *Santosh Kumar* (1963) A.A. 194.

80 *Associated Hotels of India* v. *Jodhamal Kothalia* (1953) F.C.R. 441, 475, 489. (Pak.)

81 *Kalyanpur Lime Co. Ltd.* v. *State of Bihar* (1954) S.C.A. 278, 290; (1954) A.SC. 165.

1963] the relinquishment of the claim to further performance can be made at any stage of the proceedings.[82]

Agreement of sale by manager.—If the contract of sale by a manager of a joint Hindu family is for legal necessity then the Court can enforce the contract even though some members are minors.[83]

In *Balmukand* v. *Kamlavati* the karta of a joint Hindu family agreed to sell joint family lands but the sale was not for necessity or for benefit of the family and the other members of the family who were adults were not consulted. In these circumstances the relief for specific performance was refused.[84]

If a Hindu, who is the karta, agrees to sell not as karta but in his individual capacity specific performance cannot be decreed even of his own share.[85] A contract to sell property by a person on behalf of herself and on behalf of somebody else a minor and the contract is not enforceable against that somebody else then the contract cannot specifically be performed in regard to share of the person entering into the contract and neither s. 15 nor s. 16 are applicable [Section 12(3) & 12(4) of 1963].[86] The Supreme Court of Pakistan[87] held s. 15 (of 1877 Act) inapplicable in a case where one of the two cosharers who agreed to sell his share of the property and "promised" to get the share of the other cosharer also conveyed to the buyer failed therein.

Sub-sec. (4).—This sub-section corresponds with sec. 16 of the repealed Act.

Divisible and indivisible contracts.—Whenever it is asserted on one side and denied on the other that certain obligations between the parties are so connected that it would be unjust to enforce on of them alone, the first thing to make sure of is whether there is only one contract or more than one. Not that this will always suffice for deciding the dispute, but it will put us on the road to a decision. Not that the preliminary inquiry will always be simple; it may involve doubtful matters of law, construction, or fact; but it must be capable of a definite solution.

If there is any contract, there is either one or more than one. If there is only one, it is reasonable to suppose that the parties intended it to be dealt with as a whole and not piecemeal, unless and until the contrary is shown. In technical terms, the contract is presumed to be entire. If there are more than one, the natural inference is the other way, and we shall assume that each contract may be separately and independently enforced, unless such a substantial and intimate connection is shown between apparently distinct agreements as would make the obvious construction unreasonable. A clear and express statement of the parties' intention would of course leave no room for dispute; but such a declaration is seldom found.[88] These observations may seem elementary even to baldness; but perhaps a little more attention to their substance might have saved some learned persons from futile perplexity; for nothing is so apt the neglect of elementary principles to confuse the discussion of controverted and complicated facts.

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82 *Ibid, 291; and 170; Waryam Singh* v. *Gopi Chand* (1930) 11 Lah. 69.

83 *Hari Charan* v. *Kamla Rai* (1917) 2 PL.J. 513; (1917) A.P. 478 F.B. See *Dhapo* v. *Ram Chandra* 57 All. 375; (1934) A.A. 1019; *Sankaralinga* v. *Ramaswami* (1952) Mad. 508; (1952) A.M. 389. *S.K. Butty* v. *Shriram* (1953) Nag. 579; (1954) A.N. 65; *Bhageran Rai* v. *Bhagwan Singh* (1962) A.P. 319; *Nathuni* v. *Makesh* (1963) A.P. 146.

84 (1964) 6 S.C.R. 521; (1964) A.S.C. 1385; *Jagat Narain* v. *Mathura Das* 50 All. 969; (1928) A.A. 454; and *A.T. Vasudevan, In the matter of* (1949) A.M. 260; and *Sital Prasad Singh* v. *Ajablal Mander* 18 Pat. 206; (1939) A.P. 370 appd.; *Shamlal* v. *Yassaram* (1954) Nag. 866; (1954) A.N. 334; *Bhageshvari Prasad* v. *Deopati Kuer* (1961) A.P. 416.

85 *Khali Panigrahi* v. *Kamla Devi* (1967) A.Or. 100.

86 *Rameshwar Prasad* v. *Anandi Devi* (1956) A.P. 53.

87 *Mrs. Anwara Chowdhury* v. *M. Majid* P.L.D. (1964) S.C. 807, 813.

88 A contract which was originally entire may subsequently be separated by consent of the parties: *Radha Kamal* v. *Puri Municipality,* 1954 A.Or. 110.

Given an entire contract, its nature may be such that only part of it can, according to the general rules, be enforced by way of specific performance. It would obviously not be just to enforce that part while the other remained to be performed and could not be effectually controlled by the Court. Further, it is obvious that a Court of justice cannot order a party to do that which would contravene any general law or be a breach of any existing personal duty. Hence the carefully guarded language of the sub-section. For the better general understanding of the subject, we will now mention some examples of the manner in which the principles are applied in English Courts.

English examples.—It has long been settled law that on a sale by auction of an estate divided into lots there is a separate contract with the purchaser of each lot, and not less so if the purchaser of two or more lots is the same person; so that, as a rule, a defect in the title to one lot will not affect the purchaser's obligation to take another. Nevertheless there may be facts within the knowledge of both parties establishing such a connection in use and enjoyment between two separate lots as to show that the purchaser bought them for a single purpose and would "not have taken one, had he not reckoned upon also having the other." Whether such a state of things exists is a question of fact to be tried as such in the regular course. If this is proved, the failure of the seller to convey to one lot will be a ground for the buyer to claim to be released from his contract as to the other.[89] Cases of this kind are not frequent.

A more usual species is that of a single instrument containing several undertakings on which the question arises whether they are separately enforceable.

"As a general rule all agreements must be considered as entire. Generally speaking, the consideration for the whole and each part of an agreement by one party is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement".[90]

Accordingly specific performance has been refused of an agreement to grant a lease, where the terms included the maintenance of a railway by the lessee on the land demised[91] and of a covenant in a lease to appoint a servant to perform specified duties for the benefit of occupiers:[92] these being such undertakings as the Court could not superintend.

There are kinds of business, however, where the needs and constant practice of the business require a different construction. Where in a single agreement for a building lease the land is mapped out in plots, and the lessee undertakes to build a certain number of houses on each plot, and, when he has built and finished them to the lessor's satisfaction, is to be entitled to one or more separate leases of the respective plot; there it is held that the lessee's right to a lease of any lot, whether in his own hands or in those of an assignee, is independent of the performance of the terms as to the other lots. In fact a building lessee works with capital borrowed in instalments which he would be unable to raise as required if the lender's security depended on the fulfilment of the builder's obligations over the whole of the property.[93]

Simultaneous agreements by *A* to sell Whiteacre to *B* and by *B* to sell Blackacre to *A* are not, without more, an entire contract even if recorded in one memorandum, but severable; and according to the general rule of evidence, extrinsic evidence is not admissible to show that an exchange was intended.[94]

Part of a Contract.—Court can grant a decree for a part of a contract under s. 12(3) and the party against whom the decree is passed may not be the whole body of persons entering in-

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89 *Casamajor* v. *Strode* (1834) 2 My. & K. 706; 39 R.R. 339.
90 Mellish L.J., *Wilkinson* v. *Clements* (1872) L.R. 8 Ch. at p. 110. For an Indian case, see *Karaun Hajra* v. *Gokul Chand* 1938 A.Cal. 234; 175 I.C. 315.
91 *Blackett* v. *Bates* (1865) L.R. 1 Ch. 117.
92 *Ryan* v. *Westminster Chambers Association* (1893) 1 Ch. 116.
93 *Wilkinson* v. *Clements* (1872) L.R. 8 Ch. 96.
94 *Croome* v. *Lediard* (1833) 2 Myl.& K. 251; 39 R.R. 195.

to the contract. Thus it cannot be said that the Court has no power to grant a decree for specific performance of a part of the contract on the ground that in so far as one of the parties is concerned the contract is void, illegal or inoperative. Thus by the repeal of the 1877 Act, the law has been made to be in accord with English Law.[95]

"Separate and independent footing":

This element is essential. A contract of sale was made for two plots of land in the same district, of the same character, and nearly equal in area, without any distinction as to the terms and conditions. The vendor could not make a title as to one of the plots (in fact it belonged to his wife, who would not concur) and the purchaser obtained judgment in the High Court of Calcutta for performance as to the other plot with abatement of the purchase-money. The Privy Council held that there was no evidence of the two plots being on a separate and independent footing, and that the decision below really imposed on the parties a new contract different from that which they had made; and the judgment was reversed accordingly and the contrary judgment of the trial judge restored.[96]

A purchaser who agreed to purchase two parcels of land for Rs. 5,750 brought a suit for specific performance and discovered that the vendor had no title to the more valuable of the two parcels. On his relinquishing his right to compensation for that parcel and agreeing to pay the whole amount he was held entitled to a decree for the less valuable parcel. Ss. 14 and 16 of the Act of 1877 were held inapplicable.[97] S. 12(3) of the Act of 1963 may be applicable.

Where a major plaintiff sues a major defendant for specific performance and no claim is made for or against a minor specific performance will be decreed. This was a case where the contract was several and not joint.[98]

Limitation.—Where the defendants agreed to sell two houses to the plaintiff with the proviso that the sale deed would be executed after the attachment of the houses in execution proceedings was raised, as no date was fixed for this event it was held that no date was fixed for the sale. One of the defendants sold a house by a registered deed to a third party. That date was taken as the date of knowledge of the refusal by the sellers and limitation would start therefrom.[99]

Where specific performance is claimed by some of several purchasers.—Where there is a single contract for sale of immovable property by the owner thereof to several persons, specific performance cannot be decreed against the vendor at the suit only of some of those persons, if the others refuse to join them in claiming performance. The present section does not apply to such case.[1]

The section does not apply where the inability to enforce specific performance of part of the contract arises from absence of jurisdiction in the court.[2]

Sections 12 & 19, when applicable.—S. 19 (s. 21 of 1963 Act) is attracted only if decree for specific performance of the whole of the contract can be granted and sections 14 and 15 of

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95 *Subramini* v. *Kannappa* (1973) A.M. 393, 395; *Jainarain* v. *Surajmull* (1949) A.F.C. All reld. on.

96 *Krishna Chandra Dey* v. *W. Graham* (1923) 50 Cal. 700; 75 I.C. 421; *Graham* v. *Krishna Chandra Dey* (1924) 52 I.A. 90; 52 Cal. 335; 86 I.C. 232; 1925 A.P.C. 45. See also *Abdul Aziz* v. *Abdul Sammad* 1937 A.M. 596; 171 I.C. 30. Whether a contract is divisible or not is a question of fact: *Harendra Chandra* v. *Nanda Lal* 1933 A.Cal. 98; 36 C.W.N. 1002; 141 I.C. 708.

97 *Parthasarathi* v. *Venkata* (1963) A.M. 106; *Rutherford* v. *Acton Adams* (1915) A.C. 868; (1915) A.PC. 113; and *Kalyanpur Lime Works Ltd.* v. *State of Bihar* (1954) A.SC. 1965 applied. *Dwijendra* v. *Manmohan De* (1957) A.Cal. folld.; *Ganga Singh* v. *Santosh Kumar* (1963) A.A. 194; (Plaintiff prepared to accept lesser rights vested in the vendor); *Tarabai* v. *Tukaram* (1956) A.B. 679 (vendor having a share in a house and vendee prepared to take his share for the stipulated consideration.).

98 *Dasarath Gayen* v. *Satyanarayan Ghose* 67 C.W.N. 110; (1963) A. Cal. 325.

99 *Shrikishna Keshav* v. *Balaji Ganesh* (1976) A.B. 342.

1 *Safiur Rahman* v. *Maharamunnessa Bibi* (1897) 24 Cal. 832. Dissented from by Bose J. in *Jagdeosingh* v. *Bisamber* (1938) Nag. 41, 171 I.C. 654; 1937 A.N. 186, as in his Lordship's view it sufficed that all the parties were before the Court if not as plaintiffs as defendants.

2 *Bimal Kumari* v. *Asoke Mitra* 1955 A.Cal. 402,409.

the old Act [s. 12(2 & 3) of 1963] apply to cases where specific performance can be decreed only in respect of a part of the contract and compensation is awarded for the remainder.[3]

Rights of purchaser or lessee against person with no title or imperfect title.

13. [18] (1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:—

(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

This section corresponds with s. 18 of the repealed Act, but has clarified the law on matters, which were subject to conflicting decisions.

Sale of "entire house"—construed.—Where the vendor agreed to sell an "entire house", only a portion of which was in his possession, the rest being in possession of tenants and the purchaser sued for specific performance claiming the whole house including the portion in possession of tenants, the Court decreed only the portion in possession of the vendor and held that the mere use of the words "entire house" did not include the portion tenanted to other persons.[4]

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3 *Smt. Labanya Ray* v. *P.M. Mookerjee* 68 C.W.N. 611,649; T.L.L. on Specific Relief by S.C. Bannerjee (2nd Ed.) 426 refd. to.

4 *Smt. Shaharyar Bano* v. *Sanwal Das* (1976) A.SC. 2073.

Sale of joint family property—A suit for specific performance cannot be dismissed on the ground of the property being ancestral property or on the ground of title being defective. The vendor cannot be permitted to set up these defences.[5]

Sub-sec. (1)(a).—A certain amount of uncertainty arose from the use of words "sale or lease" in s. 18(a) of the repealed Act, for s. 43 of the Transfer of Property Act applies to "sale or lease," whereas this Act is concerned with the performance of a contract. Whereas under s. 43 of the Transfer or Property Act, a vendor, who has acquired title to the property conveyed, has to deliver the property to the purchaser, under this section the vendor is required to convey the property contracted for, when acquired by him. Sec. 13 refers to facts during the pendency of the contract, whereas sec. 43 refers to a case in which the vendor acquires property after he has conveyed it. S. 18(a) of the old Act (s. 13a of 1963 Act) makes reference to sale or lease but not to a charge which is not an interest in immovable property.[6]

Sub-sec. (a) of sub-sec. (1) is really plain justice. A seller's obligation is determined by the contract; he is bound to fulfil it if he can when he is called upon to do so, and the Court will then compel him to the full extent of his present ability if it is a proper case for specific performance. The seller is like wise entitled to enforce the contract if he can make a good title at the proper time.[7]

A man may, if he chooses, bind himself to sell that which he has not but expects to have in time to perform the promise, taking the risk of failure; in the case of goods current in the market there is nothing out of the way in this. Talk about estoppel in this connection can only make a plain matter obscure. When it occurs,[8] it arises from confusion between the creation of a personal obligation and the passing of property, a confusion which was common at one time but should be carefully avoided by all students of equity who wish to keep their heads clear.

The Supreme Court held in an appeal under the old Act against a judgment of the Orissa High Court that the expression "subsequently to the sale or lease" means subsequently to the contract to sell or let and not subsequently to the execution of the sale deed or the lease deed. The above expression in clause (a) of section 18 of the old Act should preferably be construed in a way that there are no overlappings between the provisions of that clause and of section 43 of the Transfer of Property Act as the legislature does not ordinarily intend to make duplicate provisions for similar situations.[9] In an earlier case[10] agreeing with the High Court of Patna the Supreme Court had said that if at the time of the contract the vendor or lessor had an imperfect title and his title was perfected subsequent to the sale or the lease the purchaser or the lessee can under s. 18(a) of the old Act compel the performance of the contract. But even "subsequent to the sale or lease acquired" does not include subsequent to agreement to sell or lease but has reference to completed sale or lease.[11] A person making a contract for the purchase of property in which the vendor has an imperfect title can obtain specific performance of the contract under s. 18(a) of the old Act after the property is restored to the vendor under s. 16(1) of the Evacuee Property Act of 1950.[12]

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5. *Deenanath* v. *Chunilal* (1975) A. Raj. 69, 71; *Mir Abdul Hakim Khan* v. *Abdul Mannar Khan* (1972) A.A.P. 178; *Baluswami Aiyar* v. *Laksmana Aiyer* (1921) A.M. 172 (F.B.); *Muni Samabba* v. *Gurunaniappa* (1950) A.M. 90 folld.
6. *Panchanan Pal* v. *Nirode Biswas* (1962) A.Cal. 12.
7. *Mortlock* v. *Buller* (1804) 10 Ves. at p. 315; 7 R.R. at p. 429.
8. There is so such thing mentioned in Fry on Specific Performance.
9. *Shilla Chander Sekha Ram* v. *Ram Chandra Sahu* (1964) 7 S.C.R. 858; (1964) A.S.C. 1789; (1959) A.Or. 169 revd.; *Kalyanpur Lime Co. Ltd.* v. *State of Bihar* (1954) S.C.R. 958, 972; (1954) A.SC. 165, 169; (1954) S.C.A. 278; 290; quoted and reld on.
10. *Kalyanpur Lime Factory* v. *State of Bihar* (1954) S.C.R. 958; (1954) S.C.A. 278, 290; (1954) A.SC. 165.
11. *Bhiku* v. *Dasharath* (1967) A.B. 267; *Kalyan Lime Works* v. *State of Bihar* (1954) S.C.R. 958; (1954) A.SC. 165. refd. to; *Silla Chandra* v. *Lalita* (1959) Cut. 81; (1959) A.Or. 169 reld. on. (This was revd. by S.C. (1964) 7 SC.R. 858 (1964) A.SC. 1789; (*supra*).
12. *Abdul Satar* v. *Shah Manilal* (1970) A. Guj. 12.

According to the Bombay High Court the words "imperfect title" do not include no title at all.[13] These cases have now an historical value as in s. 13 of the Specific Relief Act of 1963, both imperfect and no title have been included.[14]

Purchaser acquiring outstanding title.—There is one case on record where a purchaser attempted to make an unfair use of the rule; having found an objection to the seller's title, and required it to be removed, which so far was a correct course, he broke off the negotiations and bought up the outstanding interest himself, thus making it impossible for the vendor to complete. The Court would not tolerate this sharp practice and decreed specific performance against the purchaser, allowing him the expenses he had incurred. In substance he was not free, after treating the contract as subsisting, to acquire the outstanding right or supposed right otherwise than as agent for the vendor.[15] It is a singular case, but the warning given by the decision goes beyond that particular combination of facts.

By s. 6 of the Transfer of Property Act it is enacted that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." The interest of a Hindu reversioner as well as that of a Mahomedan heir in the estate of his ancestor is mere *spes successionis,* and it is neither transferable nor releasable.[16] It has accordingly been held,[17] that though a Mahomedan daughter may in consideration of money paid to her by her father release her interest in her father's estate, the release is no bar to a claim by her after her father's death to her share of inheritance in his estate. It was contended in that case that the release was binding on the daughter on the principle that equity considers that as done which ought to be done. But this contention was overruled on the ground that to give effect to it would be defeat the express provisions of s. 6 of the Transfer of Property Act. This case is distinguishable from the following case which is an illustration to s. 43 of the Transfer of Property Act: "*A*, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X, Y* and *Z*, representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on partition. But, on *B*'s dying, *A* as heir obtains *Z, C,* not having rescinded the contract of sale, may require *A* to deliver *Z* to him." This is not a case of transfer of a *spes successionis,* but of a specific property.

Where *A* buys land at a revenue sale, which is subject to confirmation, and agrees to sell the land to *B, B* can sue for specific performance after the confirmation of the sale.[18] The Court held that the words "imperfect title" in the section included absence of title, and certainly *A*'s interest in the land before confirmation.[19] It has also been held by the Privy Council that if the vendor has agreed to sell property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if sanction is forthcoming to convey to the purchaser within a certain time.[20] The Supreme Court in *Vidyawati's case,* where the sale had to take

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13 *Bhiku* v. *Dashrath* (1967) A.B. 267; Contra *Pundit Daryaji* v. *Jainarayan Maliram* (1948) Nag. 815; dist.

14 See also Fry: On Specific Relief (6th Ed.) pp. 627-29.

15 *Murrel* v. *Goodyear* (1860) 1 D.F. & J. 432; 125 R.R. 498; the judgments give the point free from the rather intricate details of the narrative.

16 *Sham Sunder Lal* v. *Achlan Kunwar* (1898) L.R. 25 I.A. 183, 189; 21 All. 71; *Janaki Ammal* v. *Narayanasami* (1916) L.R. 43 I.A. 207, 209; 39 Mad. 634, 638; 37 I.C. 161; *Dhoorjeti* v. *Dhoorjeti* (1907) 30 Mad. 201; *Sumsuddin* v. *Abdul Husein* (1907) 31 Bom. 165; *Ram Gopal* v. *Gurbux Singh* 1955 A. Punj. 215.

17 (1907) 31 Bom. 165, *supra; Sri Jagannada Raju* v. *Sri Rajah Prasada Rao* (1916) 39 Mad. 554; 29 I.C. 241.

18 *Pundlik Daryaji* v. *Jainarayan* (1948) Nag. 815, 1949 A.N. 83.

19 See also *Mulji Thakarshi* v. *Kalyan Bechar* 1954 A. Sau. 87.

20 *Motilal* v. *Nanhelal* (1930) 57 I.A. 333, P.C.; *Babu Rao* v. *Sonaji* 1952 A. Hyd. 48. The Privy Council ruling seems to have been disregarded in *Raj Bahadur Singh* v. *Ram Sumiram Misra* 1950 A.A. 692, which seems to be wrongly decided. See *Chandni Vidyawati* v. *Dr. C.L. Katial* (1964) 2 S.C.R. 495; (1964) A.S.C. 978.

place with the permission of a third party, decreed specific performance and in the alternative damages if the contract became unenforceable for want of sanction of the third party.[21]

Sec. 1(b) and (c).—Sub-clauses (b) and (c) declare the consequences of the principle.

A contract for the sale of Sirdari Land after obtaining Bhoomidari rights under s. 131 of U.P. Zamindari Abolition and Land Reforms Act is specifically enforceable as Bhoomidari rights are obtainable by depositing ten times the land revenue.[22]

A lessee of land after getting a declaration of ownership under a Madras Act sold the land to a third party before his title was perfected. Having defaulted in payment of one instalment he surrendered the land to the lessor. The vender from such lessee was held not entitled to specific performance. Even if he was ready and willing to perform his part of the contract he was not entitled to relief as a matter of right or in equity, as the vendor had no transferable right at the time of the contract.[23]

Sale after getting possessions.—Premises contracted to be sold to the purchaser 3 months after the property was vacated by the tenant was requisitioned by the Magistrate for the tenant but the purchasers were always ready and willing to perform their part of the contract, the Supreme Court granted specific performance as the vendor was in no manner prejudiced; doctrine of laches considered.[24]

Sale of shares.—A contract of transfer of shares which require approval of the Board of Directors and consent of the Government as provided in the memorandum of Association cannot be enforced as it is a right to future transfer of shares.[25]

Sale of property with a condition for sale.—Where the property of the Electricity Board could be sold with consent of the Government who had leased property to the Board, the effect on a decree for specific performance is that the decree holder will have to get the approval of the Government after the decree. It is submitted in such a case the sale being subject to a condition precedent the Court cannot pass a decree for specific performance. The completion and efficacy of which is in the hands of a third party.[26]

A contract for sale of land contingent on getting permission of the Court which was not obtained cannot be specifically enforced. [27]

But where the vendor agrees to pay Government dues and get the sanad, the contract is not a contingent contract within s. 32 Contract Act and can be specifically enforced.[28]

Clause (d): Return of deposit.—In the absence of a contract to the contrary a vendor is bound to give the purchaser "a title free from reasonable doubt" [see s. 17 (b), below.] If the vendor sues for specific performance, but specific performance is refused on the ground that he could not give a title free from reasonable doubt, the purchaser is entitled to a return

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21 *Chandni Vidyawati Madden* v. *C. L. Katyal* (1964) 2 S.C.R. 495; (1964) A.SC. 978. See *Romesh Chandra* v. *Chunilal* (1965) P.L.R. Supp. 251; (the vendor cannot obtain specific performance without obtaining sanction); *Pahunchilal* v. *Mansingh,* (1971) A.A. 444 (agreement by Sirdar to pay for *Bhumidari* rights to obtain Collector's sanction under U.P. Land Reforms Act is enforceable); *Romesh Chandra* v. *Chuni Lal,* (1971) A.SC. 1238.

22 *Pachunchi Lal* v. *Man Singh* (1971) A.A. 444.

23 *Rajendra Kumar Bhandari* v. *Poosammal* (1975) A.M. 379, 382.

24 *Dr. Jiwan Lal* v. *Brij Mohan Mehra,* (1973) ASC 559; (1972) 2 SCC 757; *Lindsay Petroleum Co.* v. *Hurd* (1874) L.R. 5 P.C. 221, 239 quoted; *Maniklal Seal* v. *P.K. Chaudhary* (1976) A. Cal. 115.

25 *Bikram Kishore* v. *Benudhar Jena* (1976) A.Or. 4.

26 *Nimar Industrial Corporation (P.) Ltd.* v. *M.P. Electricity Board* (1973) A.M.P. 281.

27 *Amerendra Nath Mondal* v. *Noor Jahan Bibi,* 77 Cal. W.N. 781.

28 *Balwant Singh* v. *Rajaram* (1975) A. Raj. 73.

of his deposit.[29] There is a similar provision in s. 55 (6) (b) of the Transfer of Property Act by which it is enacted that when the purchaser "properly declines" to accept delivery of the property, he is entitled to a charge on the property for the earnest. Whether a purchaser has "properly" declined to accept delivery of the property depends on the terms of the contract and the circumstances of the case. Where a purchaser refuses to complete alleging that the title is defective, he is entitled to a refund of the deposit if he was justified in refusing the title, but not if he was bound to accept the title. Thus where a vendor agrees to sell land and the buildings thereon, but it turns out that only interest he has in the land is a revocable licence to occupy the land, and the purchaser refuses to complete, he is entitled to a return of the deposit.[30]

Where a contract contains a clause as to what is to be done with the deposit if the contract is not performed, the Court must be guided by the terms of the contract, and the rights of the parties are to be determined as in the case of any other contract.[31] Where there is no such clause, the Courts of India have followed the principles laid down in the following passage in the judgment of Cotton L.J. in *Howe* v. *Smith*.[32]

"There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit, but I think that the judgment of Lord Justice James[33] gives us the principle on which we should deal with the case. What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to James L.J. he can have no right to recover the deposit.

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

In *Howe* v. *Smith*, the contract was for sale of real estate, and it was to be performed on the 24th of April, 1881. The completion of the purchase was delayed by the purchaser, and the vendor, after pressing of completion, agreed on the 20th of June, 1881, to extend the time for completion for a month on payment of certain costs, but at the same time warned the purchaser that unless the purchase-money was then paid he would re-sell the property. The purchaser failed to complete within a month, and on 25th of July he, fearing that the vendor would re-sell the property, brought an action against the vendor for specific performance. From the conduct of the purchaser and from the correspondence it appeared that the purchaser never was up to, and even at, the time when he brought the action, ready with the money in order to purchase the estate. The Court held that he was neither entitled to specific performance nor to a return of the deposit. Following this decision, the High Court of Madras, in a case in which the facts were more or less similar, refused specific performance to

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29 *Haji Mahomed Mitha* v. *Musaji Esaji* (1891) 15 Bom. 657, 669; *Low & Co.* v. *Jyoti Prasad* (1931) 58 I.A. 392; 59 Cal. 699; 1931 A.P.C. 299; 135 I.C. 632; *Raghbir Das* v. *Sundar Lal* (1930) 11 Lah. 699; 1931 A.L. 205; 131 I.C. 371; *Seetharamamma* v. *Patta Reddi* 1940 A.M. 739.

30 *Ibrahimbhai* v. *Fletcher* (1897) 21 Bom. 827, 853.

31 *Howe* v. *Smith* (1884) 27 Ch.D. 89, 97. If time is not of the essence of the contract, and the purchaser offers to complete within a reasonable time from the date for performance fixed in the contract, the vendor is not entitled to forfeit the deposit, even if the contract provides for forfeiture in default of completion on the date fixed; *Jamshed* v. *Burjorji* (1916) 43 I.A. 26; 40 Bom. 289; 32 I.C. 246.

32 (1884) 27 Ch.D. 89, 95. And generally the applicable rules are those of English law, see *Gowal Das Sidany* v. *Luchmi Chand Jhawar* (1929) 57 Cal. 106, 125 I.C. 594; 1930 A.Cal. 324; *Naresh Chandra* v. *Ram Chandra* 1952 A.Cal. 93.

33 In *Ex parte Barrell* (1875) L.R. 10 Ch. 512.

the purchaser and held also that he was not entitled to a return of the deposit.[34] Upon the same principle it has been held that where a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit.[35] But where there is no repudiation of the contract by the purchaser, nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused.[36]

The dismissal of a purchaser's suit for specific performance was not a bar to a separate suit for a return of the deposit.[37] Now however, it is [see sec. 22(2)]. But it has been provided by the proviso to s. 22(2) that it is mandatory on the Court to allow the amendment of the plaint so as to include a prayer for refund of earnest money. But this cannot be done after the claim for specific performance has been dismissed (s. 24, below) or abandoned by the plaintiff himself.[38]

A deposit is not a penalty, but a payment in part of the purchase-money, made as a guarantee that the contract will be performed. It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained. Thus if it is provided by the terms of a contract that if the purchaser should fail to comply with the conditions, the deposit should be forfeited to the vendor, and that the vendor should be entitled to resell the property and recover from the purchaser the deficiency upon re-sale, the deposit, though forfeited, is to be taken into account in estimating the loss on a re-sale, and it is to be deducted from the deficiency upon re-sale so as to diminish the deficiency.[39]

Sub-cl (d) shows that the effect of the Court refusing specific performance on the ground of want of title is a judicial recission of the contract with the consequences stated.[40]

Sub-sec. (2).—Sub-sec. (1) refers to immoveable property, but by virtue of sub-sec. (2) the provisions of sub-sec. (1) applies, as far as may be, to contracts for the sale or hire of movable property.

CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED

Contracts not specifically enforceable.

14. [21 (a,b,d,g)] (1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;[41]

(b) a contract which runs into such minute or numerous details or which is so

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34 *Natesa Aiyar* v. *Appavu* (1913) 38 Mad. 178; 19 I.C. 462 (F.B.); *Veerayya* v. *Sivayya* (1914) 27 Mad. L.J. 482; 26 I.C. 121.

35 *Bishan Chand* v. *Radha Kishan Das* (1897) 19 All. 489; *Roshan Lal* v. *Delhi Cloth & General Mills Co. Ltd.* (1911) 33 All. 166; 7 I.C. 794 (sale of goods); *Naresh Chandra* v. *Ram Chandra* 1952 A.Cal. 93.

36 *Alokeshi Dassi* v. *Hara Chand Dass* (1897) 24 Cal. 897; *Ibrahimbhai* v. *Fletcher* (1897) 21 Bom. 827 (F.B.); *Balvanta* v. *Bira* (1899) 23 Bom. 56, 60-61.

37 *Parangodan* v. *Perumtoduka* (1904) 27 Mad. 380; *Munni Babu* v. *Kunwar Kamta Singh* (1923) 45 All. 378; 72 I.C. 86; 1923 A.A. 321.

38 *Ardeshir Mama* v. *Flora Sassoon* (1928) 55 I.A. 360; 111 I.C. 413; 1928 A.P.C. 208.

39 *Ockenden* v. *Henly* (1858) E.B. & E. 485. *The Vellore Taluk Board* v. *Gopalasami* (1913) 38 Mad. 801; 26 I.C. 226; *Naresh Chandra* v. *Ram Chandra* 1952 A.Cal. 93.

40 *Turner* v. *Marriott* (1867) L.R. 3 Eq. 744.

41 This seems too plain for any misunderstanding, but see *Ramji* v. *Rao Kishoresingh* (1929) 56 I.A. 280; 117 I.C. 1; 1929 A.P.C. 190, where the case had been confused in the courts below by charges of unfairness and extortion.

dependent on the personal qualifications[42] or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once;

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not adequate relief; and

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42 Words equivalent to "I shall convey to you" (the original was in Tamil) do not imply that the undertaking is limited to the joint life-time of the parties, *Munuswami Nayudu* v. *Sagalaguna Nayudu* 49 Mad. 387, 391; 100 I.C. 399; 1926 A.M. 699. But this is really a mere question of construction and has nothing to do with any special rule of law or procedure. Being alive is not a personal qualification.

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

This section is based on s. 21 (a) (b) (d) and (g) of the repealed Act and is amplified in sub-sec. (3).

Where compensation in money is an adequate relief:

"An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category. But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand, if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such a case".[43]

This has now received statutory recognition in sub-sec. (3). Likewise where only a formal deed of partnership is to be executed, the parties having commenced to carry on the business of partnership, or where the suit is for the purchase of a share of a partner in a firm.[44] Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance; he cannot sue for specific performance of the agreement to lend the full sum promised.[45] See I.C.A., s. 39, notes under the head "Disabled himself from performing," above. An agreement to grant a *kanom* in Malabar is not affected by this sub-section, being in substance not for lending but for a well-known kind of tenancy.[46]

If a contract is 'revocable' by the defendant specific performance will be refused. Thus a contract to enter into a partnership at will is not specifically enforceable.[47] But a contract for sale of a share in a partnership may be specifically enforced where it does not involve personal service or continuing personal relations between the parties.[48] Therefore a contract for lease which contains a stipulation enabling the defendant to determine the lease as soon as it was executed is not specifically enforceable. (See *Lews* v. *Bond*)[49]. But a tenancy from year to year determinable by either party by a six months' notice is specifically enforceable.[50] An agreement of sale which also contained a stipulation for the reconveyance of the property within three years is in its nature revocable and cannot be specifically enforced.[51]

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43 *Meenakshisundara* v. *Rathnasami* (1918) 41 Mad. 959, at p. 976; 49 I.C. 291; *South African Territories Co., Ltd.* v. *Wallington* (1898) A.C. 309; *Jewan Lal Daga* v. *Nilmani* (1927) 55 I.A. 107; 7 Pat. 305; 107; I.C. 337; 1928 A.P.C. 80; *Satyanarayanamurthi* v. *Venkata* 1946 A.M. 56, 222 I.C. 646 (it was argued that in a suit for specific performance of an agreement to mortgage, the mortgagee was also entitled to a mortgage-decree).

44 *Dodson* v. *Downey* (1901) 2 Ch. 620.

45 *Phul Chand* v. *Chand Mal* (1908) 30 All. 252; *South African Territories Co., Ltd.* v. *Wallington* (1898) A.C. 309; *Anakaran* v. *Saidamadath* (1879) 2 Mad. 79; *Rajagopala* v. *Sheik Davood* (1917) 34 Mad. L.J. 342; 45 I.C. 161; *Sheikh Galim* v. *Sadarjan Bibi* (1916) 43 Cal. 59; 29 I.C. 621; *Narain Pershad* v. *Narain Singh* (1930) 52 All. 1037; 131 I.C. 599; 1931 A.A. 40; *Khunni Lal* v. *Bankey Lal* 1934 A.A. 449; 1934 All. L.J. 713; *Ranibai* v. *Khimji* 1950 A. Kutch 86. The rule does not apply to the right of a mortgagor in a possessory mortgage to recover the balance of the mortgage money left with the mortgagee; *Thakur Singh* v. *Jagat Singh* 1933 A.L.1; 140; I.C. 495. By s. 92 of the English Companies Act, 1947, a contract with a company to take and pay for any debentures of the company can now be enforced by an order for specific performance. See also *Mst. Humela* v. *Ori Sahoo* 1935 A.A. 688; 155 I.C. 550.

46 *Thiruthiyil Unniri Kutti* v. *Narayanan Chettiar* 123 I.C. 12; 1929 A.M. 777; *Valia Kalyani* v. *Krishnan* (1931) 55 Mad. 519; 138 I.C. 78; 1932 A.M. 305.

47 *Hercy* v. *Birch* (1804) 9 Ves. 356; *Sheffield Gas Co.* v. *Harrison* (1853) 17 Beav. 294; *Pravudayal Agarwala* v. *Ramkumar Agarwala* (1956) A.Cal. 41. *Scott* v. *Rayment* (1868) 7 Eq. 112; *England* v. *Curling* (1844) 8 Beav. 129, 137.

48 See *Dodson* v. *Downey* (1901) 2 Ch. 620; Halsbury's Laws of England (3rd Ed.) Vol. 36 p. 279.

49 (1853) 18 Veav. 85.

50 *Lever* v. *Koffler* (1901) 1 Ch. 543.

51 *Jamahir Sao* v. *Satraghna Sonar* (1961) A.P. 482.

The plea of grant of compensation in lieu of equitable relief of specific performance can be taken by the promisor and not his transferee particularly if the transferee has notice of the prior contract because the benefit of s. 12(c) and s. 21(a) of 1877 Act. [Ss. 10(b) and 14(1) (a) of 1963 Act] is open only to him and not his subsequent purchaser.[52]

Sec. (1)(b)—Contracts involving personal services cannot be specifically enforced.[53] Illustrations from the repealed Act. Similarly no specific performance can be decreed of a contract to give in marriage.[54] Contracts by which a party thereto agrees to execute works which the Court cannot superintend cannot be specifically enforced. So it was held where *A* agreed to sell his property consisting of a building and vacant land to *B*, and *B* agreed to build a temple on a portion of the land and to secure an annuity to *A* and his wife.[55]

Illustrations

A contracts to render personal service to *B*:
A contracts to employ *B* on personal service:
A, an author, contracts with *B*, a publisher, to complete a literary work:
B cannot enforce specific performance of these contracts.

Personal service.— A contract of employment cannot be enforced by or against an employer.[56] The only remedy is to sue for damages.[57] A contract for personal service cannot be enforced against a Municipal Committee,[58] or against a school Board[59] or a master.[60]

Courts do not grant specific performance of contract of service and therefore when there is a purported termination of service contract, a declaration that the contract still subsisted would rarely be made.[61]

In *Dr. S. Dutt's case* an arbitration award that *D*, a Professor of the University, was dismissed wrongfully and *mala fide* and that it had no effect on his status and he continued to be in service in effect directed the specific performance of a contract of service and was therefore erroneous in view of s. 21(b) of the Act of 1877. [S 14(1)(b) of 1963].[62]

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52 *Abdul Qayum* v.*Damodhar* (1964) A.B. 46; (1964) Bom. 17.

53 *Ram Charan* v. *Rakhal Das* (1913) 41 Cal. 19, 33; 20 I.C. 157; *Ram Kumar* v. *Sholapur Spinning & Weaving Co.* 1934 A.B. 427; 36 Bom L.R. 907.

54 *In the matter of Gunput Narain Singh* (1876) 1 Cal. 74.

55 *Ramchandra* v. *Ramchandra* (1898) 22 Bom. 46. A covenant to repair in a lease cannot be specifically enforced: *Bansi Sah* v. *Krishna Chandra* 1951 p. 508.

56 *Calcutta Chemical Co.* v. *D. K. Barman* (1969) A.P. 371. *Ram Piari* v. *Municipal Committee Pathankot* (1956) A. Punj. 220; *Malik & Haq* v. *Muhmmad Shamsul Islam* PLD (1961) S.C. 531. *Hill* v. *C.A. Parsons & Co. Ltd.* (1971) 3 All E.R. 1375. (An employee continues in service where personal confidence still continues and termination of service was due to breach of Trade Union Rules—case of injunction.)

57 *Ram Piari* v. *Municipal Committee Pathankot* (1956) A. Punj. 220; Cf. *Withwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416 (injunction); *Taylor* v. *N.U.S.* (1967) 1 W.I.R. 532; (1967) 1 All E.R. 767. *Malik & Haq* v.*Muhmad Shamsul Islam* PLD (1961) S.C. 531.

58 *Municipal Committee Amritsar* v. *Asa Nand* 64 P.L.R. 47; But see *Dr. Mukand Lal* v. *Municipal Committee Simla* 1953 A. Punj. 88 which was a case under the Municipal Act and under Art. 226 and the matter was under a statute; *Guntur Tobacco Market Committee* v. *Narasaiah* (1965) A.AP. 226.

59 *Baidyanath Bose* v. *Sm. Sudha Roy* 70 C.W.N. 571; *Dr. Dutt* v. *University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050; and *R.S. Tewari* v. *District Board* (1964) A.SC. 1680; (1964) 3 S.C.R. 55 relied on.

60 *Tata Chemicals Ltd.* v. *Kailash Adhvaryu* (1964) A.Guj. 265.

61 *Bool Chand* v. *Kurukshetra University* (1968) A.SC. 292, 296; (1968) 1 S.C.R. 434. *Francis* v. *Municipal Councillors of Kuala Lumpur* (1962) 3 All E.R. 633; *Barber* v. *Manchester Regional Hospital Board* (1958) 1 All E.R. 322; & *Vidyodaya University of Ceylon* v. *Silva* (1964) 3 All E.R. 865 (P.C.) applied.

62 *Dr. S. Dutt* v. *University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050; *High Commissioner for India* v. *I.M. Lall* 75 I.A. 225; (1948) A.P.C. 121; and *Ram Kissendas Dhanuka* v. *Satya Charan Law* 77 I.A. 128; (1950) A.P.C. 81 dist.

But under s. 26(5)(b) of the Bihar Shops & Establishments Act a departure has been made in case of industrial disputes but that has to be exercised without being arbitrary and whimsical.[63]

The principle relating to personal service applies where a Company Director's service agreement is wrongfully determined,[64] but one director may by injunction be restrained from interfering with another director of his powers as a director.[65] According to a learned writer the equitable principle relating to personal service applies to contracts involving personal service though they are not contracts of service.[66] Therefore an agreement to allow an auctioneer to sell a collection of arts cannot be specifically enforced by either party.[67] A contract to publish a piece of music[68] and sometimes of contracts to build can be ordered to be specifically performed.[69]

Statutory provisions giving employees or former employees a right to reinstatement cannot be specifically enforced, but actual reinstatement my be ordered where the relationship is not of an ordinary master and servant but dismissal is from a public office.[70]

Hence a dismissal in breach of a statutory obligation can be declared null and void and a servant entitled to be declared to be continuing in service.[71]

Statutory Rules—Dismissal from Service: Contravention.—Ss 8(2) and 20 of the Indian Airlines Corporation Act empowers the Corporation to employ its employees on terms and conditions made under the regulations made under S. 45 of the Act which will govern the relations between the Corporation and the employees. Though made under a statute they do not constitute a statutory restriction on the kind of contracts made by the Corporation with its employees on the grounds in which it can terminate them. Therefore a dismissal with jurisdiction though wrongful, being in breach of these terms and conditions and therefore the employee was only entitled to damages and not to declaration that the dismissal was null and void.[72] Courts do not ordinarily grant specific performance of contracts of personal service.

The Supreme Court in *Sukhdev Singh* v. *Bhagatram*[73] overruled its decisions in *Indian*

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63 *Calcutta Chemical Co.* v. *D.K. Burman* (1969) A.P. 371. *Western India Automobile Association* v. *Industrial Tribunal* (1949) F.C.R. 321; (1949) A.F.C. 111 *Punjab National Bank Ltd.* v. *A.I. Punjab National Bank Employees Federation* (1960) 1 S.C.R. 806; (1960) A.S.C. 160

64 *Bainbridge* v. *Smith* (1889) 41 Ch.D. 462

65 *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878) 9 Ch.D. 610; *Hayes* v. *Bristol Plant Hire Ltd.* (1957) 1 W.L.R. 499

66 *Chitty*: On Contracts (23rd Ed.) para. 1529 [24th Ed.] para 1643.

67 *Chinnock* v. *Sainsbury* (1861) L.J. Ch. 409; cf. *Mortimer* v. *Beckett* (1920) 1 Ch. 571; (1920) All E.R. Rep. 179.

68 *Barrow* v. *Chappell & Co.* (unreported) referred to in *Joseph* v. *National Magazine Co.* (1959) Ch. 14; (1958) 3 All E.R. 52, 54; (1958) 3 W.L.R. 366.

69 *Wolverhampton Corpn.* v.*Emmons* (1901) 1 Q.B. 515; as modified by *Carpenters Estate Ltd.* v. *Davies* (1940) Ch. 160: (1940) 1 All E.R. 13, 17.

70 *Ridge* v. *Baldwin* (1964) A.C. 40 cf. *Vine* v. *N.D.L.B.* (1957) A.C. 488; contrast *Barber* v. *Manchester Regional Hospital Board* (1958) 1 W.L.R. 181: *Francis* v. *Municipal Councillors of Kuala Lumpur* (1962) 1 W.L.R. 1411; *Vidyodaya University* v. *Silva* (1965) W.L.R. 77; (P.C.)

71 *Tata Chemicals Ltd.* v. *Kailash Adhvaryu* (1964) A.Guj 265; *Barber* v. *Manchester Regional Hospital* (1958) 1 All E.R. 322; *Vine* v. *National Dock Labour Board* (1956) 3 All E.R. 939; and *Dr. S. Dutt* v.*University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050 reld. on; see *Dr. Mukandlal* v. *Municipal Committee Simla* (1959) A.Puj. 88; *Asansol E.S. Co.* v. *Chunilal Daw*, (1972) A. Cal. (dismissal in breach of statute).

72 *Indian Airlines Corporation* v. *Sukhdeo Rai* (1971) Supp. S.C.R. 510; (1971) ASC 1828, 1834; 72 Cal. W.N. 205 reld. S.C. Judgment over reld in (1975) ASC 1331. (Infra); *A. Francis* v. *Municipal Councillors of Kuala Lampur* (1962) 3 All E.R. 633 and *Barber* v. *Manchester Regional Hospital Board* (1953) 1 All E.R. 322 applied; *Ridge* v. *Baldwin* (1964) A.C. 40, 65 considered; *U.P. State Warehousing Corp.* v. *Tyagi* (1970) 2 SCR 250; (1970) ASC 1244 folld; *Life Corporation of India* v. *Mukherjee* (1964) 5 SCR 528, (1964) ASC 841 disting.

73 (1975) ASC 1331, 1347-8; (1975) 3 SCR 619 (1971) Supp. SCR 510 overruled.

Airlines Corporation v. *Sukhdeo Rai*[74] and held that the employees of statutory bodies have a statutory status. If they are dismissed in contravention of the statutory provision, they have a right to get a declaration that they continue to be in service. They are not in the service of the Union or the States. These statutory bodies fall within Art. 12 and the employees are entitled to the protection of Arts. 14 and 16. Thus in *U.P. State Warehousing Corporation* v. *Tyagi*[75] and in *Indian Airlines Corporation* v. *Sukhdeo Rai*[76] the terms of regulations were treated as terms and conditions of relationship between the Corporation and its employees and this view was criticised in *Sukhdev Singh* v. *Bhagatram*[73] by a later Supreme Court fuller bench where it said "that does not lead to the conclusion that they are of the same nature and quality as the terms and conditions in the contract of employment". Those, the terms, not being contractual are imposed by subordinate legislation which the Corporation had no power to alter. The above two decisions were directly opposed to the dicision of the Constitution Bench in *Naraindas Barot's case*.[77] The Supreme Court therefore held that rules and regulations framed by Statutory Corporations have the force of law. Hence the employees of a Statutory body dismissed in utter disregard and breach of statutory provision have a right to sue for a declaration that they continue to be in employment of these bodies which have a statutory status (p. 1348 of A.I.R.).

It will be relevant to point out that the Privy Council in a case from Madras[78] which the rules made under S. 96-B Government of India Act 1919 were considered, when there was no provision corresponding to S. 240(3) of the Constitution Act 1935, held that S. 96-B provided that the servants of the Crown hold office during pleasure of the Crown because such were the rules of their employment. The words 'subject to the rules' show that the section contains a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action, but will be regulated by rule. At p. 34 (AIR) it was observed by Lord Roche: "The argument for limited and special kind of employment during pleasure but with an *added contractual term* that the rules are to be observed is too artificial and too far reaching to commend itself for acceptance. The rules are too manifold in number and too minute in particularity and are all capable of change". No declaration for the dismissed servant being in service was given in that case nor in the other case decided on that very day[79] (which was also from Madras)".

In this connection reference may be made to two other Privy Council Decisions and one of the English Court of Appeal—*A. Francis* v. *Municipal Councillors of Kuala Lumpur*;[80] *Vidyodaya University* v. *Silva*[81] and *Barber* v. *Manchester Regional Hospital Board*[82] where specific relief of continuing in employment was not granted. In *I.M. Lal's case*[83] the Privy Council gave a declaration that a purported dismissal of a civil servant in contravention of the procedure provided by S. 240(3) of the Constitution Act 1935 was void and of no effect and the servant was a civil servant on the date of constitution of the suit for the aforesaid declaration.

It may therefore be inferred from these judgments that there is a distinction between a breach of the requirements of the provisions of the Constitution Act and the rules made under one of its provisions. The Supreme Court has, in the case of statutory Corporations within Art. 12 of the Constitution, not observed this distinction. On the contrary it has equated the

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74 (1971) ASC 1331; (1971) A.SC. 1828 (1971) Supp. S.C.R. 510; *U.P. Warehousing Corporation* v. *Tyagi* (1970) ASC 1244, (1970) 2 SCR 250 overruled.
75 (1970) 2 SCR 250; (1970) ASC 1244
76 (1971) Supp. SCR 510; (1971) ASC 1828, 1834
77 *Mafatlal Naraindas Barot* v. *J.D. Rathod Divisional Commissioner* (1966) 3 SCR 40; (1966) A.SC. 1364.
78 *Venkata Rao* v. *Secretary of State*, 64 I.A. 55; (1937) A.P.C. 31, 34.
79 *Rangachari* v. *Secretary of State* 64 I.A. 40; (1937) A.P.C. 27
80 (1962) 3 All ER 633.
81 (1964) 3 All E.R. 865.
82 (1958) 1 All E.R. 322.
83 *High Commissioner for India* v. *I.M. Lall* (1948) A.PC. 121.

breach of a statute and its mandatory requirements with the breach of regulations made under the statute. (*Sukhdev Singh* v. *Bhagatram* (1975) 3 S.C.R. 616; (1975) ASC 1331.

Again the Supreme Court[84] has held in the case of a College Executive Committee that a statutory body is a creation of a statute. Hence there is a distinction between such bodies and those that are governed by certain statutory provisions for their proper administration which is not sufficient to make them statutory bodies. The Executive Committee of a college constituted under Cooperative Societies Act is not such a body.[84].

By a majority the Supreme Court held in the above case[84] that subject to exceptions a contract of personal service cannot be enforced; the exceptions being(i) a violation of Art, 311 of the Constitution;(ii) reinstatement of a workman discharged in contravention of Industrial Law and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute. The relief of declaration and injunction being discretionary is granted *ex debito justiciae* where ends of justice so require. It will not be granted where the employee complaining was guilty of misconduct and derelicton of duty. Bhagwati J . in his minority judgment held that where termination is outside the power of a statutory body or is in breach of a mandatory provision as to the manner of termination, the aggrieved employee will have a right to ask for a declaration of being still in service.

Temporary servant.—A declaration that a dismissal of an employee was in violation of a statutory obligation or a statutory provision is maintainable being different from a declaration for enforcement of a contract of personal service. It is merely a declaration that the order of dismissal in breach of statutory conditions of service is invalid, and a suit for the a same is maintainable. Therefore a temporary employee dismissed without a week's notice under standing orders can maintain a declaratory suit to get relief against such dismissal.[85]

State Bank of India.—Although the State Bank of India is constituted by a parliamentary statute the rules and regulations it has framed for the employment of its officers and employees have not the status of law or of statutory Rules. The relationship between its employees and itself is purely contractual relationship of master and servant. There is no provision in the Act which imposes any statutory restriction or obligation limiting its power of terminating the service of its employees. Therefore an employee illegally dismissed may have a right in damages but not of reinstatement by quashing the order of dismissal.[86]

Khadi Board.—The dismissal of an employee by the Madras Khadi & Village Industries Board was treated as a dismissal in an ordinary case of master and servant.[87]

Cooperative Society.—An accountant in the employment of a Cooperative Society does not have the protection in regard to his service which employees of statutory bodies have. Therefore such an employee cannot be granted a declaration of being in service if he is dismissed without being called upon to show cause.[88]

The law relating to dismissals and relief against illegal exercise of power therefore may be stated thus::-

1. Contract of personal service is not specifically enforceable under S. 14(1) b Specific Relief Act See *Dr. Dutt* v. *University of Delhi* (1959) SCR 1236; (1958) A.SC. 1050.
2. Where there is a breach of the requirement of a statute, the Court will give a declaration that the dismissal is ineffective and the servant continues to be in service. *High*

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84 *Executive Committee of Vaish College* v. *Lakshmi Narain* (1976) A.S.C. 888, 892; (1976) 2 S.C.R. 1006; (1974) A.A. 1(F.B.) revd; *Sukhdev Singh* v.*Bhagatram* (1975) 3 S.C.R. 619; (1975) A.S.C. 1331 folld.; *Subhajit Tewari* v. *Union of India* (1975) A.SC 1329, 1330; *Kumari Regina* v. *St. Aloysius Higher Secondary School* (1971) A.SC. 1920.

85 *Calcutta Electric Supply Co.* v.*Ramratan Mahto* (1973) A.Cal. 258, 262; 78 Cal. W.N. 628.

86 *Ramesh Krishna Rao* v. *State Bank of Inida* (1975) Bom. 303.

87 *Khadervelu* v. *Secretary, Madras State Khadi & Village Industries Board* (1972) 2 Mad. L.J. 68

88 *Shankaran* v. *Dy. Registrar, Cooperative Societies* (1975) 1 Ker. 364.

Commissioner of India v. *I.M. Lall* (1948) A.P.C. 121; *Executive Committe, Vaish College* v. *Lakshmi Narain* (1976) A.S.C. 888;

3. A statutory body is one which is established or created by a statute e.g. Indian Airlines Corporation and similar bodies; but a body which is only governed or administered by certain statutory provisions is not a statutory body e.g. Executive Council of the Vaish College in the reported case of that name (1976) A.S.C. 888; (1976) 2 S.C.R. 1006.
4. In the case of such non-statutory bodies a dismissed employee cannot specifically enforce his contract of personal service.
5. In the case of statutory bodies a dismissal which is without jurisdiction, *mala fide* or in breach of natural justice so as to be in contravention of the doctrine of *ex Debito justiciae* the Court will give a declaration as in I.M. Lall's case—(See *Sukhdev Singh* v. *Bhagatram* (1975) 3 SCR 619; 1975 ASC 1331; *Executive Committee of Vaish College* v. *Lakshmi Narain* (1976) ASC 888; (1976) 3 SCR 1006.
6. The Privy Council opinion in *Venkata Rao* v. *Secretary of State* 64 I.A. 55; (1937) A.PC 31 that such a declaration could not be given in view of the changeability of the statutory regulations has not been adopted by the Supreme Court in *Sukhdev Singh* v. *Bhagatram* (1975) ASC 1331; (1975) 3 SCR 619.

It was observed[89] in a case of specific performance that it should not be assumed that as soon as an element of personal service or its continuance is discernable in a contract, the court will without more, refuse to order its specific performance. Therefore where the defendants agreed to reorganise an insurance brokers company, to increase the shares and allot shares to the plaintiff company and appoint the owner of plaintiff company as managing director for a period of years and there were other provisions the contract was held capable of specific performance.

Mutuality.—In *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri*[90] the Privy Council held that specific performance could not be granted to a contract which can be enforced at the option of only one of the parties. It is however, now enacted by s. 20(4) that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. See under s. 20(4) *infra* s. 20(b) of the act.

Volition of parties.—A matter referred to arbitration cannot be said to be dependent on the volition of the arbitrators. They are in the position of judges.[91] The phrase "volition of parties" refers to parties to the agreement not of any other party such as a statutory authority with power to act under the statute; e.g. an authority which under the law could in its discretion issue a certificate enabling a vendor to sell the property under the Administration of Evacuee Property Act.[92]

Sale of Goodwill.—At one time it was thought that specific performance of contract for the sale of goodwill alone without business premises could not be granted but in *Beswick* v. *Beswick* specific performance was ordered of a contract for the sale of goodwill without business premises at the suit of personal representative of a vendor who had performed his part of the contract.[93]

Vague Contracts.—A contract may be so vague that it cannot be enforced at all even by action for damages. Thus specific performance has been refused of a contract to publish an article as to whose precise wording the parties were disagreed.[94] Unless there is a contract for

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89 *G.H. Gills & Co. Ltd.* v. *Morris* (1972) 1 All E.R. 960, 968, 970.
90 (1911) 39 I.A. 1, 39 Cal. 232.
91 *Bai Mangu* v. *Bai Vijili* (1967) A.Guj. 81.
92 *Abdul Satar* v. *Manilal* (1970) A.Guj. 12: *Shri Ambarnath Mills* v. *Custodian General* (1957) Bom. 668; (1957) A.B. 119 dist.
93 (1968) A.C. 58, 89, 97; (1967) 3 W.L.R; 932; (1967) 2 All E.R. 1197.
94 *Joseph* v. *National Magazine Co.* (1959) Ch. 14; (1958) 3 All E.R. 52; (1958) 848, 366.

the sale of land at an ascertained or ascertainable price, specific performance cannot be ordered.[95] In *Savages case*[96] a document headed "Promissory Note" stated:

"I promise to pay to (respondent) or order 3 months after date the sum of £780 for value received or in default to convey to him (specified property) to hold the same into the said (respondent) or order in fee simple."

The £780 were not paid and the respondent sought specific performance of the alleged agreement to convey. The Privy Council held that there was no contract for sale of land at ascertained or ascertainable price and the relationship of vendor and purchaser was not established. The words for "value received" did not show what the consideration was. Moreover if they referred to past consideration it would be insufficient to support a contract for the sale of land, though it would be sufficient to support a promise to pay given in a promissory note.

In order to give specific performance of a contract the terms must be clear, definite and complete: If it is uncertain no oral evidence can be given to add to its terms and it will be void under S. 29 Contract Act.[97] For specific performance of a completed contract there must be four certainties, viz. certainty as to price, certainty as to parties, certainty as to the property and certainty as to other terms.[98] A contract to sell at a fair price or at a fair valuation or to let out a fair rent is specifically enforceable on the principle *certum est quod certum reddi potest*. (*Republic Store* (*Trader*) v. *Jagjit Industries Ltd.* 81 Col. W.N. 646.) See s. 29 of the Contract Act. But when a process for ascertaining the price has been provided and that process fails the contract remains imperfect and incapable of specific performance, e.g. where a valuer fails or refuses to act as such.[99] A general agreement to sell land at "a fair valuation" is not so vague and uncertain as to be void for uncertainty but is sufficiently certain to be enforceable as a contract. It means the same thing as a fair price. But the law as to chattels is different.[1] An agreement for a lease which is to contain such other covenants and conditions as shall "be reasonably required" by the lessors is not too vague or widely drawn as to be unenforceable but is sufficiently certain to be a concluded contract for lease and as such is capable of specific performance[2]. Specific performance of a contract to grant a permanent lease cannot be granted unless its date cn be expressly or impliedly fixed,[3] but if the date can be inferred from surrounding circumstances an oral agreement to lease can be specifically enforced.[4]

Lease renewable.—*A* executed a lease in favour of *B* for 5 years with a provision for renewal for another term of 5 years on terms and conditions to be mutually agreed upon. *A* gave notice to *B* on the termination of the lease for eviction and *B* gave notice for renewal on terms to be agreed. While this correspondence was going on *A* executed a lease in favour of *C*. *A* then filed a suit for eviction of *B* which was compromised and *A* executed a lease in favour of *B* for 10 years. *C* then filed a suit for specific performance and for possession and for meone profits form the date the possession should have been given to *C*, *B* being in possession with knowledge of *C*'s prior lease. Before the certificate to appeal to the Supreme Court could

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95 *Savage* v. *Uwechia* (1961) 1 W.L.R. 455, 457 (P.C.).

96 Ibid at pp. 457-8; *Tapply* v. *Sheather* 7 L.T. (N.S.) 298 dist.; (where consideration for sale of land was clearly expressed).

97 *Smt. Phuljhari* v. *Mithai Lal (1971) A.A. 494, 498.*

98 *Sanwarmal Goenka* v. *Soumyendra Chandra Goopta,* (1981) A.Cl. 37, 41. Fry: On Specific Performance (6th Ed.) 157 reld. on.

99 *Nair Service Society* v. *R.M. Palat* (1966) A.Ker. 311; (1966) 2 Ker. 54; Fry: Specific Performance (6th Ed.) paras. 353, 355-7 pp. 164-66 refd. to; *Milness* v. *Grey* 33 E.R. 574; *The Moorcraft* (1889) 14 P.D. 64; *New Beerbhom Coal Co.* v. *Bula Ram* 7 I.A. 107.

1 *Talbot* v. *Talbot* (1967) 3 W.L.R. 438; *Milness* v. *Grey,* (1807) 14 Ves. 400, 407; 33 E.R. 574, *Morgan* v. *Milman*, (1853) 3 DE G.M. & G. 24, 34.

2 *Sweet and Maxwell Ltd.* v. *Universal News Service Ltd.* (1964) 3 W.L.R. 356; (1964) 2 Q.B. 699; (1964) 3 All E.R. 30.

3 *Kameshwar Prasad Singh* v. *Shahamat* (1958) A.P. 162; *Giribala Dassi* v. *Kalidas* (1921) A.P.C. 71; refd. to; *Khushi Ram* v. *Munshilal* (1940) A.L. 225 reld. upon.

4 *Kameshwar Prasad Singh* v. *Shahamat Mian* (1958) A.P. 162.

be granted Mysore Rent Control Act 1966 came into operation removing all the impediments in the way of *C* and so relief of specific performance could be granted to C.[5]

Uncertainty of a term of rent in a lease.—Where in a convenant of lease it was provided that the lease was renewable on such rent as was agreed between the parties on the basis of the rents prevailing in the locality, the Madras High Court held that it was not a term where just rent could not be found. The true Test in such cases is not whether the term is in itself certain but whether it is capable of being made certain—*Id certain ist quod reddi certain potest.* If parties do not agree the Court will determine the rent.[6]

Enforcement of a conditional contract.—A contract to sell leasehold land, the term of which was to be renewed before the sale, is a conditional contract and cannot be specifically enforced unless it is completed and the name of the vendor is mutated.[7]

An agreement which is vague as to price, time and person purchasing it cannot be specifically enforced.[8]

Therefore an agreement to sell evacuee property to which Government of India was not a party and which provided the price to be fixed by an expert appointed by the Government of india and the price was to be paid in compensation claims of the vendee who could also join another evacuee to make up the claims sufficient to make up the price was held not to be specifically enforceable.[9]

(1)A letter by a vendor saying "for a quick sale I would accept £12,600" followed by a reply of buyer "I accept your offer" constitute an enforceable contract. [*Bigg* v. *Boyd Gibbins Ltd.*, (1971)2 All. E.R. 183].

(2) Option of renewal of lease at a rent to be fixed having regard to the then market value of the primises without providing a machinery is valid and enforceable. [*Brown* v. *Gould*, (1971) 2 All E.R. 1505].

Sec. (1)(c).—This corresponds with s. 21(d) of the repealed Act. The word "revocable" in s. 21(d) was inaccurate and at the suggestion of Pollock and Mulla "determinable" has been substituted. The illustration to s. 21(d) sufficiently explains this sub-section.

A and *B* contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either *A* or *B* might at once dissolve the partnership.

[*Scott* v. *Rayment (1868)* L.R. 7 Eq. 112. It may be otherwise if the partnership is for a defined term: *England* v. *Curling* (1844) 8 Beav.129; 68 R.R. 39].

Where the contract of a vendor at a railway station was terminated without requisite notice and the vendor brought a suit for damages for the unexpired period of his vending contract and temporary injunctions was sought, the Court held that the case one under S.14 (1) a & c and injunction could not be granted as the contract was terminable though after notice.[10]

Sec. (1)(d).—This corresponds with s. 21(g) of the repealed Act and brings the sub-clause in conformity with the decisions. The illustration to sec. 21(g) of the repealed Act was under.

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5 *H.V. Rajan* v. *C.N. Gopal* (1975) A.S.C. 261; (1975) 4 S.C.C. 302.

6 *Khivraj Chandra* v. *Esso Standard Eastern Inc.* (1975) A.M. 374; *Sree Sankarachariswamiar* v. *Varada Pillai* 27 Mad. 399; *New Beerbhoom Coal Co.* v. *Billa Madhav, T.I.A.* 107; 5 Cal, 982 folld.

7 *Durga Prasad* v. *Lilawati* (1972) A.A. 396, 499; Salmond & Williams: On Contract 2nd ed. p. 53 applied. *Chandnee Widyawati Madam* v. *Dr. C.L. Katial* (1964) 2 SCR 495; (1964) A.S.C. 978 disting.

8 *Shree Ambarnath Mills* v. *Custodian* (1957) A.B. 119; (1957) Bom. 668. But for enforceable contract see *Bigg* v. *Boyd Gibbins Ltd.* (1971) 2 All E.R. 183 (not vague); *Brown* v. *Gould* (1971) 2 All E.R. 1505 (option for renewal valid).

9 *Ibid.*

10 *Ramchandra Tanwar* v. *Ramrakha Mal Aminchand* (1971) A. Raj. 292; *Dominion of India* v. *Sohanlal* (1950) A.E.P. 40; *Eldin* v. *Latimer Clark Mairhead* (1894) 2 Ch. 347 reld. on.

A contracts to let for twenty-one years to *B* the right to use such part of a certain railway made by *A* as was upon *B*'s land, and that *B* should have a right of running carriages over the whole line on certain terms, and might require *A* to supply the necessary engine power, and that *A* should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to *B*.

[*Blackett* v. *Bates* (1865) L.R. 1 Ch. 117 has supplied the facts.] See *Republic Stores (Trader)* v. *Jagjit Industries Ltd.* 1 C.W.N. 646.

Contract Supervision.—A contract requiring constant supervision by the Court for its due performance will not be specifically performed; but it does not apply to a continuous obligation to pay money, e.g. an annuity.[11] For the same reason the Courts have refused to specifically enforce an undertaking by the lessor of a service flat to have a porter "constantly in attendance";[12] or an agreement by landlord to provide a housekeeper;[13] or the obligation of a shipowner under a charter party[14] or a contract to deliver goods by instalment.[15] The difficulty of supervision is also a reason for not enforcing building contracts[16] or to keep buildings in repair.[17] But sometimes specific performance is decreed in spite of difficulty; e.g. to construct and maintain a neat archway;[18] to keep a drain open;[19] to restore support.[20]

A writer cannot be taken to have repudiated his contract merely because be refuses to have his name published as the author of an article which has been re-edited by a newspaper expressing other opinions in a different style. But he cannot get specific performance of his contract as that will require supervision by the Court of editing the article but he will be entitled to damages for loss of opportunity of enhancing his reputation.[21]

A agreed to vacate the premises on the condition that on completion of the building vacated for reconstruction he will be given a lease of a portion of the premises rebuilt. On the landlord refusing to complete the contract *A* sued for specific performance. By the time of the suit the building was practically built and at the time of the hearing of the appeal in the High Court the building was completed; the Court held that specific performance could be decreed.[22]

The plaintiff executed a *murusi patta* in favour of the defendant who also paid a *salami*. There was also a *kabuliyat* undertaking to pay rent. On the same day there was an agreement by the defendant undertaking to release his interest on payment of Rs. 50 by the plaintiff within 6 years. In spite of the plaintiff's demand for the release the defendant did not accept the money and execute the release. The agreement was ordered to be specifically performed as the amount had already been tendered and became absolute and mutual.[23]

Sub-sec. (3)(c) however deals with building contracts which can be specifically enforced. Ordinarily a building contract cannot be enforced[24] and money payment is adequate relief, but may be in cases falling under sub-cl. (c), sub-cl. (c)(i) purports to give statutory recognition to decided cases. The Proviso to sub-sec. (3) is based on the judgment of Romer L.J. in *Wolverhamption Corporation's case.*[25] With regard to condition (iii) Farewell J. in

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11 *Swift* v. *Swift* (1841) 3 I.R. Eq. 267; *Beswick* v. *Beswick* (1968) A.C. 58; (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932; But see *Ramchandra* v. *Ramchandra* 22 Bom. 46 (a case of sale of land for building a temple and annuity to the seller and his wife.)

12 *Ryan* v. *Mutual Toutine Westminster Chambers Association* (1893) 1 Ch. 116 (C.A.).

13 *Barnes* v. *City of London Real Property Co.* (1918) 2 Ch. 18.

14 *De Matos* v. *Gibson* (1858) 4 D. & J. 276.

15 *Dominion Coal Co.* v. *Dominion Iron & Coal Co.* (1909) A.C. 293.

16 Halsbury's Laws of England (3rd Ed.) Vol. 36 p. 267 Chitty: On Contracts, (23rd Ed.) para. 1531.

17 *Bansi Sah* v. *Krishna Chandra* (1951) A.P. 508; *Flint* v. *Bradon* (1803) 8 Ves. 159; *Wheatley* v. *Westminster Brymbo Coal Co.* (1869) 9 Eq. 538 (covenant to work a coal mine.)

18 Chitty: On Contracts (23rd Ed.) para 1530 (24th Ed.) para 1645.

19 *Keunard* v. *Cory Bros.* (1922) 2 ch. 1

20 *Morris* v. *Redlands Bricks Ltd.* (1967) 1 W.L.R. 967; (1967) 3 All E.R. 1.

21 *Joseph* v. *National Magazine Co. Ltd.* (1958) 3 All E.R. 52; (1958) W.L.R. 366; (1959) Ch. 14.

22 *Jaina Beevi* v. *Govindaswami* (1967) A.M. 369.

23 *Fazaluddin* v. *Panchan Das* (1957) A.Cal. 92; Fry on Specific Performance (6th Ed.), Para 465 refd. to.

24 *Ramchandra* v. *Ramchandra* (1898) 22 Bom. 46; *Jaina Beevi* v. *Govindaswami* (1967) A.M. 369; *Carpenters Estate* v. *Davies* (1940) Ch. 160; (1940) 1 All E.R. 13; *Ranjit Chandra* v. *Union of India* (1963) A.Cal. 594; *Foster* v. *Hastings Corporation* (1903) 87 L.T. 736 dist. Hudson: Building & Engineering Contracts (8th Ed.) 405 refd. to. *Union Construction Co.* v. *Chief Engineer* (1960) A.A. 73.

25 See *Wolverhampton Corporation* v. *Emmons* (1901) 1 K.B. 515, 524-525.

Carpenter's Estates Ltd. v. *Davies*[26] took exception. "I would rather say that what the plaintiff has to establish is that the defendant is in possession of the land on which the work is contractd to be done." This is the law in England.[27]

Sub-sec.(2): Arbitration.—The Arbitration Act of 1940 is comprehensive and although there were some conflicting decisions on s. 32 of the Act as to whether a suit for specific performance would lie to enforce an award under the Act, the preferable view was that the procedure for enforcing an award was only under s. 14 of the Act. This view has received statutory force by virtue of an amendment of s. 32 contained in s. 43 of the Specific Relief Act, 1963.

Sub-sec. (2) therefore excepts awards under the Arbitration Act, 1940, but makes any reference to arbitration under statutes a bar to a suit. In respect of awards under any law other than the Arbitrations Act, 1940, the provisions of Chapter II apply (s. 25).

After an award has been made a rule of court, a suit for setting aside the decree on the ground of fraud is maintainable and S.14(2) of Specific Relief Act, does not come into operation in the matter.[28]

An agreement to execute a formal deed and get it registered can be specifically enforced.[29] The Allahabad High Court has held that an agreement to obtain *bhumidari* rights and then to transfer them is valid and enforceable[30] but specific performance is not possible where the property agreed to be sold becomes vested in the State under a statute (U.P. Urban Area Zamindari Abolition Act of 1957) and the contract will not apply to new statutory rights created under the Act.[31]

Decree holder-right of.—A decree of specific performance of a contract of sale does not create an interest in the immoveable property contracted to be sold. It only gives a right to the decree holder to enforce the decree through the instrumentability of the Court and he gets the right of the judgment debtor at the time of the execution.[32]

Frustration-Decree affected by.—Under S.54 Transfer of Property Act, a contract for sale creates no rights in the land contracted to be sold. A decree for specific performance therefore only entitles the decree holder to enforce the decree by execution. But if in the meanwhile the land has come under consolidation and the vendor has been allotted other plots of land to which under the U.P. Consolidation of Lands Act the right, title, interest and liabilities of the old plots are transferred. But the decree is affected by the Doctrine of frustration and cannot be executed against the plots allotted.[33]

But in a later case it held that where on consolidation under the U.P. Consolidation of Lands Act the vendor got substantially the same plot which he had agreed to sell the Court will grant relief by way of Specific performance.[34]

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26 (1940) 1 All E.R. 13, 17.
27 See Halsbury, 3rd Ed., Vol. 36, p. 268.
28 *Vineet Kumar* v. *Smt. Bhagwan Dai* (1978) A.A. 312
29 *Ramchandra* v. *Ramayya* (1969) A.M. 418. *Subramaniam* v. *Arunachallam* (1943) A.M. 761 F.B. folld. *Skinner* v. *Skinner* (1929) A.P.C. 269 dist.
30 *Moti Ram* v. *Khyali Ram* (1967) A.A. 484.
31 *Sham Sundar* v. *Durga* (1966) A.A. 185; *Sheo Ambar Singh* v. *Allahabad Bank Ltd.* (1962) 2 S.C.R. 441; (1961) A.S.C. 1790 reld. on.
32 *Hiralal Agarwala* v. *Bhegirthi Gore* (1975) A.Cal. 445; 447; *Johar Mull Bhurotra* v. *Jatindra Nath Bose* (1922) A.Cal. 412 disting.
33 *Mahendra Nath* v. *Smt. Baikunthi Devi* (1976) A.A. 150, 154; *Sri Ram* v. *Dhaniram Gupta* (1974) A.A. 358 appd; *Shanti Prasad* v. *Akntar* (1972) All L.J. 549 overruled; *Satyabrata Ghose* v. *Mugnee Ram* (1954) S.C.R. 310; (1954) A.S.C. 44 refd. to; *Sreerama Chengal* v. *Ramiah* (1961) 2 Andh. W.R. 54 folld.; *Ram Krishna* v. *Mukand Singh* (1963) A.A. 49 disting.
34 *Smt. Baikunthi Devi* v. *Mahendra Nath* (1976) A.A. 150, 154.

PERSONS FOR OR AGAINST WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED

Who may obtain specific performance.

15[23] Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

This section corresponds with s. 23 of the repealed Act, and although there are some verbal changes, the law remains the same.

Nature of the sec. 15.—This section is really an enumeration of the kinds of parties, besides the actual contractors, who are entitled to sue on a contract. It involves no principle peculiar to the remedy of specific performance. On one or two points it is more definite than the corresponding English authorities, and therefore it seems to us that citation of those authorities would not be useful. We agree with Whitley Stokes that no reason appears why

sub-s. (c) should not have extended to all compromises of doubtful claims. As to the validity of compromises in general, see under s. 25 of the Contract Act, above. It may be observed by way of caution that the enforcement of restrictive covenants by way of injunction does not come within this section. A person obtaining a lease can sue for possession and not for specific performance.[35]

Clause (a): Party to the contract.—Where there is a joint contract all must join in suing on the contract. Specific performance cannot be granted to some only of several purchasers, if others refuse to join in the suit.[36] A decree for specific relief is for the benefit of both the plaintiff and the defendant and either of them can enforce it and the mere passing of the decree does not terminate the suit.[37]

Parties indicated by description.—The contracting parties can be indicated by description instead of name provided the description is sufficient to preclude any dispute as to identity,[38] or in other words is certain within the legal maxim *id certum est quod certum reddi potest* and provided this description is not by reference but to the contract itself.[39] As to a mistaken description of parties see below:[40] A contract entered into by a solicitor for an unnamed client can be specifically enforced.[41]

Third parties.—A third party for whose benefit a contract is entered into is not entitled to enforce the contract but as an administrator of the estate of a party to the contract, he would be entitled to sue for specific performance in his own favour notwithstanding damages recoverable for that party's estate were nominal.[42] In *Beswicks case*[43] *A* promised *B* (in return for *B*'s transfer of his business to *A*) to pay an annuity to *B* and *B*'s widow after *B*'s death. The House of Lords held that this promise could be specifically enforced by *B*'s personal representative, who was the widow herself, against *A*. The House of Lords stressed three factors for granting specific performance: inadequacy of damages (nominal in that case) as a remedy for breach of contract;[44] the fact that the promisor (*A*) had received the entire consideration for his promise;[45] and the fact that *B* could have specifically enforced the contract had *A* refused to perform his part.[46] According to a learned writer the remedy would not have been available if any of these factors were not present.[47] On principle specific performance is given whenever it is the most appropriate method of enforcing the contract which was actually made.[48]

Goods of a third party insured.—If the goods of the owner are insured at the cost of the

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35 *H.V. Rajan* v. *C.N. Gopal* (1961) A.Mys. 29

36 *Safiur Rahman* v. *Maharamunnessa Bibi* (1897) 24 Cal. 832; *Krishnamachari* v. *Ganganarau* (1882) 5 Mad. 29; 24 Cal. 832 has been dissented from in *Jadeosingh* v. *Bisambar* (1938) Ng. 41; 171 I.C. 654; 1937 A. N. 186, where it was held that where a co-contractor refused to join as plaintiff, he should be made defendant; it was enough if all the parties to a contract were before the Court.

37 *Anandilal Poddar* v. *Gunendra* (1966) A.Cal. 107 *Heramba* v. *Jyotish Chandra* 59 Cal. 501; (1932) A. Cal. 579 reld. on. See Williams on Vendor & Purchaser Vol. 2 (4th Ed.) p. 1001 quoted in *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374, 377 (P.C.); Vaisey J. in *Marks* v. *Lilley* (1959) 1 W.L.R. 749, 752. See also under Ch. II p. 824 n. 6 *supra Smt. Selvi Choudhury* v. *Sm. Maydha Rajnath* 74 C.W.N. 647, 654.

38 *Rossiter* v. *Miller* 5 Ch.D 648; (1878) 3 App. Cas. 1124; (1874) All E.R. Rep. 645.

39 *Hood* v. *Lord Barrington* 6 Eq. 218; Fry; On Specific Performance (6th Ed.) 162.

40 *F. Goldsmith (Sicklesmere) Ltd.* v. *Baxter* (1969) 3 All. E.R. 733.

41 *Goshto Bihari* v. *Surs Estate Ltd.* (1960) A.Cal. 752. *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124, 1140-41; (1874-80) All. E.R. Rep. 465; refd. to.

42 *Beswick* v. *Beswick* (1967) 2 All. E.R. 1197 (H.L.); (1968) A.C. 58; (1967) 3 W.L.R. 9[illegible]

43 *Ibid.* See under s. 2 subnominee "Consideration".

44 (1968) A.C. 58, 81,102.

45 (1968) A.C. 58, 83, 89, 97, 102.

46 *Ibid*, 89, 97.

47 Chitty: On Contracts [24th Ed.] 1662. See also paras 1663-1670 for examples of the scope of specific performance in favour of 3rd parties.

48 *Ibid*, see (1968) A.C. 58, 88, 102; dictum of Windeyer J. in *Coulls* v. *Bagots Executor & Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471, 481, cited with approval by Lord Pearce in *Beswick's case*.

owner by a carrier, the owner as a beneficiary can sue upon the contract impleading the carrier even if the carrier refuses to enforce the policy.[49]

Clause (b): Representative in interest.—Where *A* agreed to grant a lease to *B* of a property which was at the date of the agreement in the possession of mortgagee, and *B* agreed to undergo all the labour necessary for the conduct of a suit for redemption which was then pending and to pay all the expenses of the litigation, and the rent was to commence from the date on which possession was recovered from the mortgagees, it was held that personal quality of *B* was a material ingredient in the contract, and that his heir was not entitled to specific performance against *A*. [50] The right to obtain a reconveyance from a vendee or his heirs is ordinarily assignable even to a stranger, unless there is an express or implied provision in the contract confining the right to the original grantor or his family.[51]

A right of reconveyance can be exercised against the heirs of a vendee.[52] On the death of the original promisee his heirs do not become several and joint promisees and therefore some of the several heirs of a single promisee cannot sue for specific performance by impleading others as party defendants.[53]

A Mahommadan sold a house to defendants 1 and 2 with an agreement of reconveyance. On his death, amongst his heirs were the two plaintiffs and one of the two defendants. The defendant heir having refused to join the plaintiffs in a suit for specific performance the plaintiffs got a decree for their shares on payment of proportionate price.[54]

Legal representatives are entitled to specifically enforce a contract of reconveyance subject to a contract to the contrary and a term against assignment of such right does not affect the rights of legal representatives.[55]

If the vendor does not apply for permission to sell protected land under U.P. Regulation of Agricultural Credit Act, vendee can do so and his suit for specific performance is not barred.[56]

It is submitted he would be entitled in any case because of the distinct difference between assignment and devolution.[57]

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49 *Snow White Food Product Pvt. Ltd.* v. *Sohanlal Bagla* (1964) A.Cal. 209, *Waters* v. *Monarch Life & Fire Insurance* 5 E & B 870; (1856) 21 Q.B. 188; *Harmer* v.*Armstrong* (1934) 1 Ch. 65; *Jnan Chandra* v. *Manoranjan Mitra* (1942) A.Cal. 251; *Vandepitte* v. *Preferred Accident Insurance Co.* (1933) A.C. 70 (1932) All. E.R. Rep. 527 refd. to. See under s. 2 of Contract Act (Consideration) and under "Agency".

50 *Mohendra Nath* v. *Kali Proshad* (1903) 30 Cal. 265, 275-276. As to 'personal quality,;" see also *Vithoba* v. Madhav (1918) 42 Bom. 344, at p. 350; 46; *Ali Mistri* v. *Fayem Ali* 1955 A.Cal. 621.

51 *Vishweshwar* v. *Durgappa* (1940) Bom. L.R. 653, 1940 A.Bom. 339, where a bench court disapproved of the bench decision in 42 Bom. 344 (*supra*) and *Harkisandas* v. *Bai Dhanoo* 1934 A.B. 171, 151 I.C. 536, in so far as these cases suggest that where there is a contract to resell to an agriculturist there is a presumption against the right to a reconveyance being assignable to a stranger, and refer to the Privy Council decision in *Sakalaguna Nayadu* v. *Chinna Munuswami* (1928) 55 I.A. 243, 51 Mad. 533; (1928) A.P.C. 174 *Sinnakaruppa Gounder* v. *Kasuppuswami* (1955) 2 Mad. 20; (1955) A.M. 506. *Vishweshwar* v. *Durgappa* (1940) Bom. 674; (1940) A.B. 339 reld. on. *Andalammal* v. *Alamelu Ammal (1962) A.M. 378. Sellappa* v. *Marappa* (1965) A.M. 37; (1964) 1 Mad. 691. *Safia Bi* v. *Abdul Shakoor* (1967) A.M. 375. *Umer Noor* v. *Dayal Saran* (1967) A.M. 253; (matter of personal qualifications), *Bipin Bihari* v. *Masrab Ali* (1961) A.Asm. 173 reld. on; *Pannalal* v. *Ram Narayan,* (1971) A. Raj. 294 (No. injunction to restrain the breach of a terminable contract). *Ramchandra Tanwar* v. *Ram Rekhamal* (1971) A. Raj. 292.

52 *Sellappa* v. *Marappa* (1964) 1 Mad. 691; (1965) A.M. 37.

53 *Smt. Katip Bibi* v. *Fakir Chandra* (1960) A.Cal. 187: *Ahinsa Bibi* v. *Abdul Kader Sahib* 25 Mad. 26 reld. on; *Monghibai* v. *Cooverji* 66 I.A. 210; (1939) A.P.C. 170 and *Jagdo Singh* v. *Bishambar* (1937) A.N. 186 dist.

54 *Mohammad Yamin* v. *Abdul Majid* (1962) 2 All. 108; (1962) A.A. 476.

55 *T.M. Doraiswami* v. *Kanniappa Reddi* (1972) A.M. 460; *Rambaran* v. *Ram Mohit* (1967) ASC 744; *Hazari* v. *Neki* (1968) ASC 1295 (Pre-emption) not a personal right) folld.

56 *Mathura Datt* v. *Teg Singh* (1967) A.A. 541; Cf.*Paul Convreur* v. *M.G. Shapiro* (1948) A.P.C. 192. (See injunction S. 20).

57 *Indian Oil Corporation* v. *Smt. Lela Gurcharan Singh* (1972) 1 Del. 308, 310.

Where there is a prohibition to assign a contract a representative in interest of a deceased party to the contract cannot enforce the contract unless there was performance by the deceased of his part of the contract or performance by the legal representative which has been accepted by the other party. In such a case rights under contract will survive to the representative. It is submitted he would be entitled in any case because of the distinct difference between assignment and devolution.[58]

Clause (c):—S. 15 (c) is one of the exceptions to the English Common Law rule that only a party to a contract can sue on it.[59]

Clause (h): Contract with promoters of a company:—A contract by a person with the promoters of a company to take a certain number of shares of the company when formed is not a "contract for the purposes of the company" within the meaning of this caluse, and allotment of shares to such a person by the company, if nothing is done by him amounting to an acceptance of the allotment, will not make him a shareholder or entitle to company to sue him for the unpaid calls on those shares.[60] The suit, moreover, in such a case is not one for specific performance. See s. 19 cl. (e), as to the company's liability to be sued. In England the company's right to sue in such cases is said to be deduced, on the principle of mutuality, from its liability.[61] Cl. (h) makes it clear that the contract of promoters is enforceable by the company, when it has accepted the contract and communicated the acceptance to the other party to the contract.

Benamidar, the beneficial owner, undisclosed principal.—Where the suit of the *benamidar* for specific performance failed, the beneficial owner cannot continue the suit as he is party to the contract. The persons entitled to sue are the parties to the contract, their legal representatives, transferees, assignee in insolvency and undisclosed principal of an agent. But a person not a party to the contract cannot ask for specific performance.[62]

Non existing society.—A contract of sale between a vendor and someone on behalf of a non existing cooperative society is a nullity and gives no cause of action. Hence it cannot be enforced.[63]

In a title suit the parties compromised and the plaintiff agreed to by the interest in the suit property. This agreement can be specifically enforced by the plaintiff under S. 16 even though it contained no compensation for its breach; as the plaintiff can claim expenses of the previous suit thrown away by him in the event of breach of the agreement. S. 20(2) 1 was also inapplicable as the price deposited by the plaintiff was in no way inadequate.[64]

Enforcement of compromise-contract of sale.—A compromise in a pending suit that in the event of sale the plaintiff will offer the land in suit for sale to the defendant is a concluded agreement enforceable at law and the fact that the defendant could waive his right does not render the contract unenforceable.[65]

This would be so even where the defendant repudiates the agreement wrongfully which the plaintiff rejects, nor is the plaintiff absolved from performing a condition precedent which should have been done at the date of the suit. Hence where the purchaser was to pay off the

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58 *Indian Oil Corporation* v. *Smt. Lela Gurcharan Singh* (1972) 1 Del. 308, 310.
59 *Janaki Bala* v. *Maheswar Das* (1942) 21 Pat. 377; 1942 A.P. 460; 201 I.C. 660.
60 *Imperial Ice Manufacturing Co.* v. *Munchershaw* (1889) 13 Bom. 415.
61 Fry, Sp. Perf. § 251
62 *Moolchand* v. Ramphool (1979) A.A. 189, 190;. *Prem Sukh Gulgulia* v. *Habibullah* (1945) A.Cal. 355 folld.
63 *Shri Ramji Mandir Harsinghji* v. *Narsimah Nagar Co-operative Housing Society* (1979) A.Guj. 134, 137.
64 *Smt. Indubala Devi* v. *Jitendranath Ghose* (1971) A.Cal. 411, 414.
65 *Nirmala Bala Dassi* v. *Sudarsan Jana* (1980) A.Cal. 258, 260; *Century Spg. & Mfg. Co. Ltd.* v. *Ulhasnagar Municipality* (1971) ASC 1021; *Baij Nath* v. *Kohetrahari* (1955) A. Cal. 210 reld. on: *Naraindas* v. *Ramanuj Dayal* (1882) 20 All. 209 (P.C.) disting.

mortgage debts and other debts but the seller wrongfully repudiated the agreement of Sale, the purchaser cannot enforce his right of specific performance without first performing his part of the contract at the date of the suit.[66]

Personal bars to relief.

16 [24] Specific performance of a contract cannot be enforced in favour of a person—

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Sec. 16 corresponds with s. 24 of the repealed Act. Sub-cls. (c) and (d) of s. 24 have been omitted, as the former is covered by O. 2, r. 2, of the Code of Civil Procedure and the latter on the ground that the law stated therein is archaic. "Under our Law, a prior settlement of property divests the title of the settler immediately and any conveyance thereafter from the settler to another, even if it be for consideration, would be ineffective to convey any title." (Law Commissioners' Report).

Cl. (a).—The words "could not recover" have been substituted by "would not be entitled to recover" in order to obviate a conflict of opinions in text-books. The illustration in repealed Act is as under.

A, in the character of agent for *B* enters into an agreement with *C* to by *C*'s house. *A* is in reality acting not as agent for *B* but on his own account. *A* cannot enforce specific performance of this contract.

Under the above circumstances only the principal can sue. See I.C.A. s. 236 above.

Matters of defence.—Note that whereas s. 15 deals with general rules of procudure or title to sue, 16 to 18 declare special grounds of defence founded on the plaintiffs' conduct.

Cls. (b) and (c).—There was no section in the repealed Act which expressly stated that an averment of readiness and willingness was necessary in a suit for specific performance, but this was the law.[67] S. 24(b) of the old Act was its nearest approach. These clauses now make it clear

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66 *Pudi Lazarus* v. *Revd. Johnson Edward* (1976) A.AP. 243, 247-8; *Edridge* v. *R.D. Sethna*, 60 I.A. 368, 375;(1933) A.P.C. 233, 236. reld. on.

67 *Ardeshir Mama* v. *Flora Sassoon* (1928) 55 I.A. 360, 375; *S.J. Silas* v. *C.J. B. Kohlhoff* 1954 A.T.C. 440; *Goshto Bihari* v. *Omiyo Prasad* (1960) A.Cal. 361.

that such an averment is necessary and the Explanation makes clear what amounts to an averment of readiness and willingness to perform the contract. There might be a dispute as to the true construction of the contract. In such a case the plaintiff must aver that he is ready and willing to perform the contract as construed by the Court.

Cls. (b) and (c) together with the explanation merely give effect to the decided cases. In *Shish* v. *Banomali*,[68] the Privy Council dismissed a suit for specific performance as the conduct of the plaintiff "was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise."

The illustrations from the repealed Act are as under:

A contracts to sell *B* a house and to become tenant thereof for a term of fourteen years form the date of the sale at a specified yearly rent. *A* becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

[The insolvency need not have been judicially established, but there must be such proof of general insolvency as the Court can act on : *Neale* v. *Mackenzie* (1837) 1 Keen, 474; 44 R.R. 105.]

A contracts to sell *B* a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. *A*, without *B*'s consent, fells the trees. *A* cannot enforce specific performance of the contract.

A, holding land under contract with *B* for a lease, commits waste, or treats the land in an unhusbandlike manner. *A* cannot enforce specific performance of the contract.

A contracts to let, and *B* contracts to take, an unfinished house, *A* contracting to finish the house and the lease to contain covenants on the part of *B* to keep the house in repair. *A* finishes the house in a very defective manner : he cannot enforce the contract specifically, though *A* and *B* may sue each other for compensation for breach of it.

[*Tildesley* v. *Clarkson* (1862) 30 Beav. 419; 132 R.R. 334.]

In the last illustration if the lessee had entered and occupied before the lessor's work was done, it would be a question for the Court whether in all the circumstances his occupation implied such acquiescence in the lessor's performance of the contract as to debar him from finally refusing to perform it on his part.[69] Such circumstances as continued protest and payment of rent under protest will exclude any presumption of acquiescence. For an example of the same kind of case being set up without success, the lessee having nothing better to show than "querulous letters, not unusual in building contracts," see *Oxford* v. *Provand*.[70]

Ready and willing.—English law and Indian law on the question of readiness and willingness to perform the contract up to the date of the decree is the same.[71] Evidently these words "up to the date of the decree" have been taken from the headnote in the A.I.R. The Supreme Court has held that in a suit for specific performance the plaintiff must set out the agreement which the defendant has refused to do so.[72] The plaintiff must plead that he has been and is still ready and willing to specifically perform his part of the agreement. In the absence of this allegation the suit is not maintainable. And before a decree for specific performance can be given he must prove his readiness and willingness to perform his part.[73]

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68 (1904) 31 Cal. 584, 596 P.C.

69 *Lamare* v. *Dixon* (1873) L.R. 6 H.L. 414, 423.

70 (1868) L.R. 2 P.C. 135 (from the British settlement at Shanghai).

71 *Vatapatra Sayi* v. *Venkata* (1965) A.AP. 353. *Ardeshir Mama* v. *Flora Sassoon*, 55 I.A. 360; 52 Bom. 597 (P.C.); (1928) A.P.C. 208; 217-8 reld. on.

72 *Ouseph Varghese* v. *Joseph Aley* C.A. 1782 of 1966 (S.C.) decided 18.8.69; (1969) 2 S.C.C. 539. Forms 47 & 48 of Sch. I of Code of Civil Procedure which requires the allegation of being ready and willing in the plaint.

73 *Ouseph Varghese* v. *Joseph Aley* C.A. 1782 of 1966 (S.C.) decided 18.8.69; (1969) 2 S.C.C. 539. *Prem Raj* v. *D.L.F. Housing & Construction Ltd.* (1968) A.SC. 1355 reld on; *Srinivas Ram Kumar* v. *Mahabir Prasad* (1951) S.C.R 277 dist. See *Gomathinayagam* v. *Palaniswami* (1967) 1 S.C.R. 227; (1967) A.S.C. 868.

The onus of proof of being ready and willing to perform his part of the contract from the date of the contract to the date of filing of the suit is on the plaintiff.[74]

In deciding the question of readiness and willingness of the plaintiff to perform his part of the contract, the substance of the matter and surrounding circumstances have to be considered, i.e. entirely of facts and surrounding circumstances and the conduct of the party suing for specific performance; whether at any stage he was not ready and willing to perform his part of the contract. Nor would a suit be premature where the contract was dated 29.7.64 and the latest date for reconveyance was 15-6-66 and the suit was instituted on 22-12-65.[75]

Following the decision of the Supreme Court, the High Courts of Allahabad,[76] Andhra Pradesh,[77] Gauhati,[78] Kerala,[79] Madhya Pradesh,[80] Patna,[81] Rajasthan,[82] Calcutta[83] and Orissa[84] have held that the non averment of readiness and willingness by the plaintiff to perform his part of the contract is fatal in a suit for specific performance of a contract for sale of immovable property. The court must raise an issue and go through this part of the case.[85]

The Gauhati Court has given two exceptions which cure the defect of averment of readiness and willingness—Deposition in Court and conduct (depositing *purchase price* in Court).[86] Where the plaintiff fails to allege his readiness and willingness and prove it, his suit for specific performance will fail. If no injustice will be caused to the defendant; the Court may in the same suit order return of consideration with interest.[87]

Amendment of plaint.—The requirements of the section 16(c) Specific Relief Act are mandatory. Hence where the necessary averments are not made in the plaint, amendment in the plaint to make the averments will not be allowed where a fresh suit will be barred by time (O . VI R. 17 C.P.C.). Requirement of the law is two fold (i) averment in the plaint and (ii) proof that the plaintiff was ready and willing to perform his part of the contract.[88]

The Supreme Court has also held that if the purchaser claims specific performance of the contract he must show that he was, since the date of the contract, upto the date of hearing continuously ready and willing to perform his part of the contract. If he fails to do so his claim for specific performance must fail.[89] The Supreme Court of Pakistan has held that the want of averment of readiness and willingness to perform in express terms is not a fatal defect because it is not a rule of law relating to structure of suits.[89]

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74 *Pakhar Singh* v. *Kishan Singh* (1974) A. Raj. 112.
75 *Prag Dutt* v. *Smt. Saraswati Devi* (1982) A.A. 37, 40; *Ramesh Chandra Chandiok* v. *Chunni Lal* (1971) A.S.C. 1238, 1242: [1971] 2 SCR 573.
76 *Sanktha Prasad* v. *Abdul Aziz Khan* (1976) A.A. 95; *Sant Singh* v. *Sohan Lal (1981) A.A. 330; Manohar Lal* v. *Smt. Rajeshwari Devi* (1977) A.A. 36.
77 *Pudi Lazarus* v. *Revd. Johnson Edward* (1976) A.A.P. 243, 247.
78 *Idris Ali* v. *Abdul Samad* (1973) A. Gau 132, 136.
79 *Prabhakaran* v. *Bhavani* (1974) A. Ker. 153.
80 *Bajranglal* v. *Purshottam Das Puran Lal* (1972) A.M.P. 137, 140.
81 *Sheopujan Tanto* v. *Bhanu Tanto* (1976) A.P. 365.
82 *Kripalal Singh* v. *Smt. Kartara* (1980) A.Raj. 212.
83 *Maniklal Seal* v. *P.K. Chawdhary* (1976) A.Cal 115; *Ardeshir Mama* v. *Flora Sasson* (1928) A.P.C. 208, 55 I.A. 360 reld on.
84 *I.K. Mohanti* v. *Bhimpen Mahapatiani* (1975) Cutt. 993.
85 *Smat Singh* v. *Sohan Lal* (1981) A.A. 330.
86 *Idmis Ali* v. *Abdul Samad* (1973) A. Gau. 132, 136 (deposition); *Kamdev Nath* v. *Devendra Kumar Nath* (1979) A. Gau. 65 (Deposit of price in Court in a case of repurchase).
87 *I.K. Monanti* v. *Bhimpen Mahapatiani* (1975) Cutt. 993.
88 *Narendra Bahadur Singh* v. *Baijnath Singh* (1981) A.A. 410, 416; *Prem Raj* v. *D.I.P. Housing & Construction (P) Ltd.* (1968) A.S.C. 1355, 1357; *Ardeshir Mama* v. *Flora Sassoon* (1928) A.P.C. (1928) A.P.C. 206 folld.
89 *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.S.C. 868 reversing (1966) A.M. 46; *Ardeshir Mama* v. *Flora Sassoon* 55 I.A. 360, 372; (1928) A.PC. 208, 216 appld.

The granting or refusing of a decree for specific performance is essentially a discretionary matter and the Court acts on equitable principles with an eye to the substantial justice of the case. Accordingly, where a person seeking specific performance, satisfies the Court that he is able, ready and willing to perform his future obligations under the contract he is entitled in equity to a decree for specific performance.[90]

Even if the vendor repudiates the contract the purchaser has to show his continuous readiness and willingness to complete the contract from the date of the contract to the date of the hearing. In *Sabal Kumar's case* the purchaser did not intimate his readiness, no intimation of approval of title was given and no draft conveyance was prepared. There was no proof of the purchaser having the consideration money. He gave proof only of having the money at the time of the contract.[91]

An act of bankruptcy of the purchaser before the date of completion cannot be treated by the vendor as anticipatory breach entitling him to immediately repudiate or after the date fixed for completion to treat the contract as though time were its essence entitling him to rescind the contract for the purchaser's failure to complete it on the due date. The vendor was in breach of contract and liable to damages for breach.[92]

In a suit for specific performance the plaintiff has to allege his continuous readiness and willingness to perform the contract. On the other hand if he alleges that the contract was the result of fraud and undue influence and was not binding, it negatives his being ready and willing.[93] Where a purchaser claims damages for breach of contract for sale of property he makes an election of accepting the contract being at an end and cannot sue for specific performance thereafter as he has disabled himself from alleging readiness and willingness on his part.[94] Plaintiff should prove his readiness and willingness to perform according to the real agreement between the parties. Therefore if there was no agreement regarding warranty of title insistence on it is indicative of lack of readiness to perform his part of the contract.[95] But see s. 55 (1) of Transfer of Property Act.

The plaintiff without expressly alleging readiness and willingness to perform his part of the contract referred to the notice in which he clearly said so. He also made a grievance of the defendant not executing the sale deed. He was held entitled to claim specific performance.[96]

Readiness and willingness of a person seeking performance in a case where time is provided for performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfil his obligations and accept performance when the time for performance arrives. But it does not mean that he had command of the necessary money

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Ouseph Varghese v. *Joseph Aley* (1969) 2 S.C.C. 539; (S.C.C.A.) 1782 of 1966 decided 18.8.69. Cf. *Maksud Ali* v. *Eskandar Ali* P.L. D. (1064) S.C. 381, 390.

90 *Gurney* v. *Gurney* (1967) N.Z.L.J. 386 (Summary of recent cases). Halsbury's Laws of England (3rd Edn.) Vol. 36, para. 309. 2 Smith's L.C. (13th Edn.) 35; Fry on Specific Performance (6th Edn.)435; 441 *King* v. *Poggioli* (1923) 32 C.L.R. 222; *Evans* v. *Norris* (1912) 8 D.L.R. 652. *Australian Hardwoods Ltd.* v. *Commissioner for Railways* (1961) 1 All. E.R. 737, 742 (P.C.) *Measures Brothers Ltd.* v. *Measures* (1910) 2 Ch. 248. *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221; (1965) A.SC. 1405.

91 *Sabal Kumar* v. *Modhusudan* (1964) A.Cal. 556; *Ardeshir Mama* v. *Sophia Sassoon* 55 I.A. 360; (1928) A.PC. 208; *International Contractors Ltd.* v. *Prasanta Kumar Sur* (1961) 3 S.C.R. 579; (1962) A.SC.77 on app. from (1959) A.Cal. 101; 59 C.W.N. 675; *Nalini Nath Mitra* v. *Abhoy Charan* (1956) A.Cal. 525 refd. to.

92 *Jennings Trustee* v. *King* (1952) 1 Ch. 899, 912; (1952) 2 All E.R. 608; refd. to in *Narayanaswami* v. *Dhanakoti Ammal* (1967) A.M. 220

93 *Prem Raj* v. *D.L.F. Housing & Construction (Pvt.) Ltd.* (1968) A.SC. 1355; (1969) 1 S.C.A. 77; *Ardeshir Mama* v. *Sophia Sassoon* 55 I.A. 360; (1928) A.P.C. 208 refd. to; *Sellappa* v.*Marappa* (1964) 1 Mad. 691; 1965 A.M. 37; *Ramayya* v. *Krishnaiah* (1957) A.AP. 26.

94 *Sundarammayar* v.*Jagadeesan* (1964) 2 Mad. 976; (1965) A.M. 85; *Calcutta Improvement Trust* v. *Sarbarana Debi* 44 C.W.N. 541.

95 *Muhammad Zia ul Haque* v. *Calcutta Vyapar Pratishtan* (1966) A.Cal. 605.

96 *Narayan Nagorao* v. *Amrit Haribhau* 1957 A.B. 241.

throughout the existence of the contract.[97] But to prove readiness and willingness a purchaser has not necessarily to produce the money or vouch a concluded scheme for financing the transaction.[98] Failure to find money or prove possession of money before time for performance cannot entitle the vendor to refuse performance.[99] A purchaser in order to succeed in a suit or specific performance need not show that he had the consideration money with him nor that he had arrangements for it but that he was ready and willing to go through with the contract. The question is one of fact.[1] If the vendor repudiates the contract the vendee is not required to tender the price before bringing a suit for specific performance of the contract.[2]

In the absence of any contract to the contrary, the ordinary rule governing sale of land is that the payment of consideration money and the conveyance are simultaneous. It is not the law that price must be tendered as a condition precedent for specific performance.[3] Even though the buyer is ready and willing to perform his part of the contract the Court will not decree specific performance where the sale was by a seller in distress and tension, his life being in danger and sale was for an inadequate price.[4]

A vendor unable to transfer full benefit of the subject-matters covered by the contract was held not to be "ready and willing" and accordingly specific performance was refused.[5]

Difference between Readiness and Willingness.—The distinction between readiness and willingness is this that the former has reference to financial capacity and latter to the conduct of the plaintiff wanting specific performance. Where a sale was to be completed on August 8, 1962 after certain documents were produced by the seller on his failure to get the documents the sale was to be executed within one month of his getting the documents. On August 13, 1962 the seller obtained the documents and informed the purchaser by registered notice. The purchaser asked for other documents not stipulated for. The seller had given notice for completion of sale on August 16, 1962. The seller was held entitled to make the term of the essence of the contract and the purchaser therefore could not sue for specific performance after one month of August 16, 1962.[6]

In a contract of sale of property, the agreement provided that the vendor shall obtain permission to sell within 2 months of the agreement and if the permission was not obtained within that then the purchasers could cancel the contract or extend the time of performance. They extended the time by one month. But the vendor withdrew the application. The purchasers were ready and willing to perform their part of the contract. The purchasers sued for specific performance or in the alternative for damages.

The Court held that the contract was not a contingent but a completed contract and time was not of the essence. It ordered specific performance of the contract and damages if the con-

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97 *Narayanaswami* v. *Dhankoti Ammal* (1967) A.M. 220; *Ardeshir Mama* v. *Flora Sassoon* 55 I.A. 360; 1928 A.PC. 208; reld. on.

98 *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC. 868; *Bank of India* v. *Chinoy* 77 I.A. 76; (1950) A.PC. 90; *Subbayya* v. *Veeraya* (1955) and. 170; (1957) A.AP. 307; *Narayanaswami* v. *Dhanakoti Ammal* (1967) A. M. 220; See *Jennings Trustee* v. *King* (1952) 1 Ch. 899; (1952) 2 All E.R. 608.

99 *Narayanaswami* v. *Dhanakoti Ammal* (1967) A.M. 220

1 *Subbayya* v. *Garikapathi* 1957 A.AP. 307; on appeal (1966) 2 S.C.J. 789 *(Garikapathi Veerayya* v. *Subbayya); Bank of India* v. *F.A.H. Chinoy* (1950) A.PC. 90; 77 I.A. 76 applied. *Jitendra Nath Roy* v. *Sm. Maheshri Bose* (1965) A.Cal. 45.

2 *Prasanta Kumar* v. *International Contractors* (1955) A.Cal. 101; on app. (1961) 3 S.C.R. 579; (1962) A.SC. 62; *Manik Chandra* v. *Abhoy Charan* (1917) A.Cal. 28; 24 Cal. L.J. 90; and *Venkatarayanan* v. *Venkata Subadrayamma* 50 I.A. 41; (1923) A.P.C. 26 appl.

3 *Nanik Lal* v. *Shankarlal* (1962) A.Cal. 103, 108; *Tribhuvandas* v. *Balmukund* (1923) A.B. 15; *Venkatanarayan Garu* v. *Venkata (Zamindar of Tuni)* 50 I.A. 41; *Edridge* v. *R.D. Sethna* 60 I.A. 368; (1933) A.PC. 233.

4 *Shib Kumar* v. *Rasul Bux* (1959) A.Cal 302.

5 *Sun Building Society* v. *Western Suburban & Narrow Road Building Society* (1921) 2 Ch. 438.

6 *Raj Rani Bhasin* v. *Kartar Singh* (1975) A.D., 137, 141, 142; *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 SCR 227, 235-6; (1967) ASC 868, 878. reld on, *Ma So Bon* v. *Ma Da Twe* (1924) APC 233; *Jainarain* v. *Suraimull* (1949) AFC 211; *M. Venkayya* v. *M. Seshayya* (1954) A.AP. 29; *Durga Prasad* v. *Deep Chand* (1954) A.SC 75; *Ramesh Chandra* v. *Chuni Lal* (1971) ASC 1238 disting.

tract becomes unenforceable for want of sanction.[7] It is not necessary to specifically allege in a plaint that the plaintiff was continuously ready and willing to perform his part of the contract. It is sufficient if the recitals make that clear. But a specific allegation seems to be necessary under s. 16 (c) of 1963 Act.[8]

Price not settled.—Without settlement of price for sale is no completed contract to be specifically performed. S. 16(c) read with Explanation (ii) to this clause makes it clear that the plaintiff in a suit for Specific Performance has not to aver and prove his being ready to perform the essential conditions of the contract from the very day of the contract but he must aver and prove readiness and willingness according to the time construction of the contract.[9]

A plaintiff in his suit for Specific performance pleaded part payment and showed his readiness to pay the balance. But his plea of part payment failed. Between the trial Court's judgment and appeal against it he paid into Court the entire amount. But his suit failed. It was held that he must plead and prove his readiness and willingness continuously between the date of the contract and the hearing of the suit.[10]

S. 24(b) of the old Act refers to the violation of an essential condition of the contract, which is absolutely vital to the bargain and which will absolutely alter the mutual relationship of the parties so that it will become inequitable to decree specific performance. It will not apply to the manner of payment of the consideration, for which liabilities in the nature of a penalty by foregoing a part of the consideration is provided.[11]

In a deed of lease there was a forfeiture clause for non-payment of rent. About two weeks later there was an agreement of sale by the lessor to the lessee which was to be performed within a period of seven years and the agreement also provided for regular payment of rent with the forfeiture clause. The property originally belonged to the lessee who sold it to *K* who sold it to the lessor. The contract was held not to be one of re-conveyance and the non-payment of rent did not amount to a breach of any essential term of the agreement of sale.[12]

A breach of term of a contract to lease that the lessee will pay the lessors solicitors' fee is not an essential condition but is merely ancillary to the main transaction. Its repudiation by a lessee will not disentitle him to specific performance. The Court can make such payment as a part of the decree.[13]

Contract to sell or let property by one who has no title, not specifically enforceable.

17. [25] (1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

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7 *Chandni Vidyawati Madden* v. *C.L. Katial* (1964) 2 S.C.R. 495; (1964) A.S.C. 978. *Moti Lal* v. *Nanhe Lal* 57 I.A. 333; (1930) A.C. 287 refd. to.

8 *Badrud Din* v. *Tufail Ahmad* (1963) A.M.P. 31. *Ramayya* v. *Krishnaiah* (1957) A.A.P. 26 *Chandrabali Shah* v. *Pritam Singh* (1965) A.P. 211.

9 *Sheopujan Tanto* v. *Bhanu Tanto* (1976) A.P. 395.

10 *Bishwanath Mahto* v. *Smt. Janki Devi* (1978) A.P. 190; *Ardeshir H. Mama* v. *Flora Sassoon* (1928) A.P.C. 208, 216; *Gomathinayagam* v. *Palaniswami Nadar* (1961)A.SC. 868 reld. on. *Gurupada Shivayya* v. *Shivappa Basappa* (1978) A. Knt. 98.

11 *Sellappa* v. *Marappa* (1964) 1 Mad. 691.; (1965) A.M. 37.

12 *Varadarajulu Iyer* v. *Arumugha* (1960) A.M. 203.

13 *Goshto Bihari* v. *Omiyo Prasad* (1960) A. Cal. 361.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

This section corresponds with s. 25 of the repealed Act except that cl. (c) of s. 25 dealing with a case of a previous settlement has been omitted, as being unnecessary.

Varieties of bad title.—The wording of clause (a) is not wholly clear. Knowing oneself not to have any title must be something more than being aware of some defect in the title; how much more? Does it include only the extreme case of a man contracting for the sale of property to which he has no present claim, on the mere chance of being able to acquire it? Or does it cover the case of an imperfect title vitiated by some material defect which the vendor knows he has no means of making good? It has been held in Nagpur that a plaintiff who has purchased property at an auction under the Berar Land Revenue Code, and has agreed to resell before confirmation of the sale to him, cannot obtain specific performance of the agreement to resell even though the sale has subsequently been confirmed.[14] The English rule is that it is enough for a vendor suing for performance to be in a position to make a good title when he brings his action; but this does not justify wilful concealment of defects from the purchaser.[15] Such concealment is of course fraud; moreover there is in every contract for sale of immovable property a duty to disclose material facts which is more stringently laid down, if anything, by Indian legislation than by English decisions.[16]

A seller may and often does complete his title by procuring the concurrence of necessary parties; but it is another matter to offer the buyer a conveyance wholly proceeding from a party from whom he did not agree to buy. The Court will not compel a buyer to accept such a conveyance, for it would be forcing a new contract on him. The illustration in the repealed Act is an example.

A, without *C's* authority, contracts to sell to *B* an estate which *A* knows to belong to *C*. *A* cannot enforce specific performance of this contract, even though *C* is willing to confirm it.

It is one thing to join a mortgagee or the like in the vendor's conveyance, another thing to substitute a new vendor.[17]

A seemingly doubtful point is whether this clause applies in the event of the buyer electing to affirm the contract with full knowledge of the facts, the afterwards refusing performance for some other reason.

It must be remembered that in England, owing to the complications of land law and tenure, almost all sales of real estate are subject to special conditions limiting the objections that may be taken by the purchaser and the time within which they must be taken. Very few English vendors can be advised to believe that they have a good title in the sense of having a "marketable" title which a purchaser can be compelled to accept without conditions. Minor defects, on the other hand, mostly cure themselves by lapse of time. In practice it is found that, where there is no reason to suspect any really fatal defect, petty stringent conditions can be imposed without any sensible prejudice to the sale.

As to cases where the original acceptance of the contract is expressed to be subject to approval of the title on the buyer's part, see notes on I.C.A., s. 7, under "certainty of acceptance," above.

"A doubtful title."—Clause (b) follows English law as it was understood when the Act of 1877 was passed: the principle being that it is not reasonable to compel a purchaser to fulfil his

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14 *Kisanlal* v. *Namdeo* (1944) Nag. 90. It has already been noted in the commentary under s. 18 that in the converse case, according to the better opinion, the sub-purchaser can obtain specific performance against the original buyer: *Pundlik Daryaji* v. *Jainarayan* (1948) Nag. 815, 1949 A.N. 83; *Motilal* v. *Nanhelal* (1930) 57 I.A. 333, P.C.

15 *Adams* v. *Broke* (1842) I.Y. & C.C.C. 627; 57 R.R. 480.

16 Transfer of Property Act, s. 55.

17 *Bryant and Barningham's Contract* (1890) 44 Ch.D. 218; *De Souza* v. *Daphtary* (1923) 25 Bom. L.R. 610; 87 I.C. 230; 1924 A.B. 252.

contract when the title is open to so much and such plausible objection that, even though on full argument it might turn out to be good, to buy such a title would be to risk buying a law suit. "The Court will not force a doubtful title on a purchaser" was the common way of stating the rule. At this day, where a title depends on a really hard question of construction which the Court can determine in another appropriate form of procedure, a suit for specific performance is not the right way to raise it, and the vendor will probably lose his costs even if in one way or another he turns out to be in the right on the point in question.[18] But the older general rule has now become the exception. "It is the duty of the Court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision."[19] Indeed a like opinion had been expressed in the Court of Appeal at a much earlier date.[20] After all, every title produced by a vendor must be good or bad, in the sense that it must satisfy or fail to satisfy the conditions of the vendor's contract.[21] Why should the Court decline to make up its mind? There would be no answer to this criticism under a system of officially authenticated title. In England, however, some titles may be and are doubtful to the point of appearing good to some very learned persons and bad to others. The prominence of the rule in English doctrine is accounted for partly by this peculiarity of English real property law and partly by the anxiety of Chancery judges, down to the middle of the nineteenth century or later, not to decide a point of common law if they could help it.

There has been considerable discussion as to the kind and amount of objections that will make a title too doubtful to be forced on a purchaser. Obviously no complete definition is possible. It might have conduced to clearness if it had always been remembered that, apart from statutory provisions which in England are compulsory only to a very limited extent, and between the extreme cases of practically immemorial continuity in a regular succession and bare-faced pretence of ownership by an imposter not having even a possessory title, there is no such thing as an absolutely good or bad title. A vendor seeking specific performance is bound to prove his title, subject to such admissions, waivers of inquiry, and acceptance of less than strict proof as the purchaser has agreed to by the terms of the contract. If the proof does not come up to that mark, the title is, as between the parties, not doubtful but bad. Such is the case, for example, when the vendor was formerly a trustee for sale of the property he is now dealing with and bought it for himself, and fails to produce any sufficient evidence that he did so with the knowledge and consent of the beneficiaries; and the nature of the case is not altered if the judgment employs old-fashioned phrases and says, "it would be inequitable to force such a title as this upon" the purchaser.[22]

What a seller is required to show under s. 25 of the old Act (S. 17 of 1963 Act) is marketable title or a title free from reasonable doubt, which means that if a person is compelled to take it he might not be exposed to substantial and not merely idle litigation or would be free from all possible hazards.[23] A title, which depends on the resolution of a latent ambiguity of description, by the aid of extrinsic evidence is too doubtful to be forced on a purchaser; specific performance would therefore be refused.[24]

With the object of having a petition for winding up of a company withdrawn a director bought up the shares of the petitioning shareholder and the agreement was that the company will pay the price to the director in 2 years' time and in default the other directors will share the loss. But the shares were not transferred in the company's books in favour of the director.

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18 *Nichol's and Van Jeol's Contract* [1910] 1 Ch. 43, C.A.
19 *Smith v. Colbourne* [1914] Ch. 533, 541, *per* Lord Cozens-Hardy M.R.
20 *Ib.*, at pp. 544, 545.
21 The decree made at the trial of a specific performance suit is conclusive as to the terms of the contract, and evidence that the purchaser was aware of a material defect is not admissible in an inquiry as to title following the decree: *McGrory* v. *Alderdale Estate Co.* [1918] A.C. 503.
22 *Williams* v. *Scott* [1900] A.C. 499, 508.
23 *Shankar Lal* v. *Jeth Mal* (1961) A.Raj. 196.
24 *Wilson* v. *Thomas* (1958) 1 All E.R. 871.

Another shareholder got the company wound up. The director during the pendency of the petitioner brought a suit for specific performance of the contract against the other directors which failed because

(1) he had no title to the shares,
(2) laches,
(3) the company itself had been wound up, and
(4) there was no averment of being ready and willing upto date of decree.[25]

In *Associated Hotels of India Ltd.* v. *Rai Bahadur Jodhmal Kothalia*[26] after an agreement of sale a notice was issued for acquisition under section 36 of the Punjab Towns Improvement Act. The Federal Court of Pakistan held that from the time the notice of acquisition was issued the vendor's right to retain the property suffered derogation and his title became liable to reasonable doubt.

From this point of view there cannot be any large proportion of cases in which the Court is of opinion that the vendor has satisfied the burden of proof, and yet thinks that a judicial pronouncement of that opinion would still leave the buyer exposed to such risk of adverse claims, or of difficulties if he is hereafter minded to become a seller, as a prudent buyer cannot reasonably be expected to undertake. In common practice judicial approval of a title is accepted as sufficient even when the question decided was of admitted difficulty.[27] There was exceptional cases however in which the Court may really feel doubtful; a judge of first instance, in the presence of unreconciled differences or ambiguities in the dicta of an appellate Court, is in that position. "The Court must feel such confidence in its own opinion as to be satisfied that another Court would not adopt another conclusion".[28] Therefore the existence of apparently conflicting decisions has been regarded as a sufficient ground of doubt even in the Court of Appeal.[29] It has happened in the case of a title dependent not on any general principle of law, but on the construction of a particular will, that a very learned judge expressed his own opinion in favour of the title and yet thought the question too doubtful to justify him in decreeing specific performance, but eighteen years later another judge, with a contract for sale of property under the very same title before him, agreed with his predecessor's opinion, regretted his decision as overcautious, and held that there was no sufficient reason for refusing specific performance.[30] It is possible that both decided rightly.

In modern English practice difference of judicial opinions, or a reasonable apprehension thereof, seems to be the only accepted ground for the kind of doubt now in question.[31] Apparently there is nothing to prevent Indian judges from taking the same line.

When clause (a) of the repealed s. 25 was enacted, a conveyance without valuable consideration was by the law of England voidable at the suit of a supervening purchaser for value, even with notice, under a sixteenth century statute as construed by the Courts; but now it cannot be so defected.[32]

Illustrations of sub-s. 1 (b) are from the repealed s. 25.

(a) *A* bequeaths his land to trustees, declaring that they may sell it with the consent in writing of *B*. *B* gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with *C* to sell him the land. *C* refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of *B*'s consent to the particular sale to *C*, the title which they can give *C* is, as the law stands, not free from reasonable doubt.

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25 *Vatapatra Sayi* v. *Venkata* (1965) A.AP. 353.
26 (1953) F.C.R. 441 (Pak.).
27 One of the learned authors had occasion to be acquainted (not professionally) with a case where a purchaser was ill-advised enough to dispute a decision of Sir G. Jessel's on which the title rested. Chitty J. followed that decision without hesitation.
28 Chitty J., *Thackwray and Young's Contract* (1888) 40 Ch.D. 34, 39 (the question was on the construction of a provision in a Railway Company's Act as to superfluous lands).
29 *Palmar* v. *Locke* (1881) 18 Ch.D. 281.
30 *Pyrke* v. *Waddingham* [1852] 10 Hare 1; 90 R.R. 243; *Mullings* v. *Trinder* (1870) L.R. 10 Eq. 449.
31 See Fry on Specific Performance, § 890.
32 Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21 (see now Law of Property Act, 1925 s. 172).

(b) *A*, being in possession of certain land, contracts to sell it to *Z*. On enquiry it turns out that *A* claims the land as heir of *B*, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. *A* cannot compel *Z* specifically to perform the contract.

The following are additional illustrations:—

(1) *N* mortgages his property to *V* in 1880. *N* and *V* sell the property in 1882 to *C*, but the sale-deed is not registered. *N* dies in 1883 leaving a will of which *V* is the executor. In 1885 *C* sells the property to *H*. *V*, who has not obtained probate of *N*'s will, joins in the sale both in his own right and as executor of *N*. In 1888 *H* agrees to sell the property to *M*. *H* cannot specifically enforce this contract, as the sale-deed of 1882 not having been registered, the equity of redemption remained in *N* up to the time of his death. On his death it passed to his executor *V*, but *V* not having obtained probate of *N*'s will, he could not make a valid transfer of the equity of redemption though he joined in the sale to *H*. *N*'s heir could therefore sue the person in possession for redemption, and the title cannot therefore be said to be free from reasonable doubt: *Haji Mahomed Mitha* v. *Musaji Esaji*.[33]

(2) *M* agrees to sell his property to *S* in 1913. One of the terms of the agreement is that *M* shall deduce "a marketable title to the property free from all reasonable doubts." In the course of the investigation of title it transpires that one of *M*'s predecessors in title had in 1892 mortgaged the property to *D* and *G*. This mortgage was effected by a deposit of the title-deeds of the property (one of which *M* failed to produce), and by a memorandum of charge duly registered. There was no reconveyance from *D* and *G*, but a release executed by *G* alone whereby after reciting that *D* had died leaving *G* as his sole heir, and that the mortgage debt had been paid off by the mortgagor to *G*, *G* released the property from the mortgage. There is no evidence to show that at the date of the release *G* was the sole heir of *D*. This is not a title free from reasonable doubt, for if at the date of the release there was another heir of *D*, neither the release, nor the recitals therein being binding on him, he could seek to enforce the mortgage. Nor can it be said that his right to do so was barred by limitation, for assuming the period of limitation to be 12 years only under art. 132 of the Limitation Act, it is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute: *Shrinivasdas* v. *Meherbai*.[34] [There is no distinction between the expression "title free from reasonable doubt" as used in this section and the expression "marketable title free from all reasonable doubts" used in the agreement in this case.[35]

(3) In a case decided by the Supreme Court one *R* a karta of a joint family agreed to sell a house and held himself out to be in sole possession and enjoyment of the house. His mother was alive at the time. In a suit for specific performance by the purchaser a decree for joint possession of the ½ share of the house was given. The purchaser appealed and during the pendency of the appeal the mother died. Decree for the whole house was given in appeal as *R's* title to the whole house was perfected by the death of the mother.[36]

It has been held in *Jodha Mal* v. *Associated Hotels of India*[37] that on agreement to sell an hotel, notice of a development scheme received by the parties between the date of the contract and the date of completion did not cast any cloud upon the title of the vendor. It was reversed on appeal. (n. 48 *supra*).

Such title as the vendor has.—The condition that the purchaser shall take such title as the vendor has, imports that the vendor has some title, however defective it may be. Hence if the vendor has no title at all, as where the vendor is a mortgagee and the mortgage is executed by one who was not the owner of the property, the vendor is not entitled to specific performance.[38]

And where a vendor agrees to sell "both my bungalows described above, including the sites and buildings together with the compounds, out-houses, etc.," he agrees to sell not a mere revocable license to occupy the lands, but the land itself; and the purchaser, therefore,

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33 (1891) 15 Bom. 657. See also *Dwarkaprasad* v. *Miss K.F. Burns* 1955 A.N. 38.
34 (1916) 44 I.A. 36, 41 Bom. 300, 39 I.C. 627.
35 *Haji Oosman* v. *Haroon Saleh Mahomed* (1922) 47 Bom. 369, 68 I.C. 862, 1923 A.B. 148; *Krishnaji* v. *Ram Chandra* 1932 A.B. 51, 33 Bom. L.R. 1377, 135 I.C. 417 (where the English authorities are discussed); *Low & Co.* v. *Jyoti Pershad* (1931) 58 I.A. 392, 33 Bom. L.R. 1544, 135 I.C. 632, 1931 A.P.C. 299.
36 *Shilla Chandra* v. *Rama Chandra* (1964) 7 S.C.R. 858; (1964) A.SC. 1789; (1959) A.Or. 169 revd.
37 1950 A.L. 106, following *Re Forsey & Hollebone's Contract* (1927) 2 Ch. 379, C.A.
38 *Motivahoo* v. *Vinayak* (1888) 12 Bom. 1.

unless he knew what the real tenure of the land was, cannot be compelled to accept a precarious title.[39]

Sub-sec. (2).—The provision of sub-sec. (1) are made applicable, as far as may be, to contracts for the sale or hire of movable property.

Non-enforcement except with variation.

18. [26] Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:–

(a) where by fraud, mistake of fact or mis-representation,[40] the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;

(b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;

(c) where the parties have, subsequently to the execution of the contract, varied its terms.

This section corresponds with s. 26 of the repealed Act.

Cl. (a).—This clause in effect embodies what was cls. (a), (b) and (c) with certain modifications, which do not appear to alter the law.

The illustrations to s. 26 are as under:

Illustrations

(a) *A*, *B*, and *C* sign a writing by which they purport to contract each to enter into a bond to *D* for Rs. 1,000. In a suit by *D* to make *A*, *B* and *C* separately liable each to the extent of Rs. 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. *D* can obtain the performance sought only with the variation thus set up.

[*Gordon* v. *Hertford* (1817) 2 Madd. 106; 17 R.R. 195.]

(b) *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he assumes that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*.

[*Cp. Denny* v. *Hancock* (1870) L.R. 6 Ch. 1, where the plan furnished by the seller was misleading.]

(c) *A* contracts in writing to let to *B* a wharf, together with a strip of *A*'s land delineated in a map. Before signing the contract, *B* proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of *A*'s land of the same dimensions, and to this *A* expressly assented. *B* then signed the written contract. *A* cannot obtain specific performance of the written contract except with the variation set up by *B*.

[*Clarke* v. *Grant* (1807) 14 Ves. 519; 9 R.R. 336.]

(4) *A* contracts in writing to let a house to *B*, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with *B*'s consent, *A* pulls it down and erects a new house in its place: *B* contracting orally to pay rent at Rs. 120 per mensem. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

[This would be so in England, but only on the ground that *A* has acted and incurred expense on the faith of the variation, as explained in *Price* v. *Dyer* (1810) 17 Ves. 356, 364; 11 R.R. 102, 106.]

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39 *Ibrahimbhai* v. *Fletcher* (1897) 21 Bom. 827, 857-858 [F.B.]; *Shivram* v. *Bal* (1902) 26 Bom. 519; *Gangadhar* v. *Kasinath* (1872) 9 Beng. L.R. 128.

40 See under Sec. 18 Contracts Act.

In *Khatijabai Hasham* v. *Zenab*[41] the defendant agreed to sell a plot of land measuring two acres for Sh. 100,000 out of which 15,000 Sh. was payable at the time of the agreement and balance at the time of the sale but within a few minutes of her signing the agreement she repudiated it on the ground that she had agreed to sell only about half an acre. The sale was to be completed within six months of the agreement. The purchaser brought a suit for specific performance six or seven weeks before the last day for completion. The defendant pleaded that the suit was premature. The plaintiff was held entitled to an order for specific performance.

An agreement of sale of a freehold house was set aside and specific performance was refused on the ground that there was a common fundamental mistake as to the existence of a statutory tenancy and there being a considerable difference between the price of the house in the circumstances. But the defendant submitted to a condition of selling the house to the plaintiff at a proper price.[42]

The defendant agreed to purchase an estate known as "Shelley" which was owned by the plaintiff company F. Goldsmith (Sicklesmere) Ltd. The agreement was signed by one of the directors of the vendor company for and on behalf of the plaintiff company but the company was there named as Goldsmith Coaches (Sicklesmere) Ltd. which the director thought was the plaintiff company's name. The defendant was unable to trace a company called Goldsmith Coaches (Sicklesmere) Ltd. and he refused to complete the sale on the ground that there was no contract.

The Court held that the contract was to be construed by reference to surrounding circumstances or in the light of the known facts and that the name inserted in the agreement of sale was an accurate description of the plaintiff company which was a party to the contract. The company was therefore entitled to a decree for specific performance.[43]

Specific performance was refused in a suit by the vendor for the following reasons:

(i) the statement of site area was a term of the contract and could not be rejected under the maxim *falsa demonstratio no nocet.* The area advertised was 3,920 sq. yds. and was actually 2,360 sq. yds.; the misrepresentation was innocent;

(ii) purchaser could not be given what he had bargained for;

(iii) the purchaser had not waived his right to rescind the contract by completing payment of the deposit and asking for repairs to be done after he became aware of the misstatement, his intention being to obtain abatement;

(iv) the vendor could not by his unilateral action in offering to waive the condition excluding compensation get specific performance if the vendee objected.[44]

Clause (c): Variation of contract.—In a Calcutta case[45] *B* by writing agreed to sell his property to *C* on "certain conditions agreed upon." *C* sued *B* for specific performance. *B* alleged that the said conditions were arranged orally, one of them being that upon execution of the conveyance *C* should execute a lease to *B* of the property for three years. Wilson J. held that oral evidence of the arrangement was not admissible having regard to the provisions of s. 92 of the Evidence Act. On appeal it was held by Garth C.J. and Pontifex J, that such evidence was admissible; and rightly, for s. 92 of the Evidence Act does not affect the possibility of the original and only agreement being partly in writing and partly not. But Garth C.J. said: "I quite agree with my brother Pontifex that s. 26 of the Specific Relief Act [1877] is intended to

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41 (1960) 2 W.L.R. 374 (P.C.)

42 *Grist* v. *Bailey* (1966) 2 All. E.R. 875. *Solle* v. *Butcher* (1949) 2 All E.R. 1107 appd. *Bell* v. *Lever Bros.* (1932) A.C. 161; 1931 All E.R. Rep. 1 dist.

43 *F. Goldsmith (Sicklesmere) Ltd.* v. *Baxter* (1969) 3 All E.R. 733. *Commins* v. *B. Scott* (1875) 20 Eq. 11 refd.

44 *Watson* v. *Burton* (1956) 2 All E.R. 929 (QBD). *Rutherford* v. *Acton-Adams* (1915) A.C. 866, 869 consd. *Shepherd* v. *Croft* (1911) 1 Ch. 521 dist.

45 *Cutts* v. *Brown* (1881) 6 Cal. 328.

provide for just such a case as the present." It is submitted, with respect, that cl. (e) of that section [now cl. (c) of s. 18] is not to the purpose. The clause refers to variations *subsequent* to the execution of the contract, while in the case before the Court no such variation was alleged. The agreement showed on the face of it that besides the terms set forth in it, there were other terms *already* agreed upon between the parties.

Where section does not apply.—*A*, who is *B*'s guardian, agrees to sell to *C* certain property belonging to *B* for Rs. 763, subject to the leave of the Court. The sale is sanctioned by the Court not for Rs. 763, but for Rs. 800. *C* is not entitled to a transfer of the property on payment of Rs. 763, for though the sale is sanctioned by the Court, it is sanctioned for Rs. 800. S. 18 does not apply to such a case.[46]

Relief against parties and persons claiming under them by subsequent title.

19. [27] Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

This section corresponds with s. 27 of the repealed Act, except "public company" is altered to "company" and a proviso has beed added to cl. (e). S. 27 had the following:

Illustrations

to clause (b)—

A contracts to convey certain land to *B* by a particular day. *A* dies inestate before that day without having conveyed the land. *B* may compel *A*'s heir or other representative in interest to perform the contract specifically.

A contracts to sell certain lands to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*.

[*Potter* v. *Saunders* (1846) 6 Ha. 1; 77 R.R. 1.]

A contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no inquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*.

[*Daniels* v. *Davidson* (1809) 16 Ves. 249; Ves. 433; 10 R.R. 171.]

A contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to *B*. Immediately after the contract *A* dies inestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*.

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46 *Narain* v. *Aukhoy* (1886) 12 Cal. 152.

A contracts to sell certain land to *B*. Before the completion of the contract, *A* becomes a lunatic and *C* is appointed his committee. *B* may specifically enforce the contract against *C*.

to clause (c)—

A, the tenant for life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to *C*, who has notice of the settlement. Before the sale is completed *A* dies. *C* may enforce specific performance of the contract against *B*.

(*Re Dyke's Estate* (1869) L.R. 7 Eq. 337; the point there was what the Court treated the agreement as equivalent to a formal execution of the power.)

A and *B* are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C* and dies. *C* may enforce specific performance of the contract against *B*.

(For the application of this to co-parceners in a joint Hindu family, see *Ramappa* v. *Yellappa* (1927) 52 Bom. 307; 109 I.C. 532; A.I.R. 1928 Bom. 150; for some peculiar results of successive sales of undivided shares in property, *Abdullah* v. *Ahmad,* 122 I.C. 666; A.I.R. 1929 All. 817; (1929) A.L.J. 1196.)

Alienation by father or guardian.—Where a father makes a contract of sale of the joint family property and the transaction is of a collusive nature, specific performance of even the father's share cannot be granted.[47]

Sale by minor's guardian.—Where the contract of sale by a minor is through his guardian, the true test for its enforceability is not mutuality but the competence of the guardian legal necessity or benefit to the estate.[48]

Sale of entire coparcenery property of minor coparceners through the mother as guardian for family benefit and necessity is valid. But the Court in every case has discretion to grant that relief or not. On considering the facts and circumstances the Court refused to grant specific performances in the instant case.[49]

Where an agreement of sale executed by *A* on behalf of himself and of his minor sons but the mother whose name was mentioned in the sale did not sign it nor her interest mentioned which was found to be a change of maintenance, a suit for specific performance was held to be maintainable. In such a case, it is a matter of intention and the person signing the agreement has to show that without such signature the document was meant to be incomplete and unenforceable.[50]

Contents of the section.—Sec. 19 is a counterpart of s. 15, enumerating classes of possible defendants to a specific performance suit who were not original parties to the contract, as that section enumerated classes of possible plaintiffs. The rules here given for convenience exhibit no common ground of principle and title, if any, of practice belonging to actions for specific performance more than to other forms of proceeding.[51] Clause (c) is so worded as to be barely intelligible without the illustrations. The word "defendant" at the end stands, in point of sense for some such words as "original contracting party from whom that title is derived." The rule is a consequence of the equitable doctrine which regards a purchaser as acquiring, as soon as the contract is complete, the rights of an owner against the vendor and all

47 *Veera Raghaviah* v. *Chinna Veeriah* (1975) A. AP. 350, 358.

48 *Bhupal* v. *Mamchand* (1973) A.A. 543, 546; *Subramanyan* v. *Subba Rao* 75 I.A. 115;(1948) A.PC. 95 refd. to.

49 *Venkata Krishna Reddy* v. *Amarababu* (1971) 2 MLJ 466

50 *Seethu Parvathy Ammal* v. *B.L. Shrinivasan Chettiar* (1972) A.M. 222, 232; *Jainarayan Rām* v. *Surajmall Sagarmall* (1949) F.C.R. 379; (1949) A.F.C. 211 folld.

51 A Defendant who has pleaded and conducted his defence on the merits cannot on appeal raise the question whether he was a proper party : *Jagannadha Rao* v. *Soma Lakshminarayana* (1930) 125 I.C. 549. Where the property stands not in the name of the vendor but his *benamidar*, he may also be joined as a defendant. If he claims that he is not a *benamidar*, he should be discharged and the question gone into in another suit after the decree is obtained : *Prem Sukh* v. *Habib Ullah*, 1945 A.Cal. 355. A stranger to a contract cannot be made a defendant : *Nagi* v. *Damodhar* (1947) Nag. 623, 1948 A.N. 181

persons not being purchasers for value without notice of the contract, and not claiming under an independent title adverse to the vendor's. English cases are mostly of little use for illustration; the principle is assumed and the discussion turns on some complication which are introduced by special circumstances.

Clause (d) appears to ignore the accepted doctrine as to novation; it does not say however that the original debtor company (which may survive a pretty long time for the purpose of winding up) is released without the assent of the creditor which would indeed be a startling new departure.

The liability declared in clause (e) was established in England in the course of the nineteenth century by decisions given in courts of equity "partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation, partly on a ground independent of contract and analogous to estoppel, namely that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms".[52] This clause now provides that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Indian authorities: Clause (b): Purchase with notice of prior agreement for sale.—This clause contains provisions similar to those of s. 40 of the Transfer of Property Act and s. 91 of the Indian Trusts Act. S. 27(b) of the old s. 19(b) of the new Act , which lays stress on "transferee without notice and in good faith" or s. 91 of the Trusts Act which refers to "a transferee who has acquired the property in good faith without notice" or s. 40(2) of the Transfer of Property Act which refers to "a transferee for consideration without notice" are all cognate or allied provisions and are reconcilable in view of s. 47 of the Indian Registration Act.[53] S. 27(b) of the old Act in substance lays down that a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees. This is the effect of ss. 37 and 40 of the Contract Act also.[54] Therefore, a pre-emption clause will also be so applicable.[55] In *Mohiuddin* v. *Province of East Pakistan*[56] the auction-purchaser was held bound by the judgment-debotr's agreement to sell to a third party of which the former had notice.

In the case put in the second illustration to cl.(b) of s. 27 *B*'s right to enforce specific performance of his contract as against *C* will not be affected, although the sale deed to *C* may have been registered and although he has obtained possession under his purchase.[57]

The principle upon which the third illustration to cl.(b) of old s. 27 proceeds is that "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice".[58] But occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in

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52 Pollock on Contract, 13th ed., p. 163.

53 *Satya Mandalini* v. *Sahadur Mondal* 64 C.W.N. 775; (1962) A.Cal. 40; *James Blackwood* v. *Indian Chartered Bank of Australia* (1874) P.C. App. Cas. 92 refd. to.

54 *Ram Bharan Prasad* v. *Ram Mohit Hazra* (1967) 1 S.C.R. 293; (1967) A.SC. 744. *Mohiuddin* v. *Province of East Pak.* PLD 1962 S.C. 119, 127.

55 *Ibid.*

56 PLD (1962) S.C. 119, 127.

57 *Chunder Kant Roy* v. *Krishna Sunder* (1884) 10 Cal. 710; *Kannan* v. *Krishnan* (1890) 13 Mad. 324; *Namasivayam* v. *Nellayappa* (1895) 18 Mad. 43; *Hurnandun Singh* v. *Jawad Ali* (1900) 27 Cal. 468; *Himatlal* v. *Vasudev* (1912) 36 Bom. 466, 450-451; 16 I.C. 680; *Naubat Rai* v. *Dhaunkal Singh* (1916) 33 All. 184; 32 I.C. 953; *Faki Ibrahim* v. *Faki Gulam* (1920) 45 Bom. 910; 60 I.C. 986; 1921 A.B. 459. *Bhup Narain* v *Gokul Chand* (1933) 61 I.A. 115; 13 Pat. 242; 147 I.C. 1134; 1934 A.P.C. 68; *Mohammad Aslam* v. *Feroze Shah (1932) 59 I.A. 386; 13 Lah. 687; 138. I.C. 770; 1932 A.P.C. 228; Sitayya* v. *Kotayya* 1932 A.M. 71; 134 I.C. 1211; *Gouri Shankar* v. *Ramsewak* 1934 A.A. 1045; 152 I.C. 39; 1934 A.L.J. 871; *Ramulu* v. *Venkatasubba Rao* (1944) Mad. 554; *Yella Reddi* v. *Subbi Reddi* 1954 A.Andh. 20.

58 *Baburam Bag* v. *Madhab Chandra* (1913) 40 Cal. 565, 569; 19 I.C. 9; *Kumaraswamy* v. *Alasius* 1950 A.T.C. 61 (F.B.); *Yella Reddi* v. *Subbi Reddi* 1954 A.Andh. 20; *Baba San* v. *Mohammad Akbar* 1923

the property.[59] S. 48 of the Registration Act does not apply in cases where the subsequent transferee had notice of a previous contract of sale.[60]

It has been held by the High Court of Calcutta that mere registration of the original contract for sale is not sufficient notice of a contract within the meaning of this clause.[61] It would, it seems, be held the same way in Madras,[62] but differently in Bombay[63] and Allahabad.[64] After the amendment in 1929 of S. 2 of the Transfer of Property Act[65] registration is now notice if the conditions, contained in the Explanations are complied with as to the registration being in accordance with the Registration Act and rules made thereunder and entered in the books prescribed thereunder.

Lis pendens.—S. 52 Transfer of Property Act overrides S. 19(b) Specific Relief Act and therefore a transfer of immovable property pending a suit relating to that property does not affect the decree passed in that suit even if the transferee took the property *bonafide* and for value being ignorant of the pendency of the litigation.[66]

A transfer of property which is subject matter of a pending suit between the vendor and a previous contractee is subject to the doctrine of *lis pendens* and the subsequent transferee's rights are subject to the result of the litigation. The doctrine does not avoid the subsequent conveyance but only makes it subject to the rights of the parties to the pending litigation even though the subsequent transferee was ignorant of the previous transactioner of the pending litigation. The maxim *pendente lite* nihil innovetur applies. The effect is as if no title in the subsequent transferee exists.[67]

Onus.—Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character.[68] According to Orissa High Court mere denial will be sufficient.[69] But the Punjab High Court has not accepted this view, and has held that mere denial without proof is not sufficient to prove *bona fides.*[70] But these are matters of quantum of proof. And it must be noted that notice before ac-

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A.M. 563, 73 I.C. 297; *Ghyasuddin* v. *Mahomed Ismail* 1946 A.Cal. 521, 229 I.C. 73. English law is the same, apart from statute: *Hunt* v. *Luck* (1902) I Ch. 428.

59 *Manji* v. *Hoorbai* (1911) 35 Bom. 342, 348-349; 8 I.C. 752.

60 *Ghasiram* v. *Shankarlal* (1960) A.MP. 3.

61 *Preonath* v. *Ashutosh* (1900) 27 Cal. 358.

62 See *Shan Maun Mull* v. *Madras Building Co.* (1892) 15 Mad. 268.

63 See *Lakshmandas* v. *Dasrat* (1882) 6 Bom. 168.

64 See *Janki Prasad* v. *Kishen Dat* (1894) 16 All. 478.

65 S. 4 of Act 20 of 1929 as amended by s. 2 of Act 5 of 1930. Substituting Explanations to s. 2 of Transfer of Property Act as to Notice.

66 *Kishan Singh* v. *Mohinder Singh* (1973) Punj. 142.

67 *Smt. Ram Peary* v. *Gawri* (1978) A.A. 318; *Samendra Nath Sinha* v. *Krishna Kumar Nag* (1967) A.SC. 1440. See *Gauri Dutt Maharaj* v. *Sheikh Sukur Mohammad* 75 I.A. 759, 165; (1948) A.P.C. 147; *Durga Prasad* v. *Deep Chand* (1954) A.S.C. 75 (where the court instead of cancelling the Sale to the subsequent purchaser ioined him in the sale deed to the earlier purchaser).

68 *Himatlal* v. *Vasudev* (1912) 36 Bom. 446; 16 I.C. 680; *Baburam Bag* v. *Madhab Chandra* (1913) 40 Cal. 565, 569; 19 I.C. 9; *Hem Chandra De Sarkar* v. *Amiyabala De Sarkar* 52 Cal. 121; 84 I.C. 693; 1925 A.Cal. 61; *Ramadeni Singh* v. *Gumani Raut*, 119 I.C. 70; 1929 A.P. 300; *Mohan Lal* v. *Wadhawa Singh* (1930) 123 I.C. 86; *Muhammad Sadik Khan* v. *Masihan Bibi* (1930) 9 Pat. 417; 125 I.C. 158; *Shankarlal Narayandas Mundade* v. *The New Mofussil Co. Ltd.* (1946) 73 I.A. 98, 48 Bom. L.R. 456, 224 I.C. 598, 1946 A.P.C. 97; *Adinarayana* v. *Jagannadha* 1949 A.Mad. 762; *Bhup Narain* v. *Gokul Chand* (1933) 61 I.A. 115; *Kumuraswamy* v. *J. Alasius* 1951 A.T.C. 61 (F.B.); *Venkataravanappa* v. *Dasappa* 1955 A.Mys. 3; *Rajkishore* v. *Vishwanath* 1953 A.N. 216.

This rule seems to have been overlooked in *Sanga Thevar* v. *Thanukodi Ammal* 1954 A.M. 116, 117, where it was held that s. 27(b) [now s. 19(b)] had not been complied with as the plaint did not aver that the defendant had notice of the sale, and was not a purchaser for value in good faith.

69 *Dhadi Dalai* v. *Basudeb* (1961).A.Cr. 129. *Ram Chander* v. *Asghari Begum* (1957) A.P. 224 reld. on. *Kanshiram* v. *Ishwar Das* (1923) A.L. 108 (good faith presumed) refd. to.

70 *Gurmukh Singh* v. *Sohan Singh* (1963) A.Puj. 470; *Bhup Narain Singh* v. *Gokul Chand* 13 Pat.242; 61 I.A. 115; (1934) A.PC. 68 and *Shankarlal* v. *New Muffusil Co. Ltd.* (1946) Bom. 694 (P.C.); 73 I.A. 98; (1946) A.PC. 97 refd. to.

tual payment of the whole of the purchase money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract.[71] But it is not necessary that the conveyance should be registered before the transferee has notice of the prior agreement, if the conveyance has been executed and the price paid before notice.[72] Therefore a subsequent purchaser who pays full price without notice of a previous contract to sell and gets the sale deed registered even after notice of a previous contract falls within the protection of s. 27(b). (s.19b). S. 47 of Registration Act makes such a transferee a transferee from the date of execution of the sale.[73]

Onus—initally is on the subsequent purchaser that he had no knowledge of any previous contract and then the onus shifts on the plaintiff, the previous contractee, to show that the subsequent purchaser was not a *bona fide* purchaser for value.[74]

Where a contract of sale was first made with one person and then sale was effected in favour of two other purchasers one of whom had knowledge of the previous contract, the first contractee could not specifically enforce his contract against the subsequent purchasers.[75]

A vendor obtained from his vendee the right of repurchase of the property sold and then released his rights to that vendee. A subsequent purchaser of the property with knowledge of the possession of the property in dispute was held not entitled to the benefits of S. 19(b) of the Act in a suit for specific performance of the agreement of his rights against the vendor.[76]

A subsequent purchaser with knowledge of the previous agreement of sale takes the property subject to the rights of the previous agreement holder and such holder is entitled to get specific performance, and the court should order both the original vendor and the subsequent purchaser to execute the deed of transfer in favour of the previous agreement holder whose rights are not affected even by S. 91 Trusts Act. A contract of sale creates no rights in property agreed to be sold merely by virtue of the agreement of sale. (S. 54, Transfer of Property Act.)[77]

The Supreme Court has laid down the proper form of decree in a suit by a purchaser for specific performance against his vendor and a subsequent transferee.[78] The direction is that both the vendor and the subsequent transferee should join in the conveyance, but the subsequent transferee merely passes on his title and does not participate in any special covenants made between the vendor and the plaintiff. In a decree for specific performance against a vendor and a subsequent purchaser there should be a direction to the latter to join in the execution of the sale deed.[79] In the absence of a subsequent purchaser as a party the Court will not grant a decree of specific performance to enforce a prior contract for sale.[80]

A contracts to sell certain land to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract, and puts *C* in possession of the land. *B*, not knowing of the transfer to *C*, sues *A* and obtains a decree of specific performance against him. This does not bar a suit by *B* against *C* for specific performance and for possession.[81] By merely paying a higher price the purchaser cannot claim any equity in his favour.[82]

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71 *Himatlal* v. *Vasudev* (1912) 36 Bom. 446, 451; 16 I.C. 680.
72 *Sumermal Jamatraj* v. *Thukappa* 1944 A.M. 391.
73 *Satya Mandalini* v. *Sahadur Mondal* 64 C.W.N. 775; (1962) A.Cal. 40; *Mina Kumari* v. *Bijoy Singh* 44 I.A. 72 refd. to.
74 *Durga Prasad* v. *Lilavati* (1972) A.A. 396, 398.
75 *Durga Prasad* v. *Lilawati* (1972) A.A. 396, 398.
76 *H.N. Narayanswamy* v. *Deveramma* (1981) A. Kant. 93, 95; *Manker Prasad* v. *Smt. Meneshwari* (1969) A.P. 304 disting.
77 *Chinna Vanam* v. *Alimelu* (1975) Mad. L.J. 6263, 264.
78 *Durga Prasad* v. *Deep Chand* 1954 A.S.C. 75; *Ramesh Chandra* v. *Chuni Lal* (1971) A.S.C. 1238; *Ramjilal* v. *Ram Pershad* (1979) A.D. 129, 132.
79 *Parmeshwar Mandal* v. *Mahendra Nath Tewari* (1961) A.P. 466.
80 *Ram Swarup* v. *Mahabir* (1960) A.P. 235.
81 *Gaffur* v. *Bhikaji* (1902) 26 Bom. 159.
82 *Abdul Kayam* v. *Damodhar Paikaji* (1964) A.B. 46.

Cl. (b) applies not only to sales, but to leases[83] and mortgages.[84]

Between two lessess:– A subsequent lessee of a cinema theatre filed a suit for specific performance of his lease deed and for possession and mesne profits against the lessor and the previous lessee who had got his lease renewed with knowledge of the lease in favour of the subsequent lessee. The suit for specific performance and other reliefs was decreed by the Supreme Court on appeal. It was also held that the doctrine of frustration does not apply to demise *in presenti.*[85]

Where the vendor got an agreement of reconveyance from the vendee and subsequently released his right of reconveyance to the vendee and thereafter, sold the property to a third party who was residing next door to the original vendee who was in possession of the property sold to him by the vendor and in the deed of sale to the third party it was mentioned that there was litigation about the property with the vendor, the third party was held not entitled to the protection of S. 19(b) against the right of the first vendee's right to enforce his right of release.[86]

A vendor obtained from his vendee the right of repurchase of the property sold and then released his rights to that vendee. A subsequent purchaser of the property with knowledge of the possession of the property in dispute was held not entitled to the benefits of S. 19(b) of the Act in a suit for specific performance of the agreement of his rights against the vendor.[87]

Between two creditors.—Three brothers who were also trustees with others of the trust property consisting of shares in companies assigned their income of shares to a creditor who gave notice of the assignment to the trustees. The brother beneficiaries then assigned their incomes to another creditor who obtained a power of attorney from the brothers, the debtors, and gave notice of assignment to the companies whose shares and income thereof was trust property. In a suit for declaration of priority between the two creditors the first creditor was held to have priority because the first creditor had given notice to the trustees which the second creditor had not and the latters notice to the companies or obtaining a power of attorney were held to be ineffectual factors in the dispute about priority nor could the want of notice to the companies by the first creditor make the second creditor a *bonafide* creditor without notice of prior transaction.[88]

Paid his money. – To claim the benefit of s. 27(b) (s. 19 of 1963) it is not necessary to pay "in money." Adjustment of an outstanding debt would also fall under the phrase.[89]

DISCRETION AND POWER OF COURT

Discretion as to decreeing specific performance.

20 [22] (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

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83 *Baburam Bag* v. *Madhab Chandra* (1913) 40 Cal. 565; *Sitlani* v. *Viroosing* 1947 A.S. 6; *Radha Kamal* v. *Puri Municipality* (1954) A.Or. 110; See also *Kameswaramma* v. *Sitaramanuja* (1960) 29 Mad. 177; (mortgage) & cp. as to notice of restrictive agreements; *Maung Pu Lwin* v. *Maung Sein Hau* 7 Rang. 100; 116 I.C. 476; (1927) A.R. 93.

84 *Ghasiram* v. *Shankarlal* (1960) A.MP. 3.

85 *H.V. Rajan* v. *C.N. Gopal* (1975) A.SC. 261, 265; *Mohanlal Chunilal Kothari* v. *Tribhuvan Nanibhai* (1963) 2 S.C.R. 707; (1973) A.SC. 368 applied.

86 *H.N. Narayanswamy* v. *Smt. Deveramma* (1981) A. Knt. 93.

87 *H.N. Narayanswamy* v. *Deveramma* (1981) A. Knt. 93, 95; *Manker Prasad* v. *Smt. Meneshwari* (1969) A.P. 304 disting.

88 *Dahyabhai Chimanlal* v. *Babulal Himmatlal* (1981) A.SC. 1556.

89 *Smt. Mary Joseph* v. *Tayab Mohammad* (1959) A.M. 86.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance —

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

This section corresponds with s. 22 of the repealed Act.[90]

Sub-sec. (1): The discretion of the Court.—The accustomed language of English equity judges as to the discretion of the Court in granting specific performance is intimately bound up with the historical limits of their jurisdiction. Every one who came to a Court of equity for relief was bound to show that he had no remedy, or no adequate remedy, in the ordinary jurisdiction of a court of common law. Failing this, his suit would be dismissed "for want of equity." Now a claim for specific performance assumes the existence of an actionable contract. Therefore the plaintiff had always to face the question: Why is not the Common Law right to recover damages good enough for your case? and the Court was in strictness always on the defensive against a charge of trespassing on the domain of the common law. The Court of Chancery did indeed establish the presumption that specific performance was the proper remedy on a contract to convey land, but it was only a presumption liable to be displaced; there is no absolute right to this remedy.

"The Court exercises a discretion ... and directs a specific performance unless it should be what is called highly unreasonable to do so;" what incidents or consequences shall be deemed highly unreasonable must depend on the circumstances of the particular case.[91]

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90 *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. 414, 423; *Holliday* v. *Lockwood* (1917) 2 Ch. 56, 57; *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221, 229; (1965) A.SC. 1405.

91 Lord Langdale in *Wedgwood* v. *Adams* (1843) 6 Beav. at p. 605; 63 R.R. at p. 199; approved, *Watson* v. *Marston* (1853) 4 D.M. & G. at p. 239; 102 R.R. at p. 107.

But, in a Court which has jurisdiction to administer all remedies, what remains of the Chancery doctrine is that the Court will decree that remedy which appears the more just and equitable, subject to the settled rule (expl. to s. 12 above) that specific performance will only for special reasons be refused on a contract for the conveyance of immovable, or granted on a contract for the transfer of movable property. A Court of unlimited jurisdiction cannot, of course, avoid, as the English Court of Chancery often did, deciding whether there is or is not an enforceable contract.

The modern rule has been thus declared: "It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered".[92]

The learned authors said of S. 22 of the 1877 Act that with its sub-divisions and illustrations was really more like an elementary lecture than legislation. We are far from saying that an exposition of this kind was not required or at least useful in 1877. It must not be supposed to be exhaustive.[93]

We have nothing more to add to the identification of the cases that furnished the illustrations to the old s. 22 except that in some of them the facts as reported have been purposely simplified; others really have much more to do with injunctions than with specific performance; in several the limits of equitable jurisdiction, as they existed in England down to 1875, make it very difficult to say whether the Court really thought there was any contract at all; and Lord Justice Bruce's judgment in *Denne* v. *Light*,[94] is one of the characteristic utterances which refresh the reader of De Gex, Macnaghten and Gordon's reports with a "gladsome light of jurisprudence" undreamt of by Coke.

There are, of course, many agreements not assignable to any particular head of this section which are quite unfit, as a matter of plain common sense, to be specifically enforced. Such was an undertaking by a Hindu, as part of an attempted settlement of a communal controversy, to cut down a pipal tree. Consideration or no consideration, it is hard to see how specific performance could be seriously demanded.[95] Where specific performance is sought against a subsequent purchaser who has the right of pre-emption, relief will be refused[96] but a sale by the vendor to a pre-emptor during the pendency of a suit for specific performance of a contract for sale would not defeat the right of specific performance of the contractee arising out of the contract of sale.[97]

The exercise of discretion to order specific performance would require the Court to be satisfied that the circumstances are such that it is equitable to make such a decree.[98] Specific performance can be refused although the contract is binding at law; although damages are not inadequate remedy; but the discretion is not arbitrary and is governed by rules and principles.[99] In *Denne* v. *Light* the Court refused specific performance against a buyer where the land contracted to be purchased was wholly surrounded by land belonging to others over which there was no right of way.[1] The Supreme Court has held that it is not possible or desirable to lay down

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92 *Oxford* v. *Provand* (1868) L.R. 2 P.C. 135, 151; *Jethalal Modi* v. *Bachu* (1945) 47 Bom. L.R. 460, 1945 A.B. 481.

93 See *Karsondas Kalidas* v. *Chhotalal Motichand* (1923) 48 Bom. 259; 77 I.C. 275; 1924 A.B. 119.

94 (1857) 8 D.M. & J. 774; 114 R.R. 328.

95 *Israr Husan Khan* v. *Deo Narain* (1929) 115 I.C. 457; 1929 A.A. 372 *Qu.* whether performance would not have been unlawful as tending to more breach of the peace rather than reconciliation. The judgment is enlivened by a couplet, somewhat defaced in the printer's transliteration, quoted without reference from the opening of the Gulistan.

96 *Rajkishore Kuer* v. *Muhammad Quaiyum* 1942 A.P. 366; 198 I.C. 890; *Habibar Rahman* v. *Ali Azahar* (1929) 44 Cal. L.J. 162; 1926 A.Cal. 1237.

97 *Mulla Qaimud Din* v. *Brij Mohandas* (1962) A.MP. 25. *Radhakishan* v. *Sridhar* (1960) A.SC. 1368 refd. to. But see n. 3 *supra*.

98 *Savage* v. *Uwechia* (1961) 1 W.L.R. 455. 458 (P.C.).

99 *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. 414, 423; *Holliday* v. *Lockwood* (1917) 2 Ch. 56, 57. *Suryaprakasam* v. *Gangaraju* (1965) A.Andh. 69 (F.B.).

1 (1857) 8 D.M. & G. 774.

the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in including the defendant to change his position to his prejudice or such as to bring about a situation wher it would be inequitable to give him such a relief.[2]

The defendant agreed to sell to the plaintiff freehold land for £5250. Pending completion he sold the land to the defendant company for £3,000, the company being a cloak for the defendant who along with a clerk of his solicitors were the owners of the company. Specific performance was ordered against both the defendant and the company.[3]

The vendors *M & D* entered into a contract of sale of site — a piece of land — to the appellant. *M* informed him of a suit filed by others including *U & S* for declaration of title and possession. The appellant agreed to take the property in case of compromise between *M* and the others. There was a compromise but before the decree was passed the vendor sold the property to the respondents 1 and 2. The conduct of the appellant was throughout fair and the compromise decree did not provide for sale to respondents. There was no evidence that as a result of sale in favour of the appellant, the vendors will be put to hardship which they did not foresee nor did appellant take any undue advantage when he entered into the agreement with the vendors. The suit for specific performance was decreed.[4]

A plaintiff guilty of forgery and fraud is not entitled to a decree for specific performance. But where the defendant handed over a stamp paper for getting a *zarpeshgi* bond prepared and the plaintiff for some reason had it executed as if it was by the defendant but showing the correct amount due and the correct property to be covered by it, the agreement was specifically decreed as this was not of such a grave nature as to preclude a decree for equitable relief.[5]

A plaintiff who asks the Court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations.[6]

The relief of specific performance of contracts is discretionary. The circumstances specified in the section are illustrative and not exhaustive. The Court should take into consideration the circumstances of the case, the conduct of parties and their respective interests under the contract. Mere delay is no ground for refusing relief.[7]

Contract must be specific.—In a suit for specific performance the contract must be specific and precise and if it is uncertain it is void under section 29, Contract Act and it must be correct and precise and no oral evidence is admissible to add to the terms of the agreement.[8]

Nor will an order for specific performance be given where a contract is conditional e.g. "subject to contract."[9]

False plea of a purchaser.—The appellant, a subsequent purchaser, claimed to be a *bona-fide* purchaser without notice, whereas the property in suit was under a usufructuary mortgage with the respondent. The previous purchaser was held not to be a *bona fide* purchaser because his false plea of being in possession of the property.[10]

False allegations in the plaint disentitle the plaintiff to get relief by way of specific performance.[11]

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2 *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221, 229; (1965) A.SC. 1405; *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. Cas. 414, 423.
3 *Jones* v. *Lipman* (1962) 1 All E.R. 442.
4 *Prakash Chandra* v. *Angad Lal* (1979) A.S.C. 1241, (1979) 4 S.C.C. 393.
5 *Ramjanam Bharthi* v. *Mt. Dharandhar Kuer* 1959 A.P. 506.
6 *Australian Hardwoods* v. *Railways Commissioner* (1961) 1 All E.R. 737 (P.C.) *Measures Brothers Ltd.* v. *Measures* (1910) 2 Ch. 248 (C.A.).
7 *Butchiraja* v. *Satyanarayana* (1967) A.AP. 69; *Satyanarayana* v. *Yellogirao* (1965) A.SC. 1405 (1965) 2 S.C.R. 291 reld. on.
8 *Smt. Phuljhari Devi* v. *Mithai Lal* (1971) A.A. 494, 498.
9 *Cohen* v. *Nessdale Ltd.* (1981) 3 All E.R. 118.
10 *Ram Bilas Ojha* v. *Bishwa Muni* (1978) A.SC. 1094; *Manikathammal* v. *Mallusami Pillai* (1977) A.M. 88 (false plea deposit of money).
11 *Ramaswamy Gounder* v. *Venkatachalam* (1976) 1 Mad. L.J. 243.

A discretion exercised by the trial Court will not be interfered with in appeal unless it has been exercised perversely, arbitrarily or against judicial principles.[12] See sub-s. (1).

Where the plaintiff alleges two agreements of sale the later superseding the earlier and he fails to prove the later agreement he cannot ask for the specific performance of the earlier agreement even though there is an admission of that agreement.[13]

A Court of equity is not bound to decree specific performance even though the buyer is ready and willing to perform his part of the contract. If the agreement of sale was in circumstances of great distress and tension for the vendor where his life was insecure and the property was agreed to be sold at an adequate price, the Court will not order specific performance and compensation for breach of contract will be sufficient.[14]

Licence—sanctity of contract and freedom of speech.—The national Front, a political body hired a Council Hall for holding a conference for which they paid a hire of £6,000. Later the council, on a change in its political constitution by Labour Party replacing Conservative Party, repudiated the contract of lending the hall and the National Front sued for specific performance which was granted and the Court of Appeal confirmed the order on the ground of "that specific performance could be granted for a contract of short duration having regard to the fact that the court must defend any interest in land, estate, or a licence, by injunction or specific performance, it was appropriate so to do". Further the court should in an appropriate case order specific performance where a licence had been wrongfully repudiated and sanctity of contract and freedom of speech were relevant matters to be taken into consideration.[15]

The Allahabad High Court applied the principles of the old section 22 (section 20 of 1963) to release a party of an arbitration agreement on his showing bias of the arbitration. The correctness of this judgment, it is submitted, is doubtful in view of sections 32 and 33 of the Arbitration Act.[16] The case relied on, *Sunder Bros. case,*[17] decided by the Supreme Court was a stay petition under s. 34 of the Arbitration Act where different considerations apply.

Lease Transfer of—Hardship.—The Court will not grant specific performance of a contract to sell lease-hold rights where the transfer will be a contravention of the terms of the lease and would expose the transferor to forfeiture of the lease. Nor would the Court grant a declaration of possession on the ground that in equity the intended lease placed the plaintiff in the same position as if the lease had been transferred, because that doctrine applied where the lease could be specifically enforced. This doctrine does not operate in India.[18]

Sale of Shares—Winding up.—A contract of sale of shares before the winding up of a company cannot be specifically enforced after the order of winding up because the transfer will be void under S. 227 Companies Act 1948 against the Company.[19]

Sound Judicial Principles.—A contract to sell joint family property for antecedent debts which were avyuwharak and not binding on the sons, of the nature of which the purchaser was aware and also the agreement of sale was antedated—was not specifically enforced as the relief is discretionary and it is not given merely because it is legal but it is governed by sound judicial principles.[20]

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12 *Narasappa* v. *Sheikh Hazrat* (1960) A. Mys. 59. *Dr. Bal Sarup* v. *Lt. Col. Lakhbir Singh* (1964) A. Punj. 375. But see sub-s. (1); *Pahunchilal* v. *Mansingh* (1971) A.A. 444 (misconception of law).
13 *Muhammad Ziaul Haque* v. *Calcutta Vyaper Pratishthan* (1966) A. Cal.605.
14 *Shib Kumar* v. *Rasul Bux* (1959) A. Cal. 302.
15 *Verall* v. *Great Yarmouth Borough Council* (1980) 1 All E.R. 839, 843; *Glasher* v. *Woolgar & Roberts* (1891) 41 Sol. Jo. 573; *Booker* v. *Palmer* (1942) 2 All E.R. at p. 677 disappd.
16 *Fertilizers Corporation of India* v. *Domestic Engineering* (1970) A.A. 31.
17 *U.P. Co-operative Federation* v. *Sunder Bros* (1966) Supp. S.C.R. 215; (1967) A.SC. 249 appd.
18 *Warrington* v. *Miller* (1973) 2 All E.R. 372, 377 (C.A.).
19 *Sullivan* v. *Henderson* (1973) 1 All E.R. 48, 50.
20 *M. Veera Raghaviah* v. *M. Chinna Veeriah* (1975) A.AP. 350, 358; *Satyanarayana* v. *Yelloji Rao* (1965) 2 S.C.R. 221; (1965) A.SC. 1405; *Subbarayudu* v. *Tatayya* (1937) Mad. W.N. 1158; *Katasubbayya* v. *Venkataswarlu* (1971) A.AP. 279 reld. on.

Reconveyance.—Plaintiffs 1-3 as heirs of the vendor brought a suit for specific performance of the agreement of reconveyance on payment of Rs. 10,000/- the amount given in the agreement. The plaintiffs 2 and 3 had received a sum of money for the release of their rights in the property. Plaintiff No. 1 claimed a decree for the whole but did not offer the amount paid to the second and the third plaintiffs. The Madras High Court held that as the relief was equitable he was not entitled to a decree for specific performance. But as the decree for the share of the first plaintiff had not been challenged that decree was confirmed.[21]

Relief in a suit for specific performance being discretionary no relief will be granted, where the recitals of deposits of moneys with the vendor's uncle in the sale or agreement—are held not to be conclusive and no other proof being adduced.[22]

Delay.—Where delay not amounting to a bar by any statute of limitation is pleaded as a defence to a suit for specific performance, the validity of that defence must be tried upon principles substantially equitable. "Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."[23] In *Erlanger* v. *New Sombrero Phosphate Co.*,[24] Lord Penzance said::

"Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay ... But delay may also imply acquiescence ... It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case."

Delay, however, should be specifically pleaded,[25] and, further, if the point is not taken in the lower Courts, it will not be allowed to be raised for the first time in second appeal.[26]

Specific performance may be refused on the ground of delay even if time is not of the essence of the contract.[27] Where a purchaser delayed payment of the purchase-money of immovable property, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold, it was held that as a right to such covenant was not shown, his delay of payment was not excused, and there was no case for decreeing specific performance.[28] Where a delay in payment has been acquiesced in by the vendor of immovable property, and no notice terminating the contract has been given, the Court will decree specific performance.[29] If a plaintiff is negligent and dilatory in carrying out his part of the contract for sale of immovable property and the other party sells it to another, the plaintiff cannot get his contract specifically performed.[30] Notwithstanding a stipulation to the effect that time is of the essence of the contract, if surrounding circumstances are such as to excuse the failure of the plaintiff to complete the transaction, specific performance will not be refused.[31] Delay in suing

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21 *G.R. Radhakrishnan* v. *Rani Ammal* (1981) A.M. 266, 270.
22 *Manichathammal* v. *Nallasami Pillai* (1977) A.M. 83.
23 *Lindsay Petroleum Co.* v. *Hurd* (1874) L.R. 5 P.C. 221, 239; *Raja of Vizianagram* v. *Maharaja of Jeypore* 1944 A.M. 518; *Mohammad Wazir* v. *Jahangiri Mal* A.I.R. 1949 A.L. 72; *Karachi Oil Products* v. *Narendrasinghji* (1950) Bom. 192, 51 Bom. L.R. 1012, 1950 A.B. 149; *Sankaralinga* v. *Ratnaswami* 1952 A.M. 389.
24 (1878) 3 App. Cas. 1218, 1231.
25 *Peer Mahomed* v. *Mahomed Ebrahim* (1905) 29 Bom. 234.
26 *Mokund Lall* v. *Chotay Lall* (1884) 10. Cal. 1061, 1069-1070.
27 *Mahendra Nath* v. *Kali Proshad* (1903) 30 Cal. 265, 276-278; *Abdul Rahim* v. *Ma. Mudima* 1933 A.R. 149.
28 *Bindeshri Parshad* v. *Jairam Gir* 1887 L.R. 14 I.A. 173; 9 All. 705; *Shamjibhai* v. *Jagoo Hemchand* 1952 A.N. 220.
29 *Ghyasuddin Ahmed* v. *Mahomed Ismail* 1946 A. Cal. 521, 229 I.C. 73. See also *Gokul Prasad* v. *Fattelal* (1945) Nag. 924. The decision to the contrary in *Ramnath* v. *Shimoga Co-operative Bank Ltd.* is, it is submitted, erroneous.
30 *Narasappa* v. *Sheikh Hazari*, (1960) A. Mys. 59.
31 *Nanik Lal* v. *Shankar Lal*, (1962) A. Cal. 103. *Jamshed Irani* v. *Burjorji*, 43 I.A. 26.

for specific performance caused by third party claims, set up against the property in dispute is sufficient excuse. Delay was of 3 years.[32]

Subbarao J. in *Satyanarayana* v. *Yellogi Rao*[33] observed:

"While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a precondition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression 'waiver' in its legally accepted sense, namely, 'waiver is contractual, and may constitute a cause of action: it is an agreement to release or not to assert a right': see *Dawson's Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha.*[34]

Mere delay in bringing a suit for specific performance is not sufficient to defeat the suit unless it amounts to waiver or acquiescence[35] but unexplained inaction bars the grant of the equitable relief. What amount of delay will constitute a bar to relief by way of specific performance, where time is not of the essence of the contract, depends on the circumstances of each case. A delay of one month has never been held sufficient for this purpose.[36] The shortest period which has been considered fatal is a delay of 3 months and 13 days as happened in *Glassbrook* v. *Richardson.*[37] In the old case of *Marquis of Hertford* v *Boore,*[38] a delay of 14 months was not considered a bar to the plaintiff's claim. On the other hand a delay of about 18 months,[39] of 21 months,[40] and of three years and a half,[41] was considered fatal in later cases.[42] The Patna High Court held inaction for 12 months to amount to waiver of rights.[43] In an Allahabad case, a delay of 1 year and 8 months was held fatal.[44] But delays of 17 months in one case and about two years in another have been excused by the Lahore High Court.[45] A delay of about 2 years and eleven months has been excused in Madras, Nagpur, Patna and Travan-

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32 *Mrs. Anwara Chawdhury* v. *Majid* P.L.D. (1964) S.C. 807.

33 (1965) 2 S.C.R. 221, 229; (1965) A.SC. 1405.

34 (1935) 62 I.A. 100, 108.

35 *Jitendra* v. *Sm. Maheshwari* 1965 A. Cal. 45; *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 291; (1965) A.SC. 1405; *Batchiraju* v. *Sri Ranga* (1967) A.AP. 69; *Bibi Moliman* v. *Tafazul Karim* (1959) A.P. 132; *Faujmal* v. *Nathulal* (1965) A.Raj. 115. *Suryaprakasam* v. *Gangaraju* (1956) A. Andh. 33 (F.B.) *Badrud Din* v. *Tufail Ahmad* (1963) A.MP. 31; *Lindsay Petroleum Co.* v. *Hurd* (1874) 5 P.C. 221; *Jiwanandan Singh* v. *Sia Ram Prasad Singh* (1961) A.P. 347; *Subrahmanyam* v. *Viswanadaraju* (1968) A.AP. 190; See also *Gomathinayagam Pillai* v. *Palaniswami Nadar* (1967) 1 S.C.R. 227; (1967) A.SC 868 (Bachawat J.). *Venkata Seshaiah* v. *Venkayya* (1964) A.AP. 193. 196; See also *Dawsons Bank Ltd* v. *Nippon Menkwa Kabushiki Kaisha* 62 I.A. 100, 108 (1935) A.P.C. 79, 82.

36 *Haradhan* v. *Bhagabati* (1914) 41 Cal. 852, 862; 23 I.C. 214.

37 (1874) 23 W.R. (Eng.) 51. The subject matter of the sale was a leasehold interest in a colliery business, and Jessel M.R. holds time to be of the essence of the contract by implication, following *MacBryde* v. *Weekes* (1856) 22 Beav. 533—see notes on s.55 of the Contract Act. There is also the factor that the other party had categorically refused to perform, after which a comparatively short period of acquiescence will act as a bar: see Fry, Specific Performance, 6th edn., para. 1109.

38 (1800) 5 Ves. 719.

39 *Southcomb* v. *Bishop of Exeter* (1847) 6 Hare 213; 77 R.R. 86.

40 *Lord James Stuart* v. *The London and North Western Ry. Co.* (1852) 1 De G.M. & G. 721; 91 R.R. 272.

41 *Eads* v. *Williams* (1854) 4 De G.M. & G. 674; 102 R.R. 326 (where the contract was for a lease of a coal mine). See also *Dhanji Pasu* v. *Karamshi Varjang* 1951 A. Kutch 14.

42 The cases cited in footnotes 33, 34 and 35, it may be noted turned upon the nature of the property involved. Case 33 was concerned with a sale of a lease for three lives, where nowadays time is regarded as impliedly of the essence of the contract. Wigram V.C. himself considered the peculiar nature of the property to be extremely material. Case 35, concerning a lease of a colliery, has always been treated as an instance of time being impliedly of the essence, since *MacBryde* v. *Weekes* (1856) 22 Beav. 533. Case 34 was not decided on delay at all: there is merely a *dictum* of Knight Bruce L.J. that perhaps there has been fatal delay.

43 *Rameshwar Prasad* v. *Smt. Anandi Devi* (1956) A.P. 53.

44 *Nawab Begum* v. *Creet* (1905) 27 All. 678; *Shiam Behari Lal* v. *Madan Singh* (1945) All. 248, 1945 A.A. 293.

45 *Jangal Singh* v. *Ghulam Mahomed* (1922) 3 Lah. 376; 67 I.C. 700; 1922 A.L. 461; *Allahditta* v. *Jamna Das* 117 I.C. 225; 1929 A.L. 679; See also *Mohammad Wazir* v. *Jahangri Mal* 1949 A.L. 72.

core cases,[46] but a period a month less than this was fatal, in the circumstances, in a Bombay cases.[47]

A sale deed was expected in favour of the plaintiff who paid a part of the consideration money but failed to get the deed registered for two years. The vendor then sold it to a third party and the plaintiff's suit for specific performance was dismissed on the ground of delay of 2½ years which amounted to abandonment.[48]

It may here be noted that the period of limitation for a suit for specific performance is 3 years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused [Limitation Act, 1963, art. 54]. In a Madras case a delay of 22 years was not, in the circumstances fatal.[49]

A purchaser would be entitled to specific performance of the contract notwithstanding ten years' delay, because (i) the time for completion specified in the contract was not of the essence of the contract; (ii) he was not barred by laches since he had an equitable title to the plots by virtue of the contract and had entered into possession of them; and (iii) there had not been abandonment of the contract by him.[50]

A agreed to purchase a piece of land for constructing a factory and the original time for execution of the sale was 2 months which was extended from time to time to enable the parties to get the area declared as an industrial area which was refused by Government. The seller however continued his efforts to get and did get permission to set up a 100 H.P. motor. *A* kept quiet for 9 months after the last extension and then demanded completion of the contract. These laches on the part of *A* were held to be abandonment or waiver of the contract and the granting of the decree would involve hardship in view of the rise in prices taking into view the locality.[51]

In *Satyanarayana* v. *Yellogi Rao*[52] the plaintiff bade at a public auction the seller being the defendant. The defendant repudiated the contract. The plaintiff called upon the defendant to accept earnest money within 24 hours and the balance within a week and to execute the sale but due to a reason which was found by the Court to be sufficient—mental worry—the plaintiff did not enforce the contract for seven months. This delay was held not sufficient to refuse to the plaintiff the relief of specific performance.

Delay.—Where time is not of the essence of the contract for sale of immovable property, mere delay in payment of consideration money is no bar to specific performance: provided the delay has caused no prejudice to the defendant or abandonment by the plaintiff or such a change as would make the relief inequitable. Thus where the payments were spread over a number of years and after the first instalment the seller accepted payments without prescribing any time limit the seller was not entitled to treat the contract as cancelled.[53]

Where the defendent pleaded in defence construction of a pucca godown without giving the details of the dates of beginning or finishing the construction thereof, the Court refused to consider that as a bar to plaintiff's suit for specific performance. The defendant in this case was not a *bonafide* purchaser.[54]

Delay of two years in payment when the plaintiff was ready and willing to perform his part of the contract but was giving time to the vendor to get possession of the land in suit to be able

46 *Sankaralinga* v. *Ratnaswami* 1952 A.M. 389; *S.K. Buty* v. *Shriram Hari* 1954 A.N. 65; *Zakir Sadagar* v. *Dolegobind Ghose* 1955 A.P. 201; *Veettil Muhammad* v. *Abdarahiman Kutty* 1953 A.T.C. 429.

47 *Karachi Oil Products* v. *Narendrasinghji* (1950) Bom. 192. 1950 A.B. 149. See also *Lal Singh* v. *Tejmal* 1954 A. Ajm. 75.

48 *Bhageran Rai* v. *Bhagwan Singh* (1962) A.P. 319.

49 *Arjuna Mudaliar* v. *Lakshmi Ammal* 1949 A.M. 265.

50 *Williams* v. *Greatrex* (1956) 3 All E.R. 705 (C.A.); *Crofton* v. *Ormsby* (1806) 2 Sch. & Lef. 583 appld.

51 *Sriram Cotton Pressing Factory* v. *Narayanswami* (1965) A.M. 352; (1965) 2 Mad. 39; *Lindsay Petroleum Co.* v. *Hurd* (1874) 5 P.C. 221, and *Sankaralinga* v. *Ratnaswami* (1952) Mad. 389; (1952) A.M. 389 reld. on.

52 (1965) 2 S.C.R. 221; (1965) A.SC. 1405.

53 *Gangabai* v. *Srinivasa Rao* (1971) A. AP. 293, 295; *Gomathinayagam* v. *Palaniswami Rao* (1967) 1 S.C.R. 223, (1967) A.SC. 868; and *Satyanarayana* v. *Yellogi* (1965) 2 S.C.R. 221; (1965) A.SC. 1405 reld on.

54 *Venkata Seshaiah* v. *Venkayya* (1974) A.AP. 193, 197.

to give possession to the plaintiff, will not disentitle the grant of relief of specific performance.[55]

A suit for specific performance brought within the period of limitation cannot be defeated on the ground of delay.[56]

Delay and Laches.—If due to delay of the plaintiff in bringing his action for specific performance, the delay being unreasonable and the grant of relief to the plaintiff will prejudice the rights of the defendant, the relief will not be granted. Thus where the defendant receives some benefit during the period of delay or has acquired rights which would be frustrated, specific performance will be refused.[57]

Where the contract of sale related to bhoomidari rights yet to be obtained, and the vendor fixed a date of execution and registration of sale deed but the purchaser did not appear at the place fixed as the bhoomidari rights had not been obtained. The defendant vendor gave notice of rescission and forfeiture of earnest money to which the purchaser did not reply for nine months but later when the bhoomidari rights were obtained, he sued for specific performance; his suit (within limitation) was held maintainable and was decreed.[58]

In England, where the contract is substantially executed, and the plaintiff is in possession of the property, and has the equitable estate, so that the object of his action is only to acquire the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the Court.[59] The reason is that the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected. It has accordingly been held that where a tenant holds under a contract for a lease, pays his rent, and has possession of the property and the enjoyment of all the benefits given to him by the contract, the lapse of time will not operate as a bar to its performance.[60] The principle of these decisions was applied by the High Court of Calcutta in 1875.

Certain shares in a company were allotted to one Seedat in 1860 on the understanding that on payment by the plaintiff to Seedat of the price thereof, Seedat should transfer them to the plaintiff's name. The plaintiff paid the price of the shares and received dividends from Seedat in respect of the said shares. After Seedat's death which took place in 1870, the plaintiff called upon his executor to transfer the shares to his name, but the executor refused. Upon these facts it was held in a suit by the plaintiff against the executor that the plaintiff was entitled to a decree for specific performance, and the executor was directed to transfer the shares to the plaintiff's name.[61]

Premature.—A suit filed for specific performance a few days before the date fixed for execution of the sale where the vendor had refused to carry out the contract a little earlier is not premature.[62]

Either party can sue.—Either party to a contract is entitled to sue in equity for specific performance of the contract. The right is, in general, founded on a breach of contract but not in the same manner as the right to sue at law.[63] A decree for specific performance is in the

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55 *Eswari Amma* v. *M.K. Koroh* (1972) A.M. 339, 344.

56 *Debnath* v. *Chunilal* (1975) A. Raj. 69, 72; *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221; (1965) A.SC. 1405 reld. on.

57 *Manik Lal Seal* v. K.P. Chaudhary (1976) A.Cal. 115, 119; *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221; (1965) A.SC. 1405; *Dr. Jiwan Lal* v. *Brij Mohan Mehra* (1973) 2 S.C.R. 230; (1973) A.SC. 559; *Lindsay Petroleum Co.* v. *Hurd* (1874) L.R. 5 P.C. 221, refd. to.

58 *Mool Chand* v. *Ved Prakash* (1981) A.A. 152, 161; *Dawson's Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha* (1935) A.P.C. 79 reld. on.

59 *Per* Lord Redesdale in *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583, 604.

60 *Clarke* v. *Moore* (1844) 1 J. & L. 723; 68 R.R. 368; *Sharp* v. *Milligan* (1856) 22 Beav. 606; *Shepheard* v. *Walker* (1875) L.R. 20 Eq. 659.

61 *Ahmed* v. *Adjein* (1876) 2 Cal. 323. See also *Gorakh Ram* v. *Laxmibai* 1953 A.S.C. 443.

62 *Malkhan Singh* v. *Raghubir Singh* (1981) A.A. 96.

63 Williams: On Vendor & Purchaser Vol. 2 (4th Ed.) p. 1001 quoted with approval in *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374 (P.C.); See Vaisey J. in *Marks* v. *Lilley* (1959) W.L.R. 749, 752.

nature of a preliminary decree which can be enforced by the plaintiff as by the defendant. The decree does not terminate the suit.[64]

Sub-sec (2)(a).—Case I of s. 22 of the repealed Act was vague, as it seemed to include voidable contracts as well. A voidable contract can be avoided and any of the grounds avoidable under any law relating to contract is available to the defendant. Sub-cl. (a) therefore refers to contracts which are not voidable but which give to the plaintiff an unfair advantage over the defendant. Furthermore as the learned authors had considered s. 28 of the former Act incongruous and out of place, it has been brought into sub-cl. (a).

Unfair advantage.—The conduct of the plaintiff is always an important element to be considered.[65] Thus specific performance may be refused if the plaintiff fails to perform a promise which he made to induce the defendant to enter into the contract but it is neither binding nor operative as a misrepresentation because it relates to the future.[66] The Supreme Court has held that the conduct of a party which puts the other party in a disadvantageous position though it does not amount to waiver may in certain cases preclude him from obtaining a decree for specific performance.[67] Where the parties are not on equal terms, as where the defendant in entering into the contract is influenced by the idea that by doing so he would get rid of a criminal charge brought against him by the plaintiff, and the terms of the contract are such that a man would not agree to them unless under some pressure of circumstances, the Court should refuse specific performance.[68] Where parties are not on equal footing and the bargain is unconscionable and oppressive, specific performance will be refused. At the time of the contract the seller had no knowledge, which the buyer had, that the digging of a channel was in progress which had increased the value of the land considerably, specific performance was refused.[69] A contract by a financier that on a suit succeeding he would get three-quarters of the property is not a fair and reasonable bargain and cannot be specifically enforced.[70]

A contract of sale by the mother of coparceners all of whom were minors for necessity and benefit of the family will not be enforced by the Court if circumstances transpire showing that enforcement would be unjust and detrimental to the interests of the minors. The sale appeared to be a distress sale and the value of the property had considerably increased.[71]

Where the sale was by a person in indigent circumstances and the plaintiff brought about circumstances which induced the defendant to agree to sell his land to the plaintiff's father, the Court in its discretion refused to grant the relief of specific performance.[72]

Where the plaintiff took an unfair advantage of his possession of the property in suit which the defendant purchased for Rs. 20,000/- a few months prior to the contract of sale and agreed to sell for Rs. 14,000/- to the plaintiff, the Court did not in its equitable jurisdiction grant a decree for specific performance.[73]

Surprise and drunkenness.—Specific performance has been refused in cases of contract obtained by unfair means. In *Walters* v. *Morgan*[74] the defendant agreed to grant to the plaintiff

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64 *Anandilal* v. *Gunendra* (1966) A.Cal. 107; See *Khatijabai Hasham* v. *Zenab* (1960) 2 W.L.R. 374, 377 (P.C.).
65 *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. 414, 423.
66 *Ibid.*
67 *Satyanarayana* v. *Yellogi Rao* (1965) 2 S.C.R. 221; (1965) A.SC. 1405; *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. Cas. 414, 423; & *Emile Erlanger* v. *The New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218. & *Lindsay Petroleum Co.* v. *Prosper Armstrong Hurd* (1874) 3 P.C.A. 221; refd. to.
68 *Callianji* v. *Narsi* (1895) 19 Bom. 764, 769; *Pannalal* v. *Thansing* 1952 A.N. 195; *Lakshminarayana Reddiar* v. *Singravela* (1963) A.M. 24, (1962) Mad. 617; *Manak Chand* v. *Puran* (1960) A.MP. 235; *Bhimbhat* v. *Yaswant Rao* 25 Bom. 126 folld.
69 *Ramakrishna* v. *Palaniappa* (1963) A.M. 17; *Gobind Chandra* v. *Nanda Kumar* 18 C.W.N. 689; *Falcke* v. *Gray* 29 L.J. Ch. 28 reld. on.
70 *Venkataswami* v. *K. Nagi Reddy* (1962) A.AP. 457.
71 *Venkatakrishna Reddy* v. *Alamelu* (1971) 2 Mad. L.J. 466, 480.
72 *Sanganna* v. *Amruth Rao* (1973) Karnataka 1025.
73 *A.M. Ganesan* v. *Ayyasami* (1979) 1 Mad. L.J. 270, 276; 92 Mad. L.W. 146.
74 (1861) 3 De G.F. & J. 718; 4 L.T. 758.

a binding lease over land which he had just purchased. Specific performance was refused on the ground that the defendant was surprised and was induced to sign the agreement in ignorance of the value of his property. On the same principle specific performance may be refused where the plaintiff has taken advantage of defendant's drunkenness although it was not so extreme as to invalidate the contract at law.[75] It is otherwise, however, where there is no such inequality between the parties.[76] The mere fact that the terms of a bargain are onerous will not amount to "unfair advantage" in the absence of evidence of fraud or misrepresentation.[77]

A, sells a leasehold to *B*, and in answer to *B*'s inquiry states in good faith, but by inadvertence, that no notice from the landlord has been served on the property. In fact, a notice has been served requiring certain dilapidations to be made good. This being a matter within *A*'s knowledge, affecting the value of the property, the failure to disclose it is material, and *A* is not entitled to specific performance, even though in the circumstances *B* may not be entitled to rescind the contract: *Beyfus* v. *Lodge* [1925] Ch. 350.

Sec. 2(b): Hardship on the defendant.—The Court will not enforce the specific performance of a contract the result of which would be to impose great hardship on either of the parties to it; and this although the party seeking specific performance may be free from the least impropriety of conduct.[78]

"The question of the hardship of a contract is generally to be judged of *at the time at which it is entered into;* if it be then fair and just and not productive of hardship; it will be immaterial that it may be by the force of subsequent circumstances or change of events have become less beneficial to one party except where these subsequent events have been in some way due to the party who seeks performance of the contract".[79]

"This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Instances of cases may be found in the books, where it has been held that mere improvidence or inadequacy is no hardship within the meaning of the rule, but that the bargain must be so hard so as to be unconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship has been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance".[80] Where a lessee agreed to assign his interest in the lease, and had not obtained the consent of the lessor as required by the terms of the lease, it was held by the Supreme Court in the assignee's suit that the possibility of the lease being forfeited was not a ground for refusing specific performance, as the forfeiture would affect the plaintiff and not the defendant.[81]

A judgment-debtor in order to get the auction sale of his property set aside agreed to sell the property for the amount of the sale price plus the amount required for Court expenses which was neither the market price nor a fair price, specific performance of the contract was refused.[82]

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75 *Mallins* v. *Freeman* (1837) 22 Keen 25, 35; 6 L.J.Ch. 133.

76 *Shib Lal* v. *The Collector of Bareilly* (1894) 16 All. 423, 433.

77 *Davis* v. *Maung Shwe Go* (1911) L.R. 38 I.A. 155; 11 I.C. 801; *Ramalinga* v. *Jagadammal* 1951 A.M. 612.

78 Fry on Specific Performance (3rd Ed.) p. 152, s. 334 at p. 194; s. 417; (6th Ed.) pp. 155 & 199; *Downsett* v. *Reid* (1912) 15 C.L.R. 595.

79 Fry, § 418; (1894) 16 All. 423, 435, *supra*. "Hardship on the defendant" means some collateral hardship and not merely, *e.g.* the diminution of the purchase money: *Pichai Moideen* v. *Chaturbhuja* 1933 A.M. 736; 65 Mad. L.J. 491; 145 I.C. 1023; *Sankaralinga* v. *Ratnaswami* 1952 A.M. 389; *Mahalakshmammo* v. *Venkatachalamayya* 1954 A.M. 870; *Ramalinga* v. *Jagadammal* 1951 A.M. 612; *Veettil Muhammad* v. *Abdarahiman* 1953 A.T.C. 429.

80 *Haradhan* v. *Bhagabati* (1914) 41 Cal. 852, 863; 23 I.C. 214; *Rami Raddy* v. *Pattabhirami* 1937 A.M. 124; 71 M.L.J. 599; 169 I.C. 12; *Jadu Nath* v. *Chandra Bhushan* 1932 A.Cal. 493; 36 C.W.N. 285; 138 I.C. 498; *Arun Prokash* v. *Tulsi Charan* 1949 A.Cal. 510; *Hari Krishna* v. *K.C. Gupta* 1949 A.A. 440; *Baijnath* v. *Kshetrahari Sarkar* 1955 A.Cal. 211. See cases no. 56, *supra* p. 675.

81 *Kamala Ranjan* v. *Baijnath* 1951 A.S.C.I. See also *Babu Rao* v. *Sonaji* 1952 A. Hyd. 48.

82 *Lakshminarayana Reddiar* v. *Singaravelu* (1962) Mad. 617; (1963) A.M. 24.

Provision for payment by vendor of a specified sum on breach.—The mere fact that a contract for sale of land contains a clause whereby the vendor agrees in case of breach to return the earnest money and to pay also a specified sum as damages does not disentitle the purchaser to specific performance.[83] This is now s. 23(1).

The illustrations are taken from s. 22 of the repealed Act:

Illustrations.

(1) *A* is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to *B*. *A*, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to *C*. Here the enforcement of the contract would operate so harshly on *A*, that the Court will not compel its specific performance in favour of *C*.

[A decision of Lord Hardwicke's of which there is no regular report: see Fry on Specific Performance § 429.]

(2) *A* and *B*, trustees, join their beneficiary, *C*, in a contract to sell the trust-estate to *D*, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D*.

[*Wedgwood* v. *Adams* (1843) 6 Beav. 600; 63 R.R. 195.]

(3) *A*, the owner of an estate, contracts to sell it to *B*, and stipulates that he, *A*, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to *B*, unless he waives his claim to the unknown property.

[Simplified from *Baxendale* v. *Seale* (1854) 19 Beav. 601; 105 R.R. 261.]

(4) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that *A* cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

[*Peacock* v. *Penson* (1848) 11 Beav. 355; 83 R.R. 193]

(5) *A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*.

[*Talbot* v. *Ford* (1842) 13 Sim. 173; 60 R.R. 314. If the notice had been limited to a prescribed short time before the end of the lease the covenant would be reasonable.]

(6) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.

[*Denne* v. *Light* (1857) 8 D.M. & G. 774; 114 R.R. 328.]

(7) *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods, but if he does not supply them *A* may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*.

[Apparently suggested by *Hills* v. *Croll* (1845) 2 Ph. 60; 78 R.R. 23, where the reason given is that the Court is unable to enforce the whole of the contract; but the substantial relief there sought was an injunction, as to which see Fry on Specific Performance, §853. There is no word of any one being ruined in the report.]

Explanation 1.—It is to be noted that the word "mere" has to be given due weight. There is undoubtedly a great difference between inadequacy of consideration and gross inadequacy, which by itself or coupled with other circumstances is evidence of fraud or undue advantage. Although mere inadequacy of price is not *per se* a ground for refusing specific performance,[84]

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83 *Sadiq Hussain* v. *Anup Singh)* (1923) 4 Lah. 327; 76 I.C. 91; 1924 A.Lah. 151; *Sobharam* v. *Totaram* 1952 A.N. 244; *Kandasami Chettiar* v. *Shanmugha Thevar* 1949 A.M. 302; *Rajammal* v. *Gopalaswami* 1951 A.M. 767.

84 *Ramakrishna* v. *Palaniappa* (1963) A.M. 17; (1963) Mad. 39; *Lakshminarayana Reddiar* v. *Singravelu Naicker* (1963) A.M. 24; *Manak Chand* v. *Puran* (1960) A.MP. 235; *Jamshedji* v. *Kashinath* 26 Bom. 126; *Webster* v. *Cecil* (1861) 30 Beav. 62.

yet the proposition that inadequacy should be "such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud is probably too narrow. The better view seems to be that specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud, e.g. mistake,[85] or surprise or unfair advantage taken by the plaintiff of his superior knowledge or bargaining position[86] even though the circumstances do not justify rescission of the contract.[87] Where the vendor had entered into a contract of sale the agreed price being grossly inadequate and the vendor was illiterate and under debt to the buyer for a long time, the provisions of s. 28(a) will apply and specific performance will be refused.[88]

Inadequacy and gross inadequacy.—The Madras High Court has drawn a distinction between inadequacy of consideration and gross inadequacy. The former according to the Explanation is not a ground for refusing Specific Performance, but in the latter case it is an "extra dose or additional dose of proof" of a design by an avaricious purchaser by which the vendor was "victimised" — in the absence of which the relief will be granted.[89]

Explanation 2.—The hardship to be considered is at the time of the contract, unless the hardship has been brought on by the action of the plaintiff. Mere rise in price of the property agreed to be sold is not a ground for refusing a discretionary relief in favour of the purchaser. What has to be considered is the fairness of the contract at the time it was made and the subsequent rise in price is not a matter to be taken into consideration.[90]

Sub-sec. (2)(c).—This clause seems to be a residuary clause to cls. (a) and (b) and to some extent has brought in the provisions of s. 28 of the former Act. The illustrations to that section contemplate cases in which an executor under an erroneous belief that he had the authority of his co-executor enters into an agreement for the sale of property or where an auctioneer, whose authority has been revoked, inadvertently sells the property. If the defendant's assent has been obtained by misrepresentation, concealment, unfair practices, mistake, misapprehension or surprise, the contract cannot be enforced.

Sub-sec. (3).—This is case III of the repealed Act.

Illustration.

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of *A*.

[*Storer* v. *G. W. Ry. Co.* (1842) 2 Y. & C.C.C. 48; 60 R.R. 23. The only difficulty in the case was the nature of the performance to be enforced.]

Plaintiff a widow left her council flat and came to live with *B* at his house to look after him and his house, the oral contract being that if she did so and paid for her board and coal she would have the house and contents on *B*'s death. *B* died and plaintiff sued for specific performance which was granted on the ground that her acts of part performance were referrable to the oral contract.[91]

Sub-sec. (4): Mutuality.—It is a little difficult to appreciate the necessity for this sub-section, having regard to s. 12, which clearly discards the doctrine of mutuality. Sub-sec. 4 equally clearly postulates that there must be a contract, and where there is no contract there can be no case for specific performance. In *Mir Sarwarjan* v. *Fakhruddin*,[92] it was decided that it was not

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85 *Webster* v. *Cecil* (1861) 30 Beav. 62.
86 *Denne* v. *Light* (1857) D.M. & G. 774.
87 *Falcke* v. *Gray* (1859) 4 Drew 651; See *Mortlock* v. *Buller* (1804) 10 Ves. 292.
88 *Manak Chand* v. *Puran* (1960) A.MP. 235; *Bhimbhat* v. *Yashwant Rao*, 25 Bom. 126 folld. *Jamshedji* v. *Kashinath*, 26 Bom. 126.
89 *Rangasami Gounder* v. *Periamuthu Gounder* (1977) 1 Mad. L.J. 231, 235.
90 *Narayanaswami* v. *Dhanakoti Ammal* (1967) A.M. 220; *Badarud Din* v. *Tufail Ahmad* (1963) A.MP. 31, and *Sankaralinga* v. *Ratnaswami* (1952) Mad. 508; (1952) A.M. 389; folld.; Fry: On Specific Performance (6th Ed.) p. 199; quoted; *L. Amma* v. *K.N.G. Nair* (1963) Kr. L.J. 752.
91 *Wakeham* v. *Mackenzie* (1968) 2 All E.R. 783; *Kingswood Estate* v. *Anderson* (1962) 3 All E.R. 593; (1963) 2 Q.B.D. 169 applied.
92 (1912) 39 I.A. 1, 39 Cal. 232.

within the competence of a manager of Mahomedan minor's estate nor within the competence of a guardian of a minor to bind the minor's estate or the minor by a contract for the purchase of immovable property. This was a clear finding that there was no contract. The Privy Council also held that "as the minor in the present case was not bound by the contract there was no mutuality." Following *Mir Sarwarjan's case*[93] in the following cases.[94] It was held that it is immaterial that the purchase was advantageous for the minor. But the later decision of the Privy Council in *Subramanyam's case*[95] must be taken to have overruled all decisions based on *Sarwarjan's case.*[93] It was so held by Andhra High Court[96] full bench. The Privy Council decided in a later case[97] that where the guardian was competent to alienate property, as in Hindu Law, the contract could be specifically enforced by either party. The guardian in that case was the mother. The Privy Council approved a passage by the learned authors in the 7th Ed. at p. 7 where it is said:

> "the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all."

The Privy Council also observed:

> "It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, not his mother, was owner. If an action had been brought for specific performance of the contract it would have been brought by or against the respondent and not by or against his mother."

Mutuality.—Want of mutuality occurs in cases in which a vendor cannot seek specific performance, but the purchaser may, and this is amply provided for in the Act. It is not easy to see to what cases the doctrine of mutuality would apply. But it would be helpful to refer to some of the cases where the applicability of the principle of mutuality was discussed:

Mutuality—meaning of.—The doctrine of mutuality means that the contract should be mutually enforceable by each party against the other and not that right for right there must be a corresponding clause. A contract may contain a series of clauses and covenants which form the total bargain each of which is a consideration for the other. Mutuality does not mean equality and exact arithmetical correspondence. It means that each party must have the freedom to enforce rights under the contract against the other.[98] The true test for the validity and enforceability of a contract by a minor's guardian is not the existence of mutuality but the competency of the guardian and legal necessity or benefit to the minor's estate.[99] Relying on *Subramanyam's case*[1] a Full Bench of the Andhra High Court[2] held that if a contract by a guardian of a minor for sale or purchase is for necessity or for benefit of the minor it is valid and enforce-

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93 *Mir Sarwarjan* v. *Fakhruddin Mohammad* (1912) 39 I.A. 1; 39 Cal. 232.

94 *Venkatachalam* v. *Seethuram* (1932) 56 Mad. 433; 1933 A.M. 322 (F.B.) See also *Jatadhari Prasad* v. *Kishan Lal* 1950 A.P. 535, 539; (English Law is the same.) *Flight* v. *Bolland* (1828) 4 Russ. 298; *Adinarayana* v. *Venkatasubbayya* (1940) Mad. 352; (1940) A.M. 625. (A minor attained majority and the other party had not repudiated the contract made by the guardian; the contract was specifically enforced.)

95 *Subramanyam* v. *Subbarao* (1948) 75 I.A. 115; (1949) Mad. 141; (1948) A.PC. 95.

96 *Surya Prakasam* v. *Gangaraju* (1956) A.Andh. 33, 40 (F.B.).

97 *Subramaniam* v. *Subba Rao* (1948) 75 I.A. 115, (1949) Mad. 141, 1948 A.P.C. 95. *Gujoba* v. *Nilkanth* (1958) A.B. 202; *Lachhuram* v. *Madhoram* (1961) 13 Assam 357; (1962) A.Asm. 41 (a case of a father acting for his minor son).

98 *Dasarath* v. *Sattyanarayan* 1963 A.Cal. 325, 327. Fry on Specific Performance (6th Ed.) pp. 219, 223 relied on. *Weeding* v. *Weeding* 74 E.R. 812; Contra *Sree Ram* v. *Ratanlal* (1965) A.A. 83, 86.

99 *Gujoba* v. *Nilkanth*, (1958) A.B. 202; *Lachhuram* v. *Madhoram* (1962) A.Asm. 41; (1961) Assam 357; (A case of father acting as son's guardian); *Subramanyan* v. *Subba Rao* 75 I.A. 115; (1948) A.PC. 95 (1948) Mad. 141.

1 *Subramanyam* v. *Subba Rao* (1948) 75 I.A. 115; (1948) Mad. 141; (1948) A.PC. 95.

2 *Suryaprakasam* v. *Gangarāju* (1956) A.And. 33 F.B.; See also *Caesar Lamare* v. *Thomas Dixon* (1873) 6 H.L. 414; 423; *Holliday* v. *Lockwood* (1917) 2 Ch. 56, 57.

able. But it does not deprive the Court of the discretionary power to refuse to enforce it if the supervening circumstances obviously affect the interests of the minor because a paramount duty rests upon the Court not to put its seal of approval on transactions affecting his interests. If the circumstances are changed to the detriment of the minor at the time the contract is to be enforced the Court may in its discretion refuse to give specific performance.

A suit for specific performance cannot be defeated merely because some of the defendants are minors in a case where the plaintiff seeks no relief against the minors and asks for a decree against the major defendant.[3]

A contract by the manager of a joint Hindu family can be enforced even if one of the coparceners is a minor so also where the sale is of a co-tenancy and one of the co-tenants is a minor. The doctrine of mutuality applies only in the case of separate property of a minor.[4] and the rule does not apply where the sale is by a karta of a joint Hindu family,[5] provided the sale is sustainable under Hindu Law, the principle of necessity or benefit to the estate.

A father assigned his rights in agreement of resale to his infant son, who brought a suit for specific performance of the contract. It was held that an infant can obtain a decree for specific performance if his father could. Mutuality is related to the date of contract and not the date of suit.[6]

But it was held by the Allahabad High Court that an agreement of purchase entered into by a minor through his father cannot be specifically enforced by the minor against the vendor because of want of mutuality and that is irrespective of the vendor's soundness or unsoundness of mind.[7] A sale of property by parties including a Hindu minor acting through his mother with an agreement of reconveyance can be enforced by the vendors and want of mutuality cannot be pleaded as the two transactions are integrated and a purchaser would be estopped by his conduct.[8]

A contract by an insolvent to buy property cannot be specifically enforced against the Official Receiver but the latter can enforce the contract on the same terms and conditions as the insolvent, had he remained solvent.[9] An agreement to lease entered into by an intended tenant and Mahomedan minor landlord through his *de facto* guardian — the mother — is void and is unenforceable.[10]

Lack of mutuality.—Neither inadequacy of consideration nor lack of mutuality are a bar to the grant of specific performance. The doctrine of mutuality has been abolished by S. 20(4) of the Act.[11]

Relief of Specific performance of a contract of sale cannot be refused merely on the ground of mutuality but it may be considered along with other grounds. A sale to a minor

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3 *Dasarath* v. *Sattyanarayan* (1963) A.Cal. 325, 328; 67 C.W.N. 110; *Jamnabai* v. *Vasantha Rao* 43 I.A. 99, 103; *Subramanyam* v. *Subba Rao* 75 I.A. 115; (1948) Mad. 141; (1948) A.PC. 95 (sale by a minor through his guardian).

4 *Sitarama Rao* v. *Venkatarama* (1956) A.M. 261 F.B. *Subramanyam* v. *Subba Rao* (1948) 75 I.A. 115; (1948) A.PC. 95; (1949) Mad. 141 P.C., 75 explained: doctrine of mutuality not affected. *Mir Sarwarjan* v. *Fakhrud Din* 39 I.A. 1; 39 Cal. 232 (P.C.) held not abrogated; Pollock and Mulla Contract Act p. 695 (7th Ed.) quoted with approval.

5 *Bhageran Rai* v. *Bhagwan Singh* (1962) A.P. 319; *Haricharan Kaur* v. *Kamla Rai* 2 P.L.J. 513; (1917) A.P. 478 reld. on.

6 *Ramchandra* v. *Ayeesha Begum* (1969) A.M. 470; *Sarwarjan* v. *Fakhruddin* (1912) 39 I.A. 1; 39 Cal. 232; & *Subramanyam* v. *Subba Rao* (1948) A.P.C. 95; 75 I.A. 115; 1949 Mad. 141 considered & appld.

7 *Bholanath* v. *Balbhadra Prasad* (1964) A.A. 527; *Venkatachalam* v. *Sethuram Rao* 56 Mad. 433; (1933) A.M. 322 folld. The later Privy Council's decision in *Subramaniam's Case* was not considered.

8 *Rajubala Dassi* v. *Nidhuram Pandit* 63 C.W.N. 436; *Subramanyam* v. *Subba Rao* 75 I.A. 115; (1948) Mad. 141; (1948) A.PC. 95. *Nir Sarwarjan* v. *Fakharud Din* 39 I.A. 1; 39 Cal. 232 refd. to.

9 *Rama Raju* v. *Official Receiver*, (1964) A.A.P. 299; *Gibson* v. *Carruthers*, (1841) 8 M. & W. 321, 333; 151 E.R. 1061; Mulla: Law of Insolvency (2nd Edn.) 479, 660.

10 *Jania Beevi* v. *Govindaswami* (1967) A.M. 369; *Imambandi* v. *Mutsaddi* 45 Cal. 878; (1918) A.PC. 11 appld.

11 *Lalji* v. *Ramji* (1978) A.A. 212; *Shree Ram* v. *Rattan Lal* (1965) A.A. 83 reld on. See under Sec. 29 Contract Act agreement not vague *supra*.

through his guardian, his father, can be specially enforced.[12] See also under Section 11 Contracts Act.

Option to purchase: Option of £1/-.—The defendant gave the plaintiff an option for £1 to purchase a house for £10,000. The plaintiff exercised his option but the defendant refused to perform. The plaintiff brought an action for specific performance which was granted by the judge. The defendant appealed on the ground that an option being for a token sum was not exerciseable and the plaintiff should have sued for damages. The Court of Appeal held that the option agreement constituted an irrevocable offer to sell and on the plaintiff's exercising that offer a contract came into being for the sale of the house for £10,000 and it was that contract which the court was being asked to enforce and the token consideration for the option was irrelevant to the appropriate remedy and the appeal was dismissed.[13]

Vendors lien: Specific performance.—Where the price of shares to be transferred to the plaintiff is payable at a future date, specific performance of the transfer of shares will not be granted without safeguarding the unpaid vendor's lien.[14]

Reconveyance.—Rule regarding lack of mutuality is not without exceptions; one such exception is of "a contract where one party has an option by the exercise of which the other party becomes bound to perform his part."[15] An agreemenet to reconvey can be specifically enforced. No question of mutuality arises as one party has already performed his part of his promise.[16] A contract of sale coupled with an agreement for reconveyance is not a case of unilateral contract to keep the offer open but constitutes rights and obligations mutually supported by consideration and is specifically enforceable between the original parties and their successors within s. 27(b) [s. 19(b) of 1963 Act]. It is also assignable. The sale does not convey to the vendee an absolute and indefeasible title but it becomes absolute if the option is not exercised within the period specified.[17] A contract for reconveyance does not lack mutuality because the vendee cannot call for his money. His right under the contract is that if he is asked to reconvey he can insist on his right to money.[18]

But no such decree will be granted where the claimant for reconveyance has before the suit agreed to sell the property claimed to another person; and compensation in money will be an adequate relief. Such a decree for reconveyance is contrary to S. 14(1) b of the Act and therefore a second appellate Court can interefere with the discretion of the first appeal Court.[19]

In *Dasarath's Case*[20] the contract for reconveyance was between a major and nine others; some of whom were minors and the contract provided that it could be enforced by either of the parties or by any one of them on payment of Rs. 8,000 and the suit for conveyance was brought by one major party against the other major party, the minors being *pro forma* defendants. To this, it was held section 43 of Contract Act and section 16 of Specific Relief Act of 1877 apply and the contract is enforceable. In this case the following passage from Fry on Specific Performance[21] was quoted:

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12 *Than Singh* v. *Bhurelal* (1974) A.M.P. 24.

13 *Mountford* v. *Scott* (1975) 1 All E.R. 198, 200; (C.A.) (1974) 1 All E.R. 248 affd. See *Malhoutra* v. *Chaudhry* (1979) 1 All E.R. 186 (Due to wife's not agreeing, specific performance not granted. Damages at law granted—option exercised without success).

14 *Langen & Wind Ltd.* v. *Bell* (1972) 1 All E.R. 296, 300.

15 *Safiya Bi* v. *Abdul Shakoor* (1967) A.M. 375; Halsbury's Laws of England (3rd Ed.) Vol. 36 para. 367 p. 269 quoted; *Radheshyam* v. *Smt. Kirenbala* (1971) A. Cal. 341; *Dave Ramshankar Jivatram* v. *Bai Kailashgauri* (1974) A. Guj. 69, 73.

16 *Shree Ram* v. *Rantanlal*, (1965) A.A. 83; *Rakhma* v. *Laxman*, (1960) A.B. 105; (1959) Bom. 1705; *Fazaldin* v. *Panchanan Das*, (1957) A. Cal. 92.

17 *Safia Bi* v. *Abdul Shakoor Sahib* (1967) A.M. 375.

18 *Dasarath Guyen* v. *Satyanarayan* (1963) A.Cal. 325; Fry: Specific Performance (6th Ed.) p. 223 para. 465 quoted; *Weeding* v. *Weeding* 74 E.R. 812 reld. on; Contra-observations in *Shree Ram* v. *Ratanlal* (1965) A.A. 83, 86.

19 *Dave Ramshankar Jivatram* v. *Bai Kailasgauri* (1974) A.Guj. 69, 72; *R.S. Ghadge* v. *L.S. Ghadge* (1960) A.B. 105.

20 *Dasarath* v. *Satyanarayan*, (1963) A.Cal. 325; 67 C.W.N. 110; *Jamanabai* v. *Vasant Rao*, 43 I.A. 99; (1916) A.P.C. 2.

21 Fry: On Specific Performance (6th Ed.) p. 223; para. 465.

"The contract may be of such a nature as to give to the one party a right to the performance which it does not give to the other—as for instance, where a lessor convenants to renew upon the request of his lessee: (*Chesterman* v. *Mann*)[22] or where the contract is in the nature of an undertaking: (*Palmer* v. *Scott*).[23] But these are merely cases of conditional contracts: and when the condition has been performed, as for instance in the case above stated, by a request to renew, the contract becomes absolute and mutual and capable of enforcement alike by either party: (*Cf. Weeding* v. *Weeding*).[24] And in support of this proposition the authority of the case of (1861) 1 John. and H. 424 is quoted, where a conditional contract had become absolute by the exercise of an option of purchase."

Property was purchased by *A* & *B* of whom *B* was a minor. There was a covenant of reconveyance. A suit for specific performance of the contract for reconveyance was decreed as the two contracts were one transaction and the reconveyance part, formed part of the consideration for the sale.[25]

An agreeement to resell by the guardian of a minor will not be specifically enforced if its performance could be indefinitely delayed.[26] But the Bombay High Court has held that a contract of reconveyance at any time on repayment of sale price is not void for want of mutuality.[27]

The right of repurchase is not a personal privilege and can in the absence of a prohibition, by assigned and is enforceable by the assignee.[28] Similarly it is enforceable by the legal representatives or one of them.[29]

Reconveyance to minor vendors through their guardian.—A contract of reconveyance executed in favour of minors through their mother cannot be refused on the ground of want of mutuality.[30]

Where a suit for specific performance of a contract for reconveyance the plaintiffs were, one, who had just attained majority and the second was a minor, and they sued in *forma pauperis* giving their assets which were wholly insufficient to pay even the Court fee of Rs. 557/ the sale price being Rs. 8,000/-, it was held that readiness and willingness to be proved being real in quality and quantity and its being mandatory under S. 16(c) Specific Relief Act the suit for specific performance must fail.[31]

A father entering into a contract of sale in his individual capacity and not as a karta cannot be compelled to specifically perform even in regard to his own share.[32]

Where the defendant orally agreed to grant the plaintiff an under-lease of a flat on increased rent and the plaintiff had to carry out interior and exterior repairs, on the non performance of which the defendant repudiated the agreement, but the plaintiff had carried out interior repairs, the defendant standing by. The plaintiff brought an action for specific performance of the under lease, and the defendant in her defence raised the plea of mutuality in so far as the defendant had failed to carry out his part of the contract. The Court of Appeal held that the proper time to consider the question of mutuality was not the date of the contract but

22 (1851) 9 Hare 206.
23 (1830) 1 Russ. and M. 391.
24 (1861) 1 John. and H. 424.
25 *Sitarama Rao* v. *Venkatarama* (1956) A.M. 261 (F.B.).
26 *Abdul Sattar* v. *Ismail* (1958) A.MP. 373.
27 *Rakhma Ghadge* v. *Laxman Ghadge* (1960) A.B. 105; *Sarwarjan* v. *Fakharuddin* 39 I.A. 1; 39 Cal. 232 (P.C.) dist.
28 *Amirchand Meghraj* v. *Devi Dayal Bhogaram* (1973) A.MP. 15, 16; *Sheikh Gaffar* v. *Kasturibai* (1961) MP L.J. 1298 reld. on; *Shammugam Pillai* v. *Annalakshmi* (1949) F.C.R. 537; (1950) A.FC. 38 Dist.; *Golam Mohd. Mondal* v. *Abdul Jalil Sepali* (1978) A. Cal. 443.
29 *Sheomurt Lal* v. *Smt. Savitri* (1977) A.A. 322.
30 *Radheshyam Kamiha* v. *Smt. Kiren Bala Devi* (1971) A.Cal. 341; *Suryaprakasam* v. *Gangarajulu* (1956) A.AP. 33 (F.B.);*S. Subramanyam* v. *K. Subba Rao* 75 I.A. 115; (1948) A.PC. 115 reld. on; *Mir Sarwarajan* v. *Fakruddin Mahamed* 16 Cal. W.N. 74 P.C. (no longer good law).
31 *Har Pratap Singh* v. *Satvanarain Misra* (1980) A.A. 52, 58; *International Contractors Ltd.* v. *Prasana Kumar* (1962) A.SC. 77 reld. on.
32 *Khali* v. *Kamala Devi* (1967) A. Or. 100.

the date of the trial. If on that date the Court find that it cannot specifically enforce the unperformed part of the contract by the plaintiff, it would not enforce the defendant to specifically perform her part of the contract. However it was open to the Court to order specific performance of the contract which was not mutual in point of the remedy, if any option to be performed by the plaintiff had already been performed.[33]

Discretion of High Court. — Where the High Court condoned the delay in depositing the balance of purchase price by a stipulated date in default of which the suit would stand dismissed and it took all the circumstances into account the Supreme Court will not, in the absence of the condonation being unjust or perverse, interfere with the discretion in matters under Art. 136 of the Constitution.[34]

Reasonable time presumed in a decree.—A contract subsists despite the decree for its specific performance and if the contract does not specify the time for its performance the law will specify that it is to be performed within a reasonable time. Therefore it will be presumed in the decree that performance will be in reasonable time — (See S. 46 contract Act).[35]

Specific Performance — Effect of order for Specific Performance.—Where an order for specific performance is a full order with consequential directions it supersedes the conditions in the provisions of the contract.[36]

Courts control after decree. — The Court passing a decree for specific performances retains control over the matter despite the passing of the decree. It is open to it when moved that the party moved against has positively refused to complete the contract, to order rescission of the decree. It is submitted that in case of the inability of the judgment-debtor to comply with the decree the Court can substitute a decree for damages.[37] It has been so held by the House of Lords in England.[38]

Specific Performance.—The House of Lords, in a case where an order of specific performance in favour of the vendor became impossible of enforcement because of the enforcement of the mortgage by the mortgagee, held that by seeking an order for specific performance the vendors merely elected a course which might or might not lead to the implementation of the contract. He was simply seeking thereby the continuance of the contract under the court's control. If the order for specific performance became impossible of enforcement, he could ask the Court to discharge the order and terminate the contract. On such termination he could be awarded damages for breach of contract at Common Law since the contract was not rescinded *ab initio* but remained in existence till its termination by the Court. The Court, however, would not make such order if it would, in the circumstances, be unjust to the other party. But on the facts of the case, the vendors were held entitled to discharge of the order of specific performance, the termination of the contract and damages at Common Law for breach of contract. The measure of damages was not affected.[39]

Contract violation of Constitution.—No right flows from a contract violative of the J.K. Constitution (Art. 122) nor is such a contract capable of creating any liability. Hence action for specific performance or damages will not lie under such a contract. However sec. 65 and 70 of the Contract Act do not permit the retention of any benefit or advantage under the Contract.[40]

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33 *Price* v. *Strange* (1977) 3 All E.R. 371, 383.
34 *Sandhya Rani Sarkar* v. *Sudha Rani Devi* (1978) A.SC. 537; (1978) 2 S.C.C. 116.
35 *Hungerfood Investment Trust Ltd.* v. *Haridas Mundra* (1972) A.SC. 1826, 1833.
36 *Saudagar Singh* v. *Nazeer* (1978) 3 All E.R. 817, 822.
37 *Hungerfood Investment Trust Ltd.* v. *Haridas Mundra* (1972) A.SC. 1826, 1833.
38 *Johnson* v. *Agnew* (1979) 1 All E.R. 683 (M.L.) infra.
39 *Johnson* v. *Agnew* (1979) 1 All E.R. 883, 890, 894, 895, 897, (H.L.) (1978) 3 All E.R. 314 varied; Dictum of Lord Porter in *Heyman* v. *Darwins Ltd* (1942) 1 All E.R. 337, 360, 361; and of Greene MR in *Austress of East Nam Ltd.* v. *Macey* (1941) Ch. 338, 341 applied; *McKenna* v. *Richey* (1950) V.L.R. 360; *Holland* v. *Wiltshire* (1954) 90 C.L.R. 409, 416 (Dixon C.J.) adopted; *Barber* v. *Wolfe* (1945) 1 All E.R. 399; *Capital & Suburban Properties Ltd.* v. *Swycher* (1976) 1 All E.R. 881 overruled; *Horsler* v. *Zorro* (1975) 1 All E.R. 584 partly overruled; *Higgin* v. *Minton* (1977) 2 All E.R. 647, 649
40 *M/s. Malik Abdul Ahad Shah* v. *State of J. & K.* (1982) A. J&K. 16.

Power to award compensation in certain cases.

21. [19] (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint the court shall, at any stage at the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

This section corresponds with s. 19 of the repealed Act.

Frame of the section.—Having regard to sub-sec. (4), one would have expected the use of the word "damages" instead of "compensation". As the learned authors pointed out with regard to the wording of s. 19 of the former Act that the particularity of the language is due to the fact that the jurisdiction to award damages was in the English Court of Chancery a statutory novelty dating from about the middle of the nineteenth century. There is no question of limitations on the jurisdiction in India such as those which troubled courts of equity in England, and the explanation makes it clear that English precedents of that kind are wholly inapplicable.

The operation of sub-sec. (2) is illustrated by *Kalyanpur Lime Works* v. *State of Bihar*,[41] where the Supreme Court refused specific performance in a suit by a lessee for specific performance of a lease as it had only a few months to run, but awarded the lessee compensation for the seven years he had been denied possession.

S. 19 [s. 21 of 1963 Act] applies to a case where the Court does not in its discretion enforce a contract. It has no application to a contract which has been materially altered and the Court holds that there is no enforceable contract under s. 62 of the Contract Act.[42] Nor is the guilty party entitled to recover the advance paid at the time of making the contract.[42] Where in an agreement for sale, the sale requires the permission of a third party and that party is not amendable to the jurisdiction of the Court and that permission is refused the aggrieved party can only claim damages for breach of contract.[43]

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41 1954 A.SC. 165.

42 *Kameswar Rao* v. *Hemalathamma Rao* (1959) A.AP. 596.

43 *Golab Ray* v. *Murlidhar Modi* (1964) A. Or. 176; *Chandanee Vidyavati* v. *C.L. Katial* (1964) A.SC. 978; (1964) 2 S.C.R. 495 refd. to.

A decree for compensation under s. 19 (s. 21 of 1963) can be passed both against the vendor and the third party vendee purchasing property with notice of the previous contract of sale. This principle would apply to the State and its lessee for quarrying limestone who takes a lease with knowledge of a previous contract of lease in favour of the plaintiff. The compensation would be on the basis of the period the second lessee was in possession; but under s. 19 of 1877 Act it was not required to be in accordance with s. 73 of the Contract Act though the principles therein laid down are followed. Now s. 73 has been made applicable.[44] Sections 19 and 22 of 1877 are independent of each other. An alternative relief under section 19 does not debar a plaintiff from asking for specific relief. *Devendra Basappa* v. *Smti Sonubai*, (1971) A. My. 217.

Sub-sec. (5) makes it clear that compensation must be claimed in the suit, but if not, the plaintiff has the right to amend the plaint at any stage of the proceeding. Under O. 2, r. 2, a subsequent suit for compensation will not lie. It is to be noted that since the Court is to be guided by the principles specified in s. 73 of the Contract Act, a proper enquiry as to damages must be directed.

Sub-sec. (3).—The illustration to the corresponding provision in the former Act was:

A contracts with *B* to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. *A* fails to perform his part of the contract, and *B* brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to *B* compensation for any loss which he has sustained by *A*'s refusal.

Damages—Difference between S. 21 Sp.R.A. and S. 73.—There is a difference between a case of damages for breach of contract under S. 73 Contract Act and damages in lieu of specific performance under S. 21 Specific Relief Act. Where the Court in its discretion awards damages in lieu of or in substitution of specific performance, the court must be taken to be of the opinion that the plaintiff, though entitled to specific performance in the special circumstances, the relief by way of damages would be adequate substitution. But if the plaintiff abandons his claim of specific performance his claim for damages in lieu of specific performance would fail. The cause of action in a case of damages for breach under S. 73 Contract Act is different. Therefore where the plaintiff entered into a contract for lease of the premises after certain constructions were effected and the construction was not effected by the specified date. On the defendant's failure the plaintiff filed a suit for specific performance but in the trial court refused to take the lease, when offered, and asked for damages the suit failed as he had abandoned his claim for specific performance.[45]

Sale free of encumbrances — Damages. — The defendant agreed to sell a house to plaintiff free of mortgages which exceeded the purchase price. On defendant failing to carry out the contract the plaintiff brought an action for specific performance, which was granted with an addition of damages but subject to the mortgages. The damages awarded were the difference between the mortgage amounts and the price of the house as on the date of the conveyance and not on the date of the breach. Thus, the amount of damages was the increased value abated by the cost of redeeming the mortgages, the value to be taken as on the date of conveyance.[46]

Damages — vacant possession agreed by vendor not possible. — The husband who was living with his wife agreed to sell his house to the plaintiff. In spite of his endeavours the wife who had right of occupation of the matrimonial house refused to agree to give vacant possession. The plaintiff's action for specific performance with vacant possession failed, as to get vacant

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44 *Dalmia Jain & Co.* v. *Kalyanpur Lime Works*, (1963) A.P. 298; *Dwarkaprasad Poddar* v. *Kathleen Burns*, (1955) Nag. 338; (1955) A.N. 38; *Adikesvan Naidu* v. *Gurunatha Chetti*, 40 Mad. 338; (1918) A.M. 1315.

45 *Gopi Nath Saha* v. *Bahadurmal Duli Chand* (1979) A.Cal. 203, 204, 208; *Rajendra Kumar Saha* v. *Saraswati Press Ltd.* (1952) Cal. 58 disting.; *Lavery* v. *Pursell* (1888) 39 Ch. D. 508 (per Chitty J.); *Ardeshir Mama* v. *Flora Sasson* 55 I.A. 360; (1928) A.P.C. 208, refd. to; *Maniklal Seth* v. *P.K. Chaudhary* (1976) A. Cal. 115, 119.

46 *Grant* v. *Dawkins* (1973) 3 All E.R. 897, 899; *Wroth* v. *Tyler* (1973) 1 All E.R. 897 applied.

possession the husband would have had to resort to litigation which in the circumstances would have been most uncertain in its result, in view of the statutory requirements of the law, nor would the court grant specific performance with the wife's right of occupation as that would lead to splitting the family which was undesirable. Further the plaintiff would not be precluded by the rule of nominal damages where the defendant is unable to make a good title for no default on his part. Damages would be assessed as if the contract had been performed even if it was subsequent to the breach.[47]

Damages for non-performances.—The plaintiff took the defendant as a junior partner in his medical practice and also sold property comprising of a house and a surgery to him and his wife as tenants in common with an option to repurchase the property at a price to be assessed in case the partnership failed to work, which did happen, and he exercised his option. But the defendant failed to carry out his obligation on the ground of his wife not agreeing. The plaintiff's suit for specific performance failed but there were certain subsidiary orders. The plaintiff took no further proceedings but after about two years claimed damages for breach of contract. The trial Court only awarded damages consisting of cost of investigation of title and other expenses. On appeal it was held that in the absence of any evidence that the defendant had endeavoured to persuade his wife to agree to the sale, the defendant was guilty of bad faith which entitled the plaintiff to substantial damages to be assessed as on the date of the judgment. But as the plaintiff had delayed his claim the court fixed a date a year earlier.[48]

Sub-sec. (4): Explanation.—The explanation involves a departure from English law as enacted in Lord Cairns' Act,[49] under which a Court of Equity had power to award damages only in addition to or in substitution for specific performance. A bench of the Nagpur High Court has held that even in India damages cannot be awarded where specific performance is impossible.[50] The plain words of the section, however, leave no doubt that compensation can be awarded even where specific performance is impossible, and in several cases such compensation has been awarded.[51] This does not mean that a plaintiff is at liberty to proceed with the claim for damages after making specific performance impossible by his own act since the commencement of the suit.[52] Under Indian procedure a plaintiff who claims specific performance or damages in the alternative may elect between the two remedies at any time down to the hearing if he is not otherwise in default,[53] but he cannot do so in appeal.[54]

Damages not claimed.—According to Rajasthan High Court where a relief of Specific performance of a contract is not possible or desirable and it is just and proper to award compensation the Court will award it even if it is not pleaded.[55]

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47 *Wroth* v. *Tyler* (1973) 1 All E.R. 897, 913, 917, 923; applied in *Grant* v. *Dawkins* (1973) 3 All E.R. 897.

48 *Malhotra* v. *Chaudhary* (1979) 1 All E.R. 186, 199, (C.A.); *Bain* v. *Fotheringill* (1874-80) All E.R. Rep. 83 disting; *Dag* v, *Singleton* (1894) 2 Ch. 320; *Keen* v. *Mear* (1920) All E.R. Rep. 147; *Dictum of Salter J. in Braybrooks* v. *Whaley* (1919) 1 K.B. at p. 441 applied.

49 1858, Chancery Amendment Act, 21 & 22 Vict. c. 27.

50 *Mohammad Abdul Jabbar* v. *Lalmia* (1947) Nag. 328, 1947 A.N. 254. The Court misunderstands the Privy Council judgment in 52 Bom. 597; citing a passage at p. 621, where Lord Blanesburgh is quoting English law, without reference to the passage at p. 623, where his Lordship observes that the law in India is different.

51 *Salim Beg* v. *Krishna Ballabh* 1954 A.MB. 76; *Rajindra Nath* v. *Saraswati Press* 1952 A. Cal. 78; *Kisanlal* v. *Namdeo* (1944) Nag. 90.

52 *Hipgrave* v. *Case* (1885) 28 Ch.D. 356; the details depend on English procedure and practice, but the principle is instructive; see comments in the case cited in the following note. See also *Ardeshir Mama* v. *Flora Sassoon* (1928) 55 I.A. 360; 52 Bom. 597; 111 I.C. 413; 1928 A.P.C. 208; *Gokul Chandra* v. *Haji Mohammad* (1938) 1 Cal. 563; 176 I.C. 832; 1938 A.Cal. 136; *Rama Krishnaya* v. *Sreeramulu* 1939 A.M. 547; (1939) 1 M.L.J. 436.

53 *Karsondas Kalidas* v. *Chhotalal Motichand* (1923) 48 Bom. 259; 77 I.C. 275; 1924 A. Bom. 119. Interest on a deposit should be granted from the date from which the plaintiff has elected to claim damages: *Mt. Jaggo Bai* v. *Hari Har Prasad Singh* (1947) 74 I.A. 213, 1947 A.P.C. 173. See also *Hari Krishna Agarwala* v. *Gupta* 1949 A.A. 440

54 *Somasundaram* v. *Chidambaram* 1951 A.M. 282.

55 *Narain Singh* v. *Dalip Singh* (1972) 22 Raj. 1064, 1072

The illustrations of the Explanation are from the former Act:

of the Explanation—

A, a purchaser, sues *B*, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award *A* compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sued for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award *A* compensation for the non-performance.[56]

Where the option under the contract is not exercised within the specified period it would entitle the other party to damages for breach of contract.[57] And the measure of damages is as stated in *Coller* v. *General Petroleum Ltd., Canada.*[58]

Power to grant relief for possession, partitions, refund of earnest money, etc.

22. [New] (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or[59] [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

This section is new. The notes or clauses explain that sub-sec. (1) (a) introduces a rule now settled by judicial decisions, that in order to avoid a multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking the right to possession accrues only when specific performance is decreed. In some cases it has been held that the Court may, in a suit for specific performance, direct a refund of earnest money while refusing specific performance if the facts disclose a case for such a refund. Sub-sec. (2) gives effect to this and also permits the plaintiff to claim any other relief. Sub-sec. (3), however, provides that the power of the Court to grant relief under cl. (b) is without prejudice to its power to award compensation under s. 21.

Decree silent on possession.—In execution of a decree for specific performance of a contract for sale which decree is silent on the question of delivery of possession as none was asked for the court, in order to complete the sale, ordered by the decree delivery of possession in order to give complete relief to the decree-holder. This is in consonance with S. 55(1)(f) Trans-

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56 *Ferguson* v. *Wilson* (1866) L.R. 2 Ch. 77 shows the imperfection of the old English Chancery jurisdiction even after amendment by statute, which gave only a strictly alternative power to award damages.

57 Bannerji: Law of Specific Performance T.L.L. (1965 Ed.) p. 87; Quoted in *Safia Bi* v. *Abdul Shakoor* (1967) A.M. 375, 379.

58 (1951) S.C.R. 154, 160 (Canada) refd. to in *Safiya Bi* v. *Shukoor Sahib* (1967) A.M. 375, 379.

59 Subs. by the Repealing and Amending Act, 1964 (52 of 1964) s. 3 and Second Schedule for "made to."

fer of Property Act. Relief of possession is inherent in relief of Specific performance. But see S. 22(2) Specific Relief Act 1963 which requires a claim for possession to be specifically made. There seems to be a conflict between the two provisions of Specific Relief Act and Transfer of Property Act.[60]

Where in a plaint relief of possession was not prayed for in an action for specific performance of a contract for sale, he can ask for amendment of the plaint to include such relief.[61]

Document of conveyance by Court void if decree reversed.—Calcutta High Court has held that a decree for specific performance includes the relief of getting possession whether it is prayed for or not or whether it is in the judgment or decree or not. The Court can in execution of the decree give possession and if that decree is set aside the Court can restitute and restore possession to the judgment-debtor even if the decree did not mention grant of possession. A document of conveyance executed in pursuance of a decree becomes void on the decree being set aside, and cannot be set up as a bar to restoration of possession and it does not need to be cancelled. But see S. 22(2).[62]

Effect of liquidated damages in contract mentioned.—Sections 20 and 23 of 1963 Act contain a comprehensive statement of the principles on which even before the Act of 1963 the term specifying the payment of money in case of breach of contract had to be construed.

Liquidation of damages not a bar to specific performance.

23. [20] (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

This section corresponds with s. 20 of the repealed Act. S. 20 did not touch the case of an express contract giving an option to the promisor. It is now provided that if on the true construction it appears that such is the contract, it will be enforced according to its terms.

The following is the illustration to s. 20 of the former Act:

A contracts to grant *B* an under-lease of property held by *A* under *C*, and that he will apply to *C* for a license necessary to the validity of the under-lease, and that, if the license is not procured, *A* will pay *B* Rs. 10,000. *A* refuses to apply for the license and offers to pay *B* the Rs. 10,000. *B* is nevertheless entitled to have the contract specially enforced if *C* consents to give the license.

[*Long* v. *Bowrin* (1864) 33 Beav. 585; 140 R.R. 272.]

For cases falling under this section see footnote.[63]

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60 *Gyan* v. *Smt. Risalo* (1977) A.A. 156; *Arjun Singh* v. *Sahu Maharaj Ltd. Nerami* (1950) A.B. 415; *Balmukand* v. *Veerchand* (1954) A.A. 643 folld. See also *Keshab Chandra Dutta* v. *Ballyyung Estates (P) Ltd.* 77 Cal. W.N. 507, 511. Also *Mohindar Nath Gupta* v. *Motiram Rattanchand* (1975) A.D. 156 (Decree passed when old Act repealed).

61 *Servicemens Enterprise Ltd.* v. *Saney Singh* (1976) A.D. 56 (1975) 2 Del. 539.

62 *Keshab Chandra Dutta* v. *Ballygunge Estates (P) Ltd.* 77 Cal. W.N. 507, 511; *Muppadalhi* v. *Krishnaswamv* (1960) A.M. 1 reld. on; *Atal Bihari* v. *Barada* (1931) A.P. 179 reld on.

63 *Sadiq Hassain* v. *Anup Singh;* (1923) 4 Lah. 327; 76 I.C. 91; 1924 A.L. 151; *Sobharam* v. *Totaram* 1952 A.N. 244; *Kandasami Chettiar* v. *Shanmugha Thevar* 1949 A.M. 362; *Rajammal* v. *Gopalaswami* 1951 A.M. 767. See also *Bissessar Das Daga* v. *Vas* (1928) 55 Cal. 238, 1928 A.P.C. 27.

Injunctions.—The principle of this section applies also to injunctions. Thus if a case be a proper one for an injunction, the fact that the contract contains a provision for a penalty for its non-performance is no bar to an award of relief by way of injunction.[64]

Even, if a sum is named as penalty for non-performance of a contract to sell, the contract has to be specifically enforced where such sum as penalty is only *in terrorem*, i.e. to secure performance of the contracts and s. 20 (s. 23 of the new Act) applies.[65] The text in such a case is whether the defendant is given an alternate choice to perform the contract or pay the penalty.[66] Whether the specification of a sum of money as a penalty in cases of breach of contract of sale is annexed to secure the performance of the contract of sale or is a contract stipulating the doing of one of the two acts, i.e. sale or payment of penalty has to be determined by the Court on the language of the contract. The latter case is one of alternate contract and s. 20 (S. 23 of 1963) would not apply.[67]

The Supreme Court has held that S. 20 of the 1963 Act shows that the jurisdiction of the Court is discretionary in decreeing the relief of specific performance and must be exercised on sound judicial principles capable of being corrected by an appeal Courts and cannot be curtailed by merely providing for liquidated damages in case of breach, which is made perfectly clear by S. 23 of the 1963 Act; so that the Court has to determine in each case whether or not on the facts and circumstances proved specific performance should be granted. The parties providing liquidated damages for breach does not affect the strong presumption of the use of the words "unless and until the contrary is proved" in S. 10(b) Explanation. Thus the fact that the parties have chosen to provide for a named sum as damages is no alternative to the enforcement of a contract if the facts and circumstances prove that specific performance is the appropriate relief.[68]

Bar of suit for compensation for breach after dismissal of suit for specific performance.

24. [29] The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

This section corresponds with s. 29 of the repealed Act with verbal alterations.

S. 21 makes it compulsory for a plaintiff to claim compensation in the suit for specific performance and this section in barring a separate suit for compensation appears to be redundant. The latter part of the section has been incorporated because of s. 22, which enables a plaintiff to ask for possession or partition and separate possession, as well as refund of earnest money or deposit. These reliefs may be granted in the suit for specific performance, if asked for, but if not asked for a separate suit will lie. It has been held that s. 29 of the former Act did not bar a subsequent suit for the return of earnest money[69] or the price paid.[70]

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64 *Madras Ry. Co.* v. *Rust* (1891) 14 Mad. 18, 22; *Kanhaya Lal* v. *Devi Das* (1931) 12 Lah. 328; 131 I.C. 289; 1931 A.L. 227.

65 *Narayan* v. *Amrit Haribhau* (1957) A.B. 241.

66 *Jaswant Singh* v. *Issar Singh* (1959) A. Raj. 88.

67 *Narayan Nagarao* v. *Amrit Haribhan* 1957 A.B. 241; *Jaswant Singh* v. *Issar Singh* (1959) A. Raj. 88; *Achhru Ram* v. *Hari Singh* (1960) A. Pui. 216.

68 *M.L. Devendra Singh* v. *Syed Khaja* (1973) A.S.C. 2457, 2461 (1974) 1 S.C.R. 312; Fry: Specific Performance (6th Ed.) p. 65 refd. to.

69 *Parangodam* v. *Perumtoduka* (1940) 27 Mad. 380; *Munni Babu* v. *Kunwar Kanta Singh* (1923) 45 All. 378; 1923 A.A. 321.

70 *Govind Appaji* v. *Miraji Rama* (1944) Nag. 718, 1945 A.N. 67.

ENFORCEMENT OF AWARDS AND DIRECTIONS TO EXECUTE SETTLEMENTS

Application of preceding sections to certain awards and testamentary directions to execute settlements.

25. [30] The provisions of this Chapter as to contracts shall apply to awards to which the Arbitration Act, 1940, does not apply and to directions in a will or codicil to execute a particular settlement.

This section corresponds with s. 30 of the repealed Act, except that it does not apply to awards under the Arbitration Act, 1940, under which an award can be enforced as a decree. See s. 43 below. The awards referred to in the section are statutory awards, but references to arbitration under a law other than the Arbitration Act, 1940, cannot be the subject-matter for a suit for specific performance, although they will bar suits under s. 14(2) of this Act.

Under s. 14(2) of this Act no suit to specifically enforce a contract to refer to arbitration present or future differences is maintainable and under s. 32 of the Arbitration Act of 1940 as amended by s. 43 of this Act (*infra*) an arbitration agreement or an award cannot be enforced except as provided in that Act.[71]

Any foreign award made under the Arbitration (Protocol and Convention) Act of 1937 is under s. 4(1) of that Act enforceable in India as if it were an award made on a matter referred to arbitration in India and the provisions (s. 6) as to judgment and decree following upon the filing of the award are analogous to that under s. 17 of the Arbitration Act of 1940.[72]

It is submitted that an award under the Arbitration (Protocol and Convention) Act of 1937 is also not enforceable by a suit for specific performance.

Testamentary directions to execute settlements.—According to English law testamentary directions to execute a settlement operate by way of a trust and are not considered under the head of specific performance, though the Court does, in the course of administering estates and otherwise, direct them to be specifically carried out. But in one sense all equitable jurisdiction rests on the power of issuing specific orders.

Limitation.—Under the Limitation Act of 1908 there was difference of opinion whether a suit to enforce the terms of an award was a suit under Art. 113 of that Act which provided a period of 3 years as the suit was regarded as a suit for the specific performance of a contract; or it was a suit to which under the residuary article, Art. 120, a period of 6 years was inapplicable as the Court enforced the award not the contract on which the original claim was founded, nor yet the contract of submission to arbitration.[73] The learned authors were in favour of the latter view and that was in accordance with the practice observed by the Court of Chancery.[74]

But that is now academic as under the Limitation Act of 1963 (36 of 1963) both for the specific performance of the contract Art. 54 and cases falling under the residuary article, Art. 113, the period of limitation prescribed is 3 years.

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71 See cases under S. 14(2) *supra*.

72 S. 4(1). A foreign award shall, subject to the provisions of this Act, be enforceable in (India) as if it were an award made on a matter referred to arbitration in (India).

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S.6 (1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

73 See the cases collected in *Kuldip Dube* v. *Mahaul Dube* (1912) 34 All. 43; 11 I.C. 705. See Also *Fardunji* v. *Jamsedji* (1904) 28 Bom. 1.

74 *Nickels* v. *Hancock* (1855) De G.M. & G. 300, 314; 109 R.R. 130, *per* Knight Bruce L.J.; *Nickels* v *Hancock*, *supra per* Turner L.J.

CHAPTER III

RECTIFICATION OF INSTRUMENTS

The principles on which the Courts act in England are in themselves quite simple: the difficulties when they occur, are of evidence or construction. In a proper case the Court will amend the language of an instrument for the purpose of making it accord with the true intention of the parties, having ascertained what that intention was and also that the words as they stand fail to express it. Rectification cannot be adjudged unless the Court is satisfied on both these points.

There is no need, it should be observed, to invoke this jurisdiction in case of such verbal slips or omissions as are obvious on the face of the writing and can be corrected by the context alone. The remedy of these minor blunders is within the Court's ordinary function of construing the expressions used. Even a missing clause can be supplied in an instrument of a well known form if the sense clearly requires it.[75]

Where the instrument finally executed is in conformity with a previous written agreement of the parties, but there was error in the expression of that agreement, it is now settled in England that they can both be rectified in the same suit.[76] The earlier doctrine that the final instrument cannot be rectified alone is therefore reduced to a warning against careless pleading; the reason for it is that the real error was in the preliminary agreement. In an action to enforce an award, a claim for rectification of the agreement containing the arbitration clause was allowed, as rectification of the agreement was outside the jurisdiction of the arbitrator: *Crane* v. *Hegeman-Harris & Co.*[77]

As there must be clear and satisfactory proof both of the real common intention and the departure from it in the document which the plaintiff seeks to rectify,[78] it has been the usage of English courts of equity not to grant rectification of a written instrument on oral evidence alone when the alleged mistake is positively denied by the defendant. On the whole this appears to be a habit of judicial prudence rather than a positive rule of evidence.[79] This view is confirmed by *Clark* v. *Barnes*,[80] where the question was whether on a sale of Redacre, the purchaser was entitled to a right of way over Brownacre. The two tenements had formerly been in the common ownership of the vendor, who had used the way to obtain access to the highway from Redacre. The conveyance was silent on the point, but the right, being a reputed easement, passed to the purchaser under the 'general words' section of the Law of Property Act, 1925.[81] The evidence of the vendor was that the parties had considered the matter, and agreed that the purchaser should have no such right, while the purchaser denied that the subject had ever been discussed. Luxmoore J. accepted the version of the vendor, and ordered rectification of the conveyance on the ground of common mistake to exclude the general words, so that the purchaser should have no such easement. This seems to have been largely a matter of oath against oath, but it must be conceded that the old cases requiring corroboration were not cited, nor does the point seem to have been argued.

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75 *See e.g. Redfern* v. *Bryning* (1877) 6 Ch.D. 133; *Burchell* v. *Clark* (1876) 2 C.P.D. 88 (reference to counterpart); *Balaprasad Asaram* v. *Asmabi* 1954 A.N. 328.

76 *Craddock* v. *Hunt* [1923] 2 Ch. 136, C.A., approved by the Judicial Committee in *United States* v. *Motor Trucks* [1924] A.C. 196.

77 (1939) 4 All E.R. 68, C.A.

78 *Fowler* v. *Fowler* (1859) 4 De G. & J. 250, 264, 124 R.R. 234. The remarks of Lord Chelmsford L.C., and those of Lord Thurlow L.C., on which they are based, are frequently cited with approval by English and Indian Courts. See e.g. *George Cohen Ltd.* v. *Docks & Inland Waterways Executive* (1951) 84 Ll. L.R. 97, 114; *Banks* v. *Ripley* (1940) Ch. 719, 724; *Fredensen* v. *Rothschild* (1941) 1 All E.R. 430, 433; *Madhavji* v. *Ramnath (1906) 30 Bom. 457, 464; Rajaram* v. *Manik* 1952 A.N. 90, 92.

79 Authorities collected in Pollock on Contract, 13th Ed., pp. 419 *sqq*. See also Kerr on Fraud and Mistake, 7th edn., 558, note (n)

80 (1929) 2 Ch. 368.

81 s. 62, 15 Geo. V. Ch. 20.

It is a sufficient reason for rectifying an instrument that it is so unskilfully framed as to raise a serious doubt whether it expresses the true intention; the Court, being satisfied that the expression as it stands is obscure and may be misleading, may proceed to reform it so as to make it plain, without undertaking to decide how it would be construed if the question of rectification were not raised.[82]

In most cases of rectification the proximate origin of the mistake lies in the carelessness or want of skill of the draftsman employed; but if, exceptionally, one of the parties, by negligence, or to conceal some fact he does not wish to disclose (not to speak of downright fraud), has caused the instrument to be so framed as to defeat the intention, known to himself, of the other party or parties, the party so in fault cannot be heard to say that his own intention was different. Cases of this kind are likely to be on the verge of fraud or undue influence.[83]

When instrument may be rectified.

26. [31 & 34] (1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their real intention, then—

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

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82 *Walker* v. *Armstrong* (1856) 8 D.M. & G. 531; 114 R.R. 234, a case of gross professional incompetence on the draftsman's part. The judgment of Knight Bruce L.J. is no less amusing than instructive. Followed, *Walton's Settlement* [1922] 2 Ch. 509

83 *Lovesy* v. *Smith* (1880) 15 Ch. D. 655; *Whiteley* v. *Delaney* [1913] A.C. 132, 144, 150, where the H.L. applied and perhaps extended the doctrine in peculiar circumstances : see L.Q.R. xxx 135. We may have gone beyond the text of the authorities in definitely stating the rule as founded on estoppel, which we think the best explanation.

This section corresponds with ss. 31 and 34 and incorporates additional matter in order to obviate a conflict of decisions.

Illustrations to s. 31 of the former Act were:

(1) *A* intending to sell to *B* his house and one of three godowns adjacent to it, executes a conveyance prepared by *B* in which, through *B*'s fraud, all three godowns are included. Of the two godowns which were fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified so as to exclude from it the godown given to *C*; but it cannot be rectified so as to affect *D*'s lease.

(2) By a marriage settlement, *A*, the father of *B*, the intended wife, covenants with *C*, the intended husband, to pay to *C*, his executors, administrators and assigns, during *A*'s life, an annuity of Rs. 5,000. *C* dies insolvent and the official assignee claims the annuity from *A*. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for *B* and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

[The material question is what the parties intended to express in the settlement, not what they "always intended."]

Rectification. — To establish a right to rectification of a document it is necessary to show that there has been either fraud or common mistake;[84] and rectification will not be granted unless it is distinctly claimed.[85] This does not affect the jurisdiction of the Court to correct manifest or undisputed errors without any formal rectification.[86] The mistake of one party to a contract is not a ground for rectification.[87] Oral evidence is admissible to prove either fraud or mistake.[88] Under the terms of the section it is necessary that the Court should find it clearly proved that there was fraud or common mistake. This requirement has, of course, been long established by English decisions.[89] See notes "Rectification: Introductory," at the beginning of Chap. III, above.

"Mututal" mistake. — The mistake must be common to both parties, and it is essential that the parties should have had precisely the same intention on the point on which the document is inaccurate.

In *Wallington* v. *Townsend*,[90] *V*, the owner of two adjoining bungalows, conveyed the East bungalow to *P*, retaining the West. The plan accompanying the conveyance showed a straight line boundary, but in fact to the east of the line lay the bathroom and other domestic offices of the West bungalow. *V*'s claim for rectification failed, for while *V* did not intend to sell this disputed strip *P did* intend to buy it.

Suit lies for rectification in a sale deed on ground of mutual mistake in description of property. *Natarajan Asari* v. *Pichamuthu*, (1972) A.M. 192.

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84 *Amanat Bibi* v. *Luchman Pershad* (1887) 14 I.A. 18; 14 Cal. 308 (elementary law in England).

85 *Blay* v. *Pollard* [1930] 1 K.B. 628.

86 In *Ladha Singh* v. *Munshiram Agarwalla* (1927) 31 C.W.N. 747; 104 I.C. 559; 1927 A. Cal. 605, an undefended suit, the plaintiff sued on a promissory note in the defendant's handwriting, wherein the rate of interest was expressed to be one per cent, per annum, by inadvertence for one per cent, per mensem, as the plaintiff alleged and the Court believed; he claimed interest at the higher rate, but did not pray for rectification. Costello J., with much doubt whether the defendant had made an honest mistake at all, and some doubt whether the suit ought not to have been under the present section, gave judgment for the plaintiff for the full amount: clearly a just decision, even if a point was strained to reach it. *Quaere*, was it not open to the Court to take judicial notice of the current rate of interest and treat the error as manifest ?

87 *Haji Abdul Rahman* v. *The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561.

88 Evidence Act, 1872 s. 92. proviso (1). See *Maung Pe Gyi* v. *Hakim Ally* (1923) 2 Ran. 113; 80 I.C. 759; 1924 A.R. 235 (filling up an amount left blank); *Siddique & Co.* v. *Uttomal & Assudmal Co.* 1946 A.P.C. 42, 223 I.C. 47; *Rantneswar* v. *Mongoli* A. Asm. 70. *Santi Rajan Das Gupta* v. *Dasuram Mirzamal* (1957) A. Asm. 49.

89 *Fowler* v. *F.* (1859) 4 De G. & J. 250, 264 (*supra*). Rectification has however been ordered simply on the evidence afforded by perusal of the document itself: *Banks* v. *Ripley* (1940) 1 Ch. 719.

90 (1939) 2 All E.R. 225. *Natarajan Asari* v. *Pichamuthu*, (1972) A.M. 192 (Mutual mistake in a sale deed in description of property)

It was at one time considered that to obtain rectification the plaintiff had "to show that there was an actual concluded contract antecedent to the instrument sought to be rectified." This dictum in *Mackenzie* v. *Coulson*[91] was follwed in certain Indian cases.[92] The English view now is that this is unnecessary, seeing that a previously existing binding document is not usually available, because negotiation has not crystallised into contract until the moment of executing the very contract it is sought to rectify: *Shipley U.D.C.* v. *Bradford Corporation.*[93] This was a case where the two parties, being corporations, could not be legally bound until a document under seal had been executed, but nevertheless rectification was ordered. This case was followed in *Crane* v. *Hegeman-Harris Co. Inc.*,[94] where negotiation had not crystallised in its entirety, and all that Simonds J., as he then was, required was a common continuing intention in regard to the particular provision or aspect of the agreement which was the basis of the claim for rectification. In *Rose* v. *Pim*[95] Denning L.J. placed a qualification on this doctrine of a common continuing intention, and held that this was insufficient unless it had found expression in outward agreement. His Lordship was dealing with a case where the parties had agreed to buy and sell horsebeans, each being under the mistaken impression that horsebeans were feveroles. The Court of Appeal held that the contract was not void for common mistake, and that rectification could not be granted as both the oral and written contracts spoke of horsebeans, whatever the parties may have intended in their inner minds.

If a mistake creeps into a decree due to mutual mistake of parties to a suit, a suit will lie to set it aside. It is on a similar footing as a compromise decree.[96] An acknowledgement under s. 19 of the Limitation Act is an instrument and falls within s. 31 (s. 26 of 1963 Act) and if the conditions of s. 31 (s. 26 of 1963) are complied with the acknowledgment can be rectified. Therefore a *mabalakbandi* which fails to record the arrangement accurately would be rectified. [See s. 2 (14) of Stamp Act.][97]

Once a person executes a settlement deed he has no right to revoke that deed except under certain conditions or to sell the property covered by the sale deed because he has no title to the property. It is not necessary for the settlee to ask for cancellation of the sale deed.[98]

Counterclaim for rectification.— Though this and the subsequent sections of this chapter refer only to suits for rectification, a defendant may, counterclaim for rectification where the rules by which the Court is governed permit of such a counterclaim where the rules of a Court do not permit it, as in the case of Mufassal Courts, those Courts as Courts guided by the principles of justice, equity and good conscience can give effect as a plea to those facts which in a suit brought for that purpose would entitle a plaintiff to rectification. It has been so held by the High Court of Bombay.[99] The Calcutta High Court had taken a different view in an earlier case, but has since followed the Bombay ruling,[2] which, it is submitted, is clearly correct.

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91 Per James V.C. (1869) L.R. 8 Eq. 368, 375.

92 *Haji Abdul Rahman* v. *The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561, 565-566, *per* Farran J.; *Dagdu* v. *Bhana* (1904) 28 Bom. 420, 425-426, *per* Jenkins C.J.

93 (1936) Ch. 375, 395, *per* Clauson J. Followed in *Monaghan C.C.* v. *Vaughan* (1948) 1 Ir. R. 306; *Federazione Italiana* v. *Federal Commerce Co. Ltd.* (1949) 82 Ll. L.R. 717, 726; *Whiteside* v. *W.* (1949) Ch. 448, 454.

94 (1939) 1All E.R. 662, 664-665.

95 (1953) 2 Q.B. 450, 462.

96 *Kistoormall* v. *Sattar Mohammad* (1958) A. Raj. 276.

97 *Santi Ranjan Das Gupta* v. *Dasuram Mirzamal* (1957) A. Asm. 49; *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy* 2 CW.N. 260; (a case of mutual mistake); and *Asitulla* v. *Sadatulla* 28 C.L.J. 197 reld. on.

98 *Tirupathi Pillai* v. *Ganthimathi Ammal* (1966) 2 M.L.J. 325; *Raja of Ramnad* v. *Arunachalam Chettiar* 24 M.L.J. 592; & *Muppudathi* v. *Krishnaswami Pillai* (1959) 2 M.L.J. 225 (F.B.) 1959 Mad. 929; (1960) A.M. 1 refd. to.

99 *Dagdu* v. *Bhana* (1904) 28 Bom. 420, 426; *Janardan* v. *Venkatesh* A.I.R. 1939 Bom. 151, 41 Bom. L.R. 191; *Shiddapa* v. *Rudrappa* A.I.R. 1954 Bom. 463; *Rajaram* v. *Manik* 1952 A.N. 90.

1 *Anarullah* v. *Koylash* (1882) 8 Cal. 118.

2 *Nandi Ram* v. *Jogendra* 1923 A. Cal. 53; 70 I.C. 960; 36 C.L.J. 421; *Binns* v. *W. & T. Avery* (1934) 61 Cal. 548; 152 I.C. 117; 1934 A. Cal. 778.

This is also the view of the Nagpur High Court.[3] S. 26(1)(c) now gives statutory recognition to these decisions.

Rights acquired by third persons in good faith. — In ill. (1) to s. 31 of the 1877 Act the transfer to *C* is not "for value," and the conveyance may therefore be rectified as regards the *godown* transferred to him, though he had no knowledge of *B*'s fraud. The transfer to *D*, however, is for value, and he having no knowledge of the fraud, the conveyance cannot be rectified so as to affect his lease. The occupation of property by a tenant ordinarily affects one who takes a transfer of property with notice of that tenant's rights,[4] but this does not apply to any equity of rectification of his lease which the tenant may have against his landlord.[5] The following is an additional illustration:—

A mortgages certain land to *B*. In the mortgage bond survey No. 49-D is inserted by common mistake for survey No. 49-A. Subsequently *A* mortgages survey No. 49-A to *C*, who had knowledge of the mistake. *B*'s mortgage bond may be rectified by substituting survey No. 49-A for survey No. 49-D. *C*, having knowledge of the mistake, cannot be said to have acquired his rights "in good faith."[6]

No time-limit. — There is no time-limit to the discovery of mistake or of fraud. At any time fraud is discovered or mistake comes to light a party affected thereby can institute a suit for rectification.[7]

Mistake of law. — It is implicit in this section that rectification can be obtained for a mistake of law, and such is the English equitable doctrine.[8]

An application of the English doctrine can be seen in *Jervis* v. *Howle*,[9] where a deed provided for a royalty on coal of threepence per ton free of tax. Both parties intended that a clear sum of threepence should be received, but as it stood the agreement was void under a statute. To validate it, Clauson J. allowed rectification by substituting the words 'a royalty of such an amount that after deduction of income tax at the standard rate from time to time, shall leave a sum of threepence a ton.' This decision was approved by the Court of Appeal in *Whiteside* v. *W.*,[10] although doubts had been cast upon it by Harman J. in the lower court.[11] Harman J. cited with approval[12] from Kerr on Fraud and Mistake :

> 'Though the Court will rectify an instrument which fails through some mistake of the draftsman in point of law to carry out the real agreement between the parties, it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument'.[13]

Of this passage Evershed M.R. observed in the Court of Appeal.

> 'I do not read this passage as meaning that if the mistake made is in using language to perfect an agreement which in law has some result different from the common intention that is not a case in which there can be rectification .... if it did it would be too wide'.[14]

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3 *Rajaram* v. *Manik* 1952 A.N. 90.
4 *Hunt* v. *Luck* (1902) 1 Ch. 428.
5 *Smith* v. *Jones* (1954) 2 All E.R. 823.
6 *Mahadeva* v. *Gopala* (1910) 34 Mad. 51; 8 I.C. 390. See also *Shaikh Barsati* v. *Surjee* (1938) 14 Luck. 308; 178 I.C. 609; 1939 A.O. 10; *Venkatachalam* v. *P. L. A. R. M. Firm* 1939 A.R. 90; 181 I.C. 427 (rectification of mortgage deed against execution-purchaser of mortgaged property).
7 *Gerala Kalita* v. *Dharmeshwar* (1961) A. Asm. 14.
8 *per* Turner L.J. in *Stone* v. *Godfrey* (1854) 5 D.M. & G. 76, 90.
9 (1937) Ch. 67.
10 (1950) Ch. 65.
11 (1949) Ch. 448, 458, and *per* Bennett J. in *Fredensen* v. *Rothschild* (1941) 1 All. E.R. 430, 435.
12 at p. 455.
13 7th edn. 563.
14 at p. 74.

Of the seven authorities cited in Kerr for this proposition, only two indicate that there is any limitation on relief for mistake of law.[15] In *Irnham* v. *Child*,[16] the plaintiff sold an annuity. It was intended to be redeemable, but it was agreed that such a clause should not be inserted, as it was erroneously supposed it would make the transaction unsurious. Thurlow L.C. refused rectification. This is clearly a correct decision. There was no mistake as to the legal construction of the document or as to its legal consequences. It was deliberately decided not to insert a clause of redemption. The ground a claim for rectification, it must be a mistake of law as to the document as it stands, not a mistake as to the effect of clauses which are entirely omitted. An operative mistake of law would arise, for example, the parties thought that they had made the annuity redeemable, but in law the cause as drafted did not have that effect. The other case relief upon by Kerr is the Irish decision in *Jackson* v. *Stopford*. Under a tenancy agreement, the tenant was to pay an annual rent of £250, but the landlord was to pay all rates including poor-rate. Statute prohibited the landlord from paying this rate. The tenant had to pay, and sought rectification. The Court distinguished the English income-tax cases in the *Jervis* v. *Howle* note 9 *(supra)* tradition, holding that an agreement to pay such annual sum as amounted with the poor-rate to £250 would still infringe the statute. On this basis, there is no conflict, but the Irish Court goes further and indicates its view that mistake as to the general law is no ground for relief, relying on the maxim *ignorantia iuris non excusat.*[17] Carried to its logical conclusion, this would amount to an almost complete rejection of mistake of law as a ground for rectification, which is certainly not the attitude of English law.

So far as Indian law is concerned, it seems that s. 26 clearly allows the Court to rectify an instrument to bring the legal consequences into conformity with those intended by both of the parties. There must of course be some limitation on the full amplitude of such a doctrine, but *Irnham* v. *Child (supra)* note 16 is the only English authority expressly restricting its scope. The remedy is discretionary, and the Courts will not permit it to be abused. In *Whiteside* v. *W. (supra)*, note 10 the Court refused the remedy, as the only object of the plaintiff husband was to save income-tax, there being no issue between him and the defendant, his former wife, as she would not on the facts be a loser in any event.

Sub-sec. (3). — This corresponds with s. 34 of the repealed Act. The following illustration is from that section :

A contracts in writing to pay his attorney, *B*, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude *B* from all rights under it. *B* is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it has expressed the intention of the parties.

[Now settled practice in England: *Olley* v. *Fisher* (1886) 34 Ch.D. 367. The illustration is founded on the headnote to *Stedman* v. *Collett* (1854) 17 Beav. 608; 99 R.R. 310; but the language there used is erroneous; the Court treated the effect of the agreement as a matter of construction. The main point decided was the validity of the settlement with the solicitor for a fixed sum.]

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15 *North Eastern Railway* v. *Hastings* (1900) A.C. 260, and *Townshend* v. *Stangroom* (1801) 6 Ves. 328 are cases neither on rectification nor on mistake of law. *Sutherland* v. *Heathcote* (1892) 1 Ch. 475; *Worrall* v. *Jacob* (1817) 3 Mer. 270 and *Rake* v. *Hooper* (1900) 83 L.T. 889 are cases of unilateral mistake.

16 (1781) 1 Bro. C.C. 92.

17 (1923) 2 Ir. R.I. In *Whiteside* v. *W.* (1950) Ch. 65, Harman J. cited this case with approval, but his Lordship was doubtful of *Jervis* v. *Howle* (*supra*), whereas the Court of Appeal approved it.

CHAPTER IV

RESCISSION OF CONTRACTS

When rescission may be adjudged or refused.

27. [35 (a & b)] (1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely :—

(a) where the contract is voidable or terminable by the plaintiff;

(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract —

(a) where the plaintiff has expressly or impliedly ratified the contract; or

(b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or

(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation. —In this section "contract", in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

This section corresponds with s. 35(a) and (b) of the repealed Act. It states the principles upon which rescission can be ordered. A person suing for rescission cannot in the alternative sue for specific performance but a person suing for specific performance can sue for rescission.[18]

Contract. — In this section "contract" in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing. See Explanation to the section. The requirement of a contract in writing is not necessary where the Transfer of Property Act is in force.

"Any person interested in a contract." — The remedy by way of rescission is not confined to persons named as parties to a contract;[19] it is open to any person, who, though not named as a party to a contract, is interested in the contract. Thus any member of a joint Hindu family is entitled to rescind a contract entered into by the manager, whereby the former would be defrauded.[20]

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18 *Prem Raj* v. *D. L. F. M. Co. Ltd.* (1968) A.S.C. 1355. Fry: On Specific Performance (6th Ed.) 493; *Cawley* v. *Poole* (1863) 71 E.R. 23 appld.

19 It is available for legal representatives and other assigns, provided that the original party has not by his own conduct disentitled himself to relief, which does not affect the general rule; see *Shravan Goba Mahajan* v. *Kashiram Devji*, 51 Bom. 133; 29 Bom. L.R. 115; 100 I.C. 932; 1927 A.B. 384.

20 *Ravji* v. *Gangadharbhat* (1880) 4 Bom. 29. In this case the manager, while ostensibly selling the right to cut wood in a forest belonging to the family for Rs. 4,000, made a collateral private bargain according to which he was to receive Rs. 4,000 more.

Sub-sec. (1)(a): Voidable contract. — The illustration to the Cl. (a) of s. 35 of the former Act is:

A sells a field to *B*. There is a right of way over the field of which *A* has direct personal knowledge, but which he conceals from *B*. *B* is entitled to have the contract rescinded.

This clause, it is conceived, comprises cases referred to in ss. 19, 19A, 39,53 and 55 of the Indian Contract Act. It also, it is submitted, includes cases where a power to rescind is reserved by the contract to one or both of the contracting parties.

There is a rule of equity that where a conveyance has been executed it will be set aside only on the ground of actual fraud, and not for mere innocent misrepresentation; *Wilde* v. *Gibson*.[21] The facts of the case were as in the above illustration, except that the vendor had no personal knowledge of the right of way. It was held that the vendor could not rescind.

Sub-sec. (1)(b). — The corresponding clause in s. 35 of the repealed Act has the following illustration:

A, an attorney, induces his client, *B*, a Hindu widow, to transfer property to him for the purpose of defrauding *B*'s creditors. Here the parties are not equally in fault, and *B* is entitled to have the instrument of transfer rescinded.

[This is a matter of conveyance, but it presupposes or includes a contract.]

The provisions of this clause do not apply if the parties are *in pari delicto*.[22]

Sub-sec. (2). — The Court may refuse rescission of the contract on any of the grounds mentioned, and the sub-clauses are a statutory recognition of the case law on the subject.[23]

Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.

28. [35(c)] (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the Court —

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

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21 (1848) 1 H.L.C. 605, 632-3. Approved in *Delli Gramani* v. *Ramachandran* 1953 A.M. 769 771.
22 *Hari* v. *Naro* (1894) 18 Bom. 342.
23 See *Ohid* v. *Dorshee* 1926 A. Cal. 959; Fry pp. 346-352; *Inder* v. *Campbell* (1881) 7 Cal. 474; *Clough* v. *L. N. W. Rly. Co.* (1871) 7 Ex. 26, 35.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

A decree passed for specific performance before the repeal of Specific Relief Act 1877 does not confer an accrued right and therefore S. 6 General Clauses Act does not apply. An application for rescission of the contract of sale under S. 35(c) of the repealed Act is not maintainable.[24]

Hence where the cause of action for rescission of a contract arose under S. 35 of 1877 Specific Relief Act and the provision was replaced by S. 28 of 1963 Act which only prescribed a different procedure, no question of vested or substantive right arises and the remedy of rescission will be governed by the procedure under S. 28 of 1963 Act.[25]

This section corresponds with s. 35(c) of the Repealed Act.

Under s. 35(c) of the former Act it was open to the vendor or lessor in the circumstances mentioned in that section to bring a separate suit for rescission, but to avoid multiplicity of suits the remedy of the rescission is provided for the benefit of the vendor or lessor, when after a suit for specific performance is decreed, the plaintiff fails to pay within the period fixed. Likewise where the purchaser or lessee has paid the moneys, he is entitled to the reliefs in sub-sec. (3).

In a suit for specific performance of a contract to reconvey certain immoveable properties a consent decree was passed specifying the date by which the consideration money and stamp duty was to be deposited. But the decree-holder did not deposit the money within time and a few days later applied for execution of the decree, deposited the money and prayed for extension of time for payment which was allowed as there was no default clause in the decree.[26] But in a Calcutta Case it was held that where the Court had made an order for specific performance of a contract and payment of money within a specified time then in default the suit shall stand dismissed. It has no further jurisdiction to extend the time and to such an order ss. 148 and 151 C.P.C. do not apply.[27] The result is that the suit which was once decreed can be dismissed.[28]

In *Anandilal's*[29] *case* the Calcutta High Court held that for rescission of a contract after a decree for specific performance a suit will lie if the purchaser makes default in payment. A

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24 *Hungerford Investment Trust Ltd.* v. *Haridas Mundra* (1972) 3 SCR 696; (1972) A.SC. 1826.

25 *Smt. Jnanada Debi* v. *Nath Bank Ltd.* (1979) A. Cal. 246, 253. *T.R.S. Sarna* v. *Nagendra Baha Debi* (1952) A. Cal. 879 folld.

26 *Manicka Gounder* v. *Samnikannu Gounder* (1966) 2 M.L.J. 242; *Bhagwatsaran Singh* v. *Mithila Saran Singh* (1953) A.P. 158 folld. *Shanmugham Pillai* v. *Annalakshmi Ammal* 50 F.C.R. 537; (1950) A.F.C. 38; & *Simrathmull* v. *Nanjalingiah* (1963) A.SC. 1182 dist.

27 *Bhootnath* v. *Sahodeb* 66 C.W.N. 645; See *Ibrahim* v. *Mastan* (1967) 2 An. W.R. 60.

28 *Narayan Gangadhar* v. *Rango Krishna* (1960) A. Mys. 175.

29 *Anandilal* v. *Gunendra* (1966) A. Cal. 107; *Kurpal Hemraj* v. *Shamrao* 47 Bom. 589; (1928) A.B. 211

rescission can also take place by an application under s. 35(c) of the old Act, [s. 28(1) of the new Act] which is also supported by the English practice.

But under sub-sec. (4) no separate suit now lies.

According to the Calcutta High Court there can be no default if time for payment by the purchaser is not fixed by the decree ordering specific performance and default is a condition precedent to an application for rescission of the contract by the vendor under S. 35(c) Specific Relief Act 1877. (S. 28 of 1963 Act).[30]

Extension of Time for payment under decree.—A decree fixing the time for payment is a self operating decree and time cannot be extended by the Court. Therefore, if the party required to pay fails to do so the suit shall stand dismissed.[31]

The Patna High Court has held that the Court which passed the decree can give extension of time even where the decree has merged in the decree of the High Court and even after the expiry of time given by the decree. But under S. 28(1) of the Specific Relief Act this power is discretionary and will not be exercised on flimsy grounds. Further the extension of time for payment is not modification of the decree (S. 148 of Code of Civil Procedure applied). It is submitted that this is a correct view of S. 148 Civil Procedure Code.[32]

A suit for return of purchase money without suing for rescission of contract is maintainable. Therefore, where due to a fraudulent statement of the vendor, the purchaser loses possession of the property purchased, he can sue for return of purchase price without suing for rescission of the contract.[33]

On rescission of a contract on default by a purchaser the earnest money paid by the purchaser can be forfeited by the vendor in the absence of an express stipulation to the contrary.[34]

Sub-sec. (4) makes it clear that a separate suit will not lie for any of the reliefs enumerated in the section.

Alternative prayer for rescission in suit for specific performance.

29. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

This section is verbatim the same as s. 37 of the repealed Act, and it is almost verbally identical with the opening of § 1058 of Fry on Specific Performance.

A party suing for specific performance may in the alternative sue for rescission of the contract but the converse is not true and a person suing for rescission cannot in the alternative sue for specific performance.[35]

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reld. on. Fry: Specific Performance (6th Ed.) paras. 1171-73 pp. 546, 547. See also *Narayan Gangadhar* v. *Rango Krishna* (1960) A. Mys. 175.

30 *Hungerford Investment Trust Ltd.* v. *Haridas Mundra* (1971) A.Cal. 182 affd. in (1972) A.SC. 1826.

31 *Bhujangrao* v. *Sheshrao* (1974) A.B. 104; *Babulal* v. *Jagannath* (1970) 72 Bom. L.R. 835 not foll.

32 *Bisan Prasad Misra* v. *Kamla Kant Jha* (1972) A.P. 322; *Mahanth Ram* v. *Ganga Das* (1961) A.SC. 882; (1961) 3 SCR 763 reld on.

33 *Champalal* v. *Roopa* (1963) A. Raj. 38.

34 *Anandilal Poddar* v. *Gunendra* (1966) A.Cal. 107; *Kurpal Hemraj* v. *Shamrao* 47 Bom. 589; (1928) A.B. 211; folld.; *Hall* v. *Burnell* (1911) 2 Ch. 551; *Barber* v. *Wolfe; Palmer* v. *Lark* (1945) Ch. 187; (1945) 1 All E.R. 399; and *Hower* v. *Smith* (1884) 27 Ch.D. 89 refd. to. *Kurpal Hemraj* v. *Shamrao* 47 Bom. 589: (1928) A.B. 211; folld., See also *Narayan Gangadhar* v. *Rango Krishna* (1960) A.Mys. 175.

35 *Prem Raj* v. *D. L. F. H. Co. Ltd.* (1968) A.SC. 1355, 1357; Fry: on Specific Performance p. 493 (6th Ed.) quoted; *Cawley* v. *Poole* (1863) 71 E.R. 23 applied.

Court may require parties rescinding to do equity.

30. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

This section corresponds with s. 38 of the repealed Act.

Benefit and compensation.—This section is in accord with English equitable rules, whereby if rescission is to be granted both parties must be restored to the *status quo ante*. If a purchaser seeks rescission, a Court of equity can take account of any profit he has made, and make allowance for any deterioration in the property.[36]

Onus.—A party claiming restoration of benefit received must prove the value of that benefit.[37]

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36 *Per* Lord Blackburn in *Erlanger* v. *New Sambrero Phosphate* (1878) 3 A.C. 1218, 1278-9. For a Scottish case where a vendor sued for rescission subject to compensation, see *Spence* v. *Crawford* (1939) 3 All E.R. 271, H.L.

37 *Govindram* v. *Edward Radbone* (1947) 74 I.A. 295, (1947) Bom. 360, 1948 A.P.C. 56.

CHAPTER V

CANCELLATION OF INSTRUMENTS

When cancellation may be ordered.

31. [39] (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or void-able; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.[1]

(2) If the instrument has been registered under the Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

This section corresponds with s. 39 to which there were the following illustration:

(a) *A*, the owner of a ship, by fraudulently representing her to be seaworthy, induces *B*, an underwriter, to insure her. *B* may obtain the cancellation of the policy.

(b) *A* conveys land to *B*, who bequeaths it to *C* and dies. Thereupon *D* gets possession of the land and produces a forged instrument stating that the conveyance was made to *B* in trust for him. *C* may obtain the cancellation of the forged instrument.

(c) *A*, representing that the tenants on his land were all at will, sells it to *B*, and conveys it to him by an instrument, dated the 1st January, 1877. Soon after that day, *A* fraudulently grants to *C* a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. *B* may obtain the cancellation of this lease.

(d) *A* agrees to sell and deliver a ship to *B*, to be paid for by *B*'s acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by *A* on *B*. The bills are drawn and accepted, but the ship is not delivered according to the agreement. *A* sues *B* on one of the bills. *B* may obtain the cancellation of all the bills.

[*Anglo-Danubian Co.* v. *Rogerson* (1867) L.R. 4 Eq. 3. The disputed point for which the case is reported was on a question of procedure which is not obsolete in England and could never arise in India.]

When cancellation may be ordered.—To entitle a plaintiff to a decree for cancellation of an instrument three points must be made good by him, namely,—

(1) that the instrument is void or voidable;

(2) that the plaintiff has reasonable apprehension that the instrument, if left outstanding, may cause him serious injury; and

(3) that the Court ought under the circumstances of the case, in the exercise of its discretion, to order it to be delivered up and cancelled. Delay in the institution of the suit or the plaintiff's conduct may be such that the Court may in the exercise of its discretion refuse to grant him relief. The appellate Court will not lightly interfere with an exercise by the first Court of its discretion. But if there is no exercise of discretion at

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According to the terms of the section an express prayer for cancellation would seem to be superfluous, but it is doubtful whether its presence or absence does not, for the purpose of Court fees, make the difference of the suit being for consequential relief or merely declaratory, see *Parvatibai* v. *Vishvanath Ganesh* (1904) 29 Bom. 207; 6 Bom. L.R. 1125; *Kuber Saran* v. *Raghubar*, 5 Luck. 235; 121 I.C. 281; 1929 A.O. 491. On principle, it is submitted, the Court has full discretion to order cancellation whether the plaintiff expressly asks for it or not, and therefore the suit is in no case merely declaratory; and it has been so held in Madras: *Kattiya Pillai* v. *Ramaswami Pillai* 1929 A.M. 396; 56 M.L.J. 394; 119 I.C. 35; and in Allahabad: *Kalu Ram* v. *Babu Lal* (1932) 54 All. 812; 1932 A.A. 485; 139 I.C. 32, F.B.; followed in *Bulakram* v. *Ganga Bishun* 1940 A.P. 133; 185 I.C. 123.

all by the lower Court in decreeing cancellation of an instrument, the appellate Court may set aside the decree.[2]

In the exercise of this discretion, the Court should ordinarily, where a plaintiff is out of possession and is in a position to claim a decree for possession, refuse to pass a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, and leave the plaintiff to a suit for possession.[3]

Minor.—The language of sections 39 and 41, of the old Act (Ss. 31 & 33 of 1963) shows that the jurisdiction conferred thereby is also exerciseable when it is invoked by a minor.[4]

Cancellation on ground of fraud. — *S.* an old man, an illiterate villager executed a *Kobala* in favour of *A & B*. Before his death *S* told his heir that the document was obtained by *A* through fraud and misrepresentation and was without consideration. The heirs made a complaint to the villagers and *B* through his guardian his mother made a *nabali* in favour of the executant. In a suit to set aside the Kobala, *A* was unable to prove that the executant understood the nature of the document or that consideration money was paid, the Court set aside the *Kolaba*.

Any person against whom written instrument is void or voidable.—The relief by way of cancellation of an instrument may be claimed not only by a party to the instrument, but by any person against whom the instrument is void or voidable. Thus a creditor may sue on behalf of himself and all other creditors to set aside a deed executed by his debtor by which the creditors are defrauded, defeated or delayed within the meaning of s. 53 of the Transfer of Property Act.[6] A perfected conveyance is of course not void or voidable merely because the consideration has not been paid.[7]

Parties equally guilty.—Where a well placed man brought a suit for the rescission of a sale he got effected in favour of his mistress (for five years) on the ground of its being immoral and for future cohabitation and therefore void, being against public policy, the Court in the exercise of its discretion under S. 31, Specific Relief Act refused to grant the relief on the ground of the parties being equally guilty, applying the principles of in *pari delicto* and *particeps criminis*. The Court laid down the following principles which are applicable to such actions:

"A plaintiff is denied assistance where he would derive benefits from his own immorality or fraud or illegality on the maxim that he who seeks equity must do equity or he who seeks equity must come with clean hands."

The Court also laid down the following principles which have to be applied:

i) The Court will not assist a party to an illegal transaction;

ii) The Court will not intervene to rescind a transaction done for an immoral purpose and after the object is achieved.

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2 *Vulley Mahomed* v. *Dattubhoy* (1901) 25 Bom. 10, 18-19,24 [suit for cancellation of an award].

3 *Shankar Lal* v. *Sarup Lal* (1912) 34 All. 140, 142; 13 I.C. 19; *Rikhobram* v. *Nalini* 1950 Asm. 72; Laxmi Bai v. *Lal Chand* 1952 A.V.P. 69.

4 *Khan Gul* v. *Lakha Singh*, 9 Lah. 701, 720; (1928) A.L. 609; See *Perumalsami Naicker* v. *Srinivasaga* (1962) A.M. 396.

5 *Abhimanya Biswas* v. *Abdul Sheikh* (1981) A. Cal. 444, 447.

6 *Ishvar* v. *Dewar* (1903) 27 Bom. 146; *Ket Prasad* v. *Chandra Mal* 1934 A.A. 1071; (1934) A.L.J. 955; 153 I.C. 517; *Mahadeo Deoji* v. *Nana Banaji* 1946 A.N. 359, 225 I.C. 84; *Chajulal* v. *Gokul* 1952 A.M.B. 168; *Venkama* v. *S.V. Chisty* A.I.R. 1951 Mad. 399. The contrary *dicta* in *Vellaya Konar* v. *Ramaswami* (1940) Mad. 73, 76, and *Ponnammal* v. *Kanthammal* 1952 A.M. 552 seem to ignore illustrations (b) and (c). A creditor against whom a document is neither void nor voidable cannot sue for cancellation either as his sole remedy or as a relief further to a declaration: *Maung Ba Maung* v. *Maung Ba Yin* (1940) Rang. 59; 183 I.C. 746; 1939 A.R. 332, F.B.; *Jagat Singh* v. *Behari Lal* (1942) A.L.J. 37; 1942 A.A. 104.

7 *Abdul Hashim Sahib* v. *Kadir Batcha Sahib* (1919) 42 Mad. 20; 48 I.C. 370.

iii) Where the Court finds both the parties equally guilty, the Court will stay its hand and let the mischief lie where it lies.

iv) A party seeking an equitable relief must come with clean hands.[8]

Sale of coparcener's property. — Where joint family property is sold by one of them, the other members of the coparcenery can sue for cancellation of the instrument of sale, as their interest would be affected if it remains outstanding and unchallenged.[9]

But where one of the three heirs of the father sold his share in the joint property to a third party, the other coheirs sued for cancellation of the instrument of sale. The Court in its discretion directed a suit for partition of joint property as that would not affect the rights of the purchaser.[10]

Award or a judgment. — An award or a judgment is not a "written instrument" which can be "adjudged". The instruments falling within section 39 of the old Act are unadjudged instruments. Besides a judgment or an award cannot be delivered to be cancelled. Judgments and awards on which judgments are pronounced are public records. Therefore section 39 of the old Act is inapplicable to awards of arbitratoral tribunals or judgments of Court.[11]

Reasonable apprehension of serious injury. — It cannot be laid down as a rule of law that in no case can a man, who has parted with his property, in respect of which a void or voidable instrument exists, sue to have that instrument cancelled. The test is, "reasonable apprehension of serious injury." Whether that exists or not, must depend on the circumstances of the particular case with which the Court has to deal.

Thus where the *swami* of a *math* who had become old and blind executed a *jimmapatra* whereby he appointed the defendant, manager of the properties of the *math* upon certain terms, and delivered possession of some of the *math* properties to the defendant, and the *swami* subsequently sold the *math* properties to another person, and thereafter brought a suit against the defendant for cancellation of the *jimmapatra* alleging that the defendant had failed to comply with the terms of the instrument, it was held by the High Court of Bombay that though the *swami* had sold the *math* properties and had no longer any interest in them, he was entitled to maintain the suit, the grounds of the decision being that if the document were not cancelled, the purchaser (who, it may be observed, was joined as a plaintiff) might sue the *swami* for a return of his purchase money if the *swami* could not give possession of the lands by reason of the defendant holding them under the *jimmapatra* and that there was danger also of the defendant suing the *swami* in respect of the lands of which the defendant had not obtained possession.[12]

In an earlier Madras case, however, where the plaintiff, who had sold and delivered possession of her property to the buyer (her nephew), sued the defendant for cancellation of the sale-deed, alleging that the defendant had forged it in the name of the plaintiff as executant and that if the instrument was left outstanding she might be sued by the buyer on the covenants relating to the property, it was held that the plaintiff was not entitled to a decree for cancellation. The Court said: "Clearly she had no legal interest in the property comprised in the sale-deed, but it is suggested that she is entitled to have that instrument cancelled in case any action for damages should be brought against her on the covenant contained in the document executed in her nephew's favour. We are of opinion that this bare possibility does not entitle a plaintiff who has divested herself of all interest in the property to maintain this suit".[13] This

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8 *Kamorbai* v. *Badrinarayan* (1977) A.B. 228, 235.
9 *Kedar Prasad* v. *Ganga Prasad* (1980) A.A. 85.
10 *Smt. Hoshiari Devi* v. *Tajvir Singh* (1977) A.A. 295.
11 *Pratabmull* v. *K.C. Sethia* (1944) *Ltd.* (1960) A.Cal. 702.
12 *Kotrabassappaya* v. *Chenvirappaya* (1899) 23 Bom. 375; cf. *Radha Sundar* v. *Saktipada* 1936 A.Cal. 714; 41 C.W.N. 312; 166 I.C. 55. Mere speculation as to unknown and vague complication arising in future is no ground for cancellation: *Jeka Dula* v. *Bai Jivi* 1938 A.B. 37; 39 Bom. L.R. 1072; 174 I.C. 24.
13 *Iyyappa* v. *Ramalakshmamma* (1890) 13 Mad. 549.

view of the law, it is submitted, is not correct. We are inclined to think that apprehension of serious injury within the meaning of this section, and, other conditions being present, he is entitled to a decree for cancellation.[14]

It is different, however, where the defendant has already sued and obtained a decree against the buyer on the alleged forged instrument, and the plaintiff subsequently sues the defendant not only for cancellation of the instrument, but to set aside the decree. The plaintiff, not being a party to the decree, is not entitled to have it set aside unless the buyer is joined as a party to the suit.[15]

Section 39 of the repealed Act is not applicable to cases where a document is executed by a person claiming title adverse to the person whose rights are affected by the document, e.g. sale by a person claiming against the true owner.[16]

Where *A* sues *B* on a bond which *B* alleges is void, *e.g.*, as being passed for a balance due on wagering transactions, and pending the suit *B* sues *A* for cancellation of the bond, *B* is not entitled to cancellation. It cannot be said in such a case that *B* would suffer serious injury if he did not bring the suit, for the very plea which is the foundation of *B*'s suit is his defence in *A*'s suit.[17]

Moreover, the question of the validity of the bond being before the Court in *A*'s suit, it cannot be said thus far that it could be left "outstanding" within the meaning of this section. But where *A* sues *B* for possession of certain land under s. 6 of the Act, and pending the suit he sues *B* for cancellation of a deed of gift under which *B* claims title to the land, there is nothing to prevent the Court from decreeing *A*'s second suit, for the question in the second suit is one of title, while there is no such question in the first suit, the only question in the first suit being whether *A* was dispossessed otherwise than in due course of law.[18]

In an administration suit a prayer was added for a declaration that a sale deed in respect of a house by the deceased in favour of his wife was "nominal" and result of undue influence. This was held to be a suit under section 39 of the repealed Act[19] (S. 31 of 1963).

In a suit by a minor for declaration that an alienation by his father of the joint family property is a sham and nominal, it is not necessary to pray for setting aside the sale. He can ignore the same. This really affects the question of court-fees.[20]

Cost of conveyance—where decree set aside.—Where a decree holder in an *ex parte* decree for specific performance got a deed of conveyance executed and got possession but the decree was set aside, restoration of possession to the judgment-debtor upon that event cannot be made conditional upon payment of the costs of conveyance as that expense was not at the instance or order of the Court in pursuance of decree or consequential thereon in S. 144 Civil Procedure Code proceedings.[21]

Registration.—The proceedings of a Registrar under the Registration Act are of an executive officer invested with *quasi*-judicial functions and not proceedings of a judicial character. An order, therefore, made by the Registrar for the registration of a document of which the execution is denied by the party alleged to have executed it is no bar to a suit by such

14 See also (1899) 23 Bom. 375 at p. 380, *supra*.
15 *Jhuna* v. *Beni Ram* (1887) 9 All. 439.
16 *Nisha Ghose* v. *Siddak Ali* (1963) A.Asm. 4; *Muppudathi Pillai* v. *Krishnaswami*, (1960) A.M. 1 (F.B.): *Ammani Ammal* v. *Ramaswami*, 37 M.L.J. 113; (1919) A.M. 105 and *Venkamma Naidu* v. *S.V. Chisty*, (1951) A.M. 399; (1950) 2 M.L.J. 587 refd. to.
17 *Chaganlal* v. *Dhondu* (1903) 27 Bom. 607.
18 *Jai Gopal* v. *Lalit Mohan* (1904) 26 All. 236. See notes to s. 6, above; *Debi Prasad* v. *Smt. Maika* (1972) A.A. 376; *Sukhlal* v. *Devi Lal* (1954) A. Raj. 170; *Badri Narain Singh* v. *Kodo Sah* (1915) A.Cal. 423; 28 I.C. 138 disting.
19 *Asmalbai* v. *Esmailji* (1964) A. Guj. 174.
20 *Perumalsami Naicker* v. *Srinivsaga* (1962) A.M. 396; *Sahul Hameed Rowther* v. *Mohideen* (1948) Mad. 883; (1948) A.M. 451 folld. *Sankaranarayana* v. *Kandaswami* (1956) A.M. 670 (F.B.) expln.
21 *Keshab Chandra Dutta* v. *Balyaunge Estates Ltd.* 77 Cal. W.N. 507, 511; *Kedar* v. *Kedar* (1922) A.P.C. 209 applied.

party for cancellation of the document under this section. That this is so is clear from the provisions of the second paragraph of this section.[22]

Limitation.—Where a document is voidable (as distinguished from void), so that possession of the property to which it relates could not be recovered until the document is set aside, and the suit is for cancellation of the document and for possession, the period of limitation was 3 years as provided by art. 91 of the Limitation Act, 1908, art. 144 which provided a period of 12 years did not apply to such a case.[23] Art. 91 of the old Act did not apply where the document was void from its very inception; the reason is that a document which is void *ab initio* does not require to set aside.[24] Under art. 59 of the Limitation Act, 1963, a suit for cancellation of an instrument is three years from the time when the facts entitling the plaintiff to have the instrument cancelled first become known to him. See also notes to s. 16 of the Contract Act under the head "Lapse of time and limitation," above.

S. 32, Arbitration Act, 1940.—S. 32 of the Arbitration Act of 1940 does not bar a suit for cancellation of a contract containing an arbitration clause.[25]

What instruments may be partially cancelled.

32. [40] Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

This corresponds to s. 40 of the repealed Act, to which the following was an illustration:

A draws a bill on *B*, who endorses it to *C*, by whom it appears to be endorsed to *D*, who endorses it to *E*. *C*'s endorsement is forged. *C* is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

Partial cancellation.—This section should not be applied unless the rights or obligations evidenced by an instrument are distinct and separable. The following are further illustrations:—

(1) In 1871 *A*, agrees to grow indigo for *B* on 20½ *bighas* of land for a period of 9 years at the rate of Rs. 2 per *bigha* per annum. Of these, 16½ *bighas* are situated in village *R*, and are held by *A* under a sub-lease from *X*, *Y* being the superior landlord, and the remaining 4 *bighas* are situated in village *K* and belong to *A*. *K* fails to pay the rent to *y*, and in 1874 *Y* resumes possession of the land. The contract becoming impossible of performance (see Contract Act, s. 56), *A* may obtain cancellation of the agreement as regards the 16½ *bighas* situated in village *R*.: *Inder Pershad* v. *Campbell*.[26]

(2) *A* executes a deed of mortgage in favour of *B*. *A* gets back the deed from *B* by fraud, and endorses on it a receipt for Rs. 1,200 purporting to be signed by *B*. *B*'s signature is forged. *B* is entitled to have the endorsement cancelled, leaving the deed to stand in other respects: *Ram Chandar* v. *Ganga Saran*.[27]

Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.

33.[41] (1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

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22 *Mohima Chunder* v. *Jugal Kishore* (1881) 7 Cal. 736.

23 *Rani Janki Kunwar* v. *Raja Aji Singh* (1887) 14 I.A. 148; 15 Cal. 58; *Bakatram* v. *Kharsetji* (1903) 27 Bom. 560; *Govindasami* v. *Ramaswamy* (1909) 32 Mad. 72. *Shamshad Ali Shah* v. *Hasan Shah* P.L.D. (1964) S.C. 143 (a case of gift during death illness).

24 *Unni* v. *Kunchi Amma* (1891) 14 Mad. 26; *Jagardeo* v. *Phuljhari* (1908) 30 All. 375; *Banku Behari* v. *Kristo Gobindo* (1903) 30 Cal. 433. See also *Raikishori* v. *Debendranath* (1888) 15 I.A. 38, 49-50; 15 Cal. 409, 421; *Eswara-reddi* v. *Venkatachellamma* 1954 A.M. 83.

25 *State of Bombay* v. *Adamjee & Co.* 1951 a. Cal. 147.

26 (1881) 7 Cal. 474.

27 (1917) 39 All. 103; 37 I.C. 89. See also *Chajulal* v. *Gokul* 1952 A.M.B. 168.

(2) Where a defendant successfully resists any suit on the ground —

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.[28]

This section expands the provisions of s. 41 of the repealed Act. Apart from compensation the plaintiff may have to restore any benefit received under the instrument; or the defendant may have to do so where he has successfully defended the suit on the ground that the contract was void. This equally applies to a minor.

Compensation.—Compensation includes, of course, return of any payment received as part of the transaction annulled or avoided.[29]

Compensation on cancellation.—Where a deed of hypothecation or a deed of sale is ordered to be set aside on the ground of collusion between the grantor's manager and the lender, it being proved that the grantor was of weak intellect and that in some cases the money was paid to the grantor and sometimes to his manager, the condition of cancelling the deeds should be, not the repayment of moneys proved to have been received by the manager, but of sums shown to have been actually paid to the grantor personally, or borrowed by the manager in the course of prudent management of the estate.[30] Where a person advances a small sum of money to another, and obtains from the latter by fraud in repayment of the loan a deed of sale of property worth considerably more than the amount of the loan, all that he is entitled to on cancellation of the deed is to be placed in the same position in which he would have been, had he obtained a deed of mortgage instead of a deed of sale. He is not entitled to any allowance for repairs and improvements made by him to the property, the deed of sale having been obtained by fraud.[31]

Where a document is executed by a person claiming a title adverse to the person whose rights are affected by the document, e.g. sale by a person claiming against the true owner, s. 39 of the old (S. 31 of new) Act will not apply. Section 41 of that (S. 33 of the new) Act, therefore, does not become operative. To hold otherwise, will mean that a mere volunteer paying a debt of another would be able to recover.[32]

A entered into a partnership with *B* and advanced money for the purchase of a lorry which was in the name of the defendant. The plaintiff, it was held, was not entitled to the return of the money by way of equitable relief or on the doctrine of unjust enrichment. S. 41 (now S. 33) was held inapplicable.[33] This was a case of an illegal transaction.

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28 This section cannot be extended by analogy to cases where there is no question of cancelling any instrument: *Khan Gul* v. *Lakha Singh*, 9 Lah. 701; 111 I.C. 175; 1928 A.L. 609; *Gulabchand* v. *Chunnilal*, 122 I.C. 266; (1929) A.N. 156.

29 See *Guthrie* v. *Abool Mozuffer* (1871) 14 Moo. I.A. 53, 65.

30 *Ajit Singh* v. *Bijai Bahadur Singh* (1884) L.R. 11 I.A. 211; 11 Cal. 61.

31 *Sadashiv* v. *Dhakubai* (1881) 5 Bom. 450. The section applies in the case of a transaction declared to be void: *Abdul Majid* v. Ramiza Bibi 1931 A.M. 468; 131 I.C. 153.

32 *Nisha Ghose* v. *Siddak Ali* (1963) A.Assm. 4; *Muppudathi Pillai* v. *Krishnaswami*, (1960) A.M. 1 (F.B.); (1959) Mad. 929. *Ammani Ammal* v. *Ramaswami*, 37 M.L.J. 113; (1919) A.M. 105; and *Venkamma Naidu* v. *S. V. Chisty*, (1951) A.M. 399; (1950) 2 M.L.J. 587 refd. to

33 *Vardarajulu* v. *Thavasi Nadar* 1963 A.M. 413; (1963) Mad. 942; *Govindarajulu* v. *S.S. Naidu* (1958) 2 M.L.J. 148; *Viswanathan* v. *Nanak Chand* (1955) A.M. 536; (1954) 2 M.L.J. 782 dist *cf. Sujan*

Apart from the provisions of section 65 of Contract Act section 41 of the repealed Act is applicable to cases where a transaction is held to be void and compensation is to be made in respect of the benefit derived under that transaction. Section 41 of the old Act is not only applicable to cases where an instrument is cancelled under section 39 of the 1877 (S. 31 of 1963) Act but also to instruments that are *ab initio* void.[34]

Limitation.—No question of limitation can arise with regard to compensation under this section, as the claim arises only after the Court has ordered cancellation of the document.[35]

Minors.—There was some conflict of decisions on the question of compensation to be paid by a minor. One view was that restoration stopped where repayment began. The other view was that the minor should restore the benefit, when he has made misrepresentations as to his age.[36] See notes to s. 11 of the Contract Act under the head "Fraudulent representation."

A sale by a minor is *ab initio* void and cannot be validated by ratification and the fact that with the proceeds of the sale made by him he purchased other property which was partitioned and the plaintiff (the minor) sold his share does not amount to representation of the validity of the sale deed. But in such a case the Court will pass a conditional decree requiring the plaintiff to restore the benefit received by him. See S. 11 Contract Act to which this decision seems to be opposed.[37]

A sale of a minors property by a guardian-mother who is not a *de jure* guardian can be raised *qua* the minors share and if the proceeds have been used to discharge the debts of the estate the setting aside will be conditional on his paying his proportionate share of the liability.[38]

Sub-sec. (2) (a) makes it clear that a defendant who is a minor or a lunatic at the time of the contract may have to restore as far as may be any benefit, whether proprietary or monetary, which he has actually received under the contract. There is, however, no question of any liability for making compensation in such a case.

Even where a minor does not expressly ask for cancellation of an instrument, relying on its being a nullity, the Court may make him restore the benefit under this section.[39]

The Orissa High Court has recently held that a sale by a minors *de facto* guardian is under s. 11 of the Hindu Minority and Guardianship Act *ab initio* void and neither under s. 38 nor under s. 41 of the repealed Act of 1877 (ss. 30 and 33 of 1963) can the Court order the repayment of the consideration.[40] But in a Mysore case it was held that the grant of restitution in the case of void contracts is also applicable in case of minors who cannot be allowed to have a double advantage.[41]

Singh v. *Sardar Ali* (1960) 2 W.L.R. 180 (P.C.) & *Kiriri Cotton Co. Ltd.* v. *Ranchhoddas Dewasi* (1960) A.C. 192; (1960) 2 W.L.R. 127.

34 *Dyaviah* v. *Shivamma* (1959) A.Mys. 188.

35 *Mohammad Sardar* v. *Babu Gyanu* 1952 A.N. 17.

36 *Limbaji* v. *Rahi* (1925) 49 Bom. 576; 88 I.C. 643; 1925 A.B. 499 (attempted sale by minor's step-mother), minor requred to refund benefit to estate and himself; *Rang Ilahi* v. *Mahbub Ilahi* (1925) 7 Lah. 35; 94 I.C. 25; 1926 A.L. 170 (similar case in Mahomedan law); *Milkhi Ram* v. *Jiwan Singh* 1953 A.Pepsu 45; *Venkama* v. *S. V. Chisty* 1951 A.M. 399; *Kalipada* v. *Purnabala* (1948) 2 Cal. 485, 1948 A.Cal. 269; *Gondulal* v. *Abdul Sattar* (1948) Nag. 470, 1948 A.N. 353. See however *Kharag-Narain* v. *Hamida Khatoon* 1955 A.P. 475.

37 *Varghese* v. *Iype Kurikose* (1973) A. Ker. 267; *Hanumantha* v. *Sitaramayya* (1939) 2 Mad. L.J. 1028; (1939) A.M. 106 (F.B.) reld. on; *Ajudhia Prasad* v. *Chandanlal* (1937) A.A. 610; (1937) All. 688 distinting.

38 *Fathima Bivi* v. *Sadhakatallah* (1977) A.M. 215.

39 *Venkama* v. *S. V. Chisty* 1951 A.M. 399; *Mohamad Sardar* v. *Babu Gyanu* 1952 A.N. 17; *Mahadeo Deoji* v. *Nana Banaji* 1946 A.N. 359; *Manmatha Kumar* v. *Exchange Loan Co.* (1937) I Cal. 283, 1936 A.Cal. 567, 41 C.W.N. 115, 165 I.C. 363. The bench decision in *Fuli Bibi* v. *Khokhai Mondal* (1927) 55 Cal. 712, III I.C. 349 seems to be no longer good law. Where no question of minority was involved, a suit for a declaration that a deed of partnership was void had also been regarded as in substance a suit for cancellation *Vishwanathan* v. *Namakchand* 1955 A.M. 536.

40 *Daneyi Gurumurty* v. *Raghu Podhan* (1967) A.Or. 68; (1966) Cut. 851; *Thurstan* v. *Nottingham Permanent Benefit Society* (1902) 1 Ch. 1, 13; and *Mohoree Bibee* v. *Dhurmodas Ghose* 30 I.A. 114; 30 Cal. 539 folld.

41 *Dyaviah* v. *Shivamma* (1959) A.Mys. 188; But see *Mohoree Bibee* v. *Dharmodas Ghose* 30 I.A. 114; 30 Cal. 539. & cases under Ss. 64 & 65 of Contract Act.

CHAPTER VI[1]

DECLARATORY DECREES

Discretion of court as to declaration of status or right.

34. [42] Any person entitled to any legal character,[2] or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled,[3] and the plaintiff need not in such suit ask for any further relief:[4]

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.[5]

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

This section is verbatim the same as s. 42 of the repealed Act, which had the following illustrations:

(a) *A* is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. *A* may sue for a declaration that they are not entitled to the right so claimed.

(b) *A* bequeaths his property to *B*, *C* and *D*, "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children." No such children are in existence. In a suit against *A*'s executor, the Court may declare whether *B*, *C* and *D* took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(c) *A* covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

[Under the old English practice such a suit was dismissed as premature: *Fyfe* v. *Arbuthnot* (1857) 1 De G. & J. 406; 98 R.R. 151.]

(d) *A* alienates to *B* property in which *A* has merely a life interest. The alienation is invalid as against *C*, who is entitled as reversioner. The Court may in a suit by *C* against *A* and *B* declare that *C* is so entitled.

(e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survives her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

[But see now The Hindu Succession Act, 1956, S. 14.]

(f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. *Contra Kotturswami* v. *Veeravva* (1959) A.SC. 577.

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1 As to the Punjab, see also the Punjab Land-revenue Act, 1887 (XVII of 1887), s. 45.

2 The title must be complete. A man who is qualified to vote at an election, but has not taken the required steps for having his name put on the register of voters, cannot sue for a declaration that he is qualified: *Chittagong Municipal Commission* v. *Assam-Bengal Ry. Co.*, 115 I.C. 262; 1928 A.Cal. 736; seems to be more appropriate to the case, but the facts are not made clear.

3 The Court will not make a declaration of mere facts which are not ripe for determination of their legal consequences: *Kashma Dubain* v. *Ram Dawan Tewari* (1927) 26 All. L.J. 409; 109 I.C. 112.

4 When the Act of 1877 was passed the power of making declaratory decrees in England, was confined to cases where the plaintiff had a present cause of action. It was extended in 1883; see *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, at pp. 557-562, *per* Pickford L.J.

5 The decision of questions incidental to the plaintiff's title, such as the existence of a will, is not further relief; the Court has full power to dispose of them: *Ma Nyun* v. *Chithambaram Chettiar* (1924) 2 Ran. 572; 84 I.C. 1007; 1925 A.R. 132 (very elementary).

(g) *A* is in possession of certain property. *B*, alleging that he is the owner of the property, requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property.[6]

(h) *A* bequeaths property to *B* for his life, with remainder to *B*'s wife and her children, if any, by *B*, but if *B* dies without any wife or children, to *C*. *B* has a putative wife, *D*, and children, but *C* denies that *B* and *D* were ever lawfully married. *D* and her children may, in *B*'s lifetime institute a suit against *C* and obtain therein a declaration that they are truly the wife and children of *B*.[7]

Origin and purpose of the section.—The history of decrees merely declaratory is as follows:—

(1) Before the Chancery Procedure Act, 1852, it was not the practice of the Court in England to make a declaration of right except as introductory to relief which it proceeded to administer.[8]

(2) Decrees merely declaratory are an innovation, and they first obtained authoritative sanction in England by s. 50 of the Chancery Procedure Act, 1852 (15 & 16 Vict., c. 86).[9]

(3) Seven years later, India followed suit with s. 15 of the Code of Civil Procedure, 1859, by which it was enacted as follows:—

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for civil courts to make binding declarations of right without granting consequential relief".[10]

(4) S. 15 of the Procedure Code of 1859 was in the same terms as s. 50 of the Chancery Procedure Act. As to the latter section, it was held by the Courts in England that it gave a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for.[11] The same interpretation was put by the Privy Council on s. 15 of the Procedure Code. In *Kathama Natchiar* v. *Dorasinga*,[12] their Lordships of the Privy Council after observing that the application of s. 15 of the Procedure Code must be governed by the same principles as those upon which the Court of Chancery proceeds in reference to the Chancery Procedure Act, s. 50, said as to s. 15 of the Code: "It appears, therefore, to their Lordships, that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases some other Court."[13]

(5) The Code of 1859 was repealed by the Code of 1877, and the provision as to declaratory decrees transferred to s. 42 of the Specific Relief Act, 1877, which was passed in the same year. Now s. 42 has been replaced by s. 34 of the Specific Relief Act, 1963.

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6 Similarly if, *A*'s title having been judicially affirmed against *B*, *B* makes a claim adverse to it in another proceeding, this is a fresh cause of action for *A* under the present section: *Gajadhar Singh* v. *Hari Singh*, 47 All. 416; 87 I.C. 647; 1925 A.A. 421.

7 Cases where this section is invoked without dispute of the jurisdiction may, of course, be reportable on other grounds, *e.g.*, *Boulton Bros. & Co.* v. *New Victoria Mills Co.*, 26 All. L.J. 1119; 119 I.C. 837; 1929 A.A. 87; *Dhanna Singh* v. *Nami* (1929) 10 Lah. 676; 117 I.C. 806; 1929 A.L. 155, but are not to the present purpose.

8 *Fischer* v. *The Secretary of State for India* (1899) 26 I.A. 16, 28; 22 Mad. 270, 282.

9 *Deokali Koer* v. *Kedar Nath* (1912) 39 Cal. 704, 708; 15 I.C. 427.

10 The decisions on this enactment are reviewed in *Kathama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 187-190.

11 *Rooke* v. *Lord Kensington* (1856) 2 K. & J. 753; *Lady Langdale* v. *Briggs* (1856) 8 De G.M. & G. 391.

12 (1875) 2 I.A. 169, 187; *Nilmony Singh* v. *Kally Churn* (1875) L.R. 2 I.A. 83; 14 Beng. L.R. 382.

13 *E.g.*, a Revenue Court: *Sadut Ali Khan* v. *Abdool Gunney* (1873) I.A. (Suppl.) 165, 171; 11 Beng. L.R. 203, 226-227.

(6) "The terms of the section [s. 42] are not a precise reproduction of the provision contained in the Act of 1859 and the English law: in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of *declarator,* but whether this is so or not is of no great moment. We have to be guided by its provisions as they are expressed."[14]

(7) Before the Specific Relief Act the Courts in India had no power to make a merely declaratory decree independently of s. 15 of the Code of Civil Procedure, 1859: the power to make such decrees rested entirely upon that section.[15] It might have been thought that since the enactment of s. 42 of the Specific Relief Act, 1877, the power of the Courts in India to make a decree merely declaratory rested entirely upon s. 42 and that the Courts had no power to make such a decree independently of that section, but a different view has been taken in some cases which are considered below under the head "Whether a decree merely declaratory can be made independently of this section."

(8) The law as to declaratory judgments under R.S.C. Order 15, rule 16, is as follows:

"No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

Scope of the section.—In a suit under this section—

(1) the plaintiff must be a person entitled to any legal character[16] or to any right as to any property;

(2) the defendant must be a person denying, or interested to deny, the plaintiff's title to such character or right;

(3) the declaration sued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and

(4) where the plaintiff is able to seek further relief than a mere declaration of title, he must seek such relief.

If any of the first three conditions is not fulfilled, the suit should be dismissed. If those conditions are fulfilled, but the fourth is not, the Court shall not make the declaration sued for.

In *Deokali Koer* v. *Kedar Nath,*[17] Sir Lawrence Jenkins said:

"The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled' to any legal character or to any right as to any property :[18] it is the disregard of this that accounts

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14 *Deokali Koer* v. *Kedar Nath* (1912) 39 Cal. 704, 709; 15 I.C. 427.

15 (1875) 2 I.A. 169, 179-180, note 12 above.

16 *Qu* has a shareholder in a company a "legal character" enabling him to claim a declaration that the acting directors have ceased to be directors ? *Kailash Chandra Dutt* v. *Jogesh Chandra Majumdar* (1928) 32 C.W.N. 1084; 116 I.C. 724; 1928 A.Cal. 868, where the Court held the applicant wrong on the merits. Ought he not also to have sought further relief? The mere fact of kindred or affinity to a given person is not a legal character: *Farman Ali* v. *Mohammad Nawaz Khan* (1930) 121 I.C. 417.

17 (1912) 39 Cal. 704, 709; 15 I.C. 427.

18 Declarations of the right to conduct religious processions and the like have been granted without reference to the Act: *Manzur Hasan* v. *Muhammad Zamian* (1924) 52 I.A. 61; 86 I.C. 236; 1925 A.P.C. 36; folld., *Muhammad Salim* v. *Ramkumar Singh,* 26 All. L.J. 1001; 110 I.C. 657; 1928 A.A. 710 (Moslem sacrifice of cows not being in public view), in *S.C.* (parties reversed) leave to appeal not allowed, 123 I.C. 333; 1929 A.A. 339; (1929) All. L.J. 241. See also *Chandu Sajan* v. *Nyahalchand* (1950) 52 Bom. L.R. 214, 1950 A.B. 192 (F.B.) In the P.C. case there was a prayer for an injunction. But the similar

for the multiform and at times, eccentric declarations which find a place in Indian plaints.[19] If the Courts were astute—as I think they should be—to see that the plaint presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases would no longer arise." In the same case the learned Judge said: "It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour".[20]

In certain cases, such as the government of a company under the Indian Companies Act, it may have to be considered whether the jurisdiction of the Court is excluded or limited by special legislation.[21] A servant entitled to receive money from the employer cannot sue for declarative of his being so entitled. He must sue for money.[21a]

Whether a decree merely declaratory can be made independently of this section.—In *Kathama Natchiar* v. *Dorasinga,*[22] which was a case under s. 15 of the Code of Civil Procedure, 1859, the Privy Council held that the Courts in India had no power to make a merely declaratory decree otherwise than under that section. In delivering the judgment of their Lordships of the Privy Council Sir James Colville said:

"They (their Lordships) at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the mofussil before the Code of Civil Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Civil Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being: 'No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.' Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause."

The same reasoning applies with equal force to cases arising after the passing of the Specific Relief Act; that is to say, the power of Courts to make a decree merely declaratory since the passing of the Specific Relief Act rests entirely upon s. 42, now s. 34 of the Act, and the Courts have no power to make such a decree independently of that section. But according to the High Court of Madras a suit for a declaration of right may not be within the purview of s. 42 (now 34) and yet may be maintainable. It has thus been held that a pleader debarred from practising in village Courts by an order of the Collector purporting to have been made under the Madras Village Courts Act on the ground of misconduct may sue for a declaration that the order is void. The suit was against the Secretary of State for India in Council, and the Court held that the Collector had no power to make any such order under the said Act, and it made the declaration.[23] Reliance was placed by the High Court upon *Fischer* v. *Secretary of State for*

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case of *Naubahar Singh* v. *Qadir Bux*, 125 I.C. 14; (1930) All. L.J. 875, was decided expressly under the present section.

19 For a bad recent specimen, see *Sailendra Nath Bose* v. *Charu Chandra Bannerji* (1929) 118 I.C. 341; 1929 A.Cal. 422.

20 *Deokali Koer* v. *Kedar Nath* (1912) 39 Cal. 704, 707-708.

21 *Sarat Chandra Chakravarti* v. *Tarak Chandra Chatterjee*, 51 Cal. 916; 82 I.C. 405; 1924 A.Cal. 982.

21a *Malik & Haq* v. *Muhammad Shamsul Islam* P.L.D. (1961) S.C. 531, 535.

22 (1875) 2 I.A. 169, 179-180.

23 *Ramachandra* v. *The Secretary State for India* (1916) 39 Mad. 808; 31 I.C. 310. See also *Ramakrishna* v. *Narayana* (1916) 39 Mad. 80, 82; 26 I.C. 883; *Province of Orissa* v. *Durjodhar Das* 1951 A.Or. 342. Where plaintiff merely asked for a declaration that a previous decree was void, suit was held maintainable on the ground that s. 42 was not exhaustive: *Sri Krishna Chandra* v. *Mahabir Prasad* (1933) 55 All. 791; 1933 A.A. 488 [F.B.]; *Secretary of State* v. *Subba Rao* (1933) 56 Mad. 749; 144 I.C. 400; 1933 A.M. 618; *Andhra University* v. *Durga Lakshmi* 1951 A.M. 870. Suit for declaration *simpliciter* that order of statutory body is in excess of its jurisdiction is always maintainable: *Zamindar of Khallikote*

India[24] in which Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council said:

"Now, in the first place it is at least open to doubt whether the present suit is within the purview of s. 42 [now s. 34] of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of s. 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict., c. 86) as interpreted by judicial decisions. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect.[25] This is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result ? If the socalled cancellation is pronounced void the order of Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made . . . Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act."

There was no point raised in the above case that s. 42 (now s. 34) did not apply; on the other hand, it was assumed by counsel that that section applied, but that there was no "further relief" claimed as required by the section. At all events, the ground of the decision was that the suit was in fact not for a declaration without more.

On the other hand, in *Sheoparson Singh* v. *Ramnandan Singh*[26] Sir Lawrence Jenkins, in delivering the judgment of the Privy Council, said; "The Court's power to make a declaration without more is derived from s. 42 (now s. 34) of the Specific Relief Act, and regard must therefore be had to its precise terms".[27] Already in 1910 the High Court of Bombay had said: "It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which the cognizance is barred by any enactment for the time being in force does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute".[28] There is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding on the plaintiff: *Vellaya Konar* v. *Ramaswami*.[29]

The above cases arose in the *Mufassal*. Whatever doubt there may be as to the power of the High Court[30] to make a merely declaratory decree independently of s. 42 (now s. 34), the Courts in the *Mufassal* had no such power at any time. The correct view, it is submitted, is that s. 34 is exhaustive of the cases in which a decree merely declaratory can be made, and that the Courts have no power to make such a decree independently of that section.[31] At all events the proviso to s. 42 is paramount, and its effect cannot be avoided.[32] This view has been upheld by

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v. *Beero Pillai* (1935) 59 Mad. 825; 164 I.C. 398; 1936 A.M. 531 [F.B.] (The Court held that such a suit was a suit under the general law based on a common law right : 59 Mad. 825, at p. 848). An application under the Madras Agriculturists' Relief Act (IV of 1938) for a declaration that certain rules passed under the Act were *ultra vires* did not fall under sec. 42: *Swayamprabhai* v. *Muthukrishna* (1942) 1 Mad. L.J. 303; 1942 A.M. 362.

24 (1899) 26 I.A. 16, 27-28; 22 Mad. 270, 282; *Raniganj Coal Association* v. *Tata Iron and Steel Co.* (1940) 43 Bom. L.R. 403, 411; *Sib Charan* v. *Manik Chandra* 1950 A.Asm. 141.

25 Cited and followed in *Province of Orissa* v. *Durjodhar Das* 1951 A. Or. 342, 346.

26 (1916) 43 I.A. 91, 97; 43 Cal. 694; 33 I.C. 914.

27 See also *Deokali Koer* v. *Kedar Nath* (1912) 39 Cal. 704, 708 15 I.C. 427.

28 *Vaktuba* v. *Agarsingji* (1910) 34 Bom. 676, 680; 7 I.C. 945.

29 (1940) Mad. 73, (1939) 2 Mad. L.J. 400, 1939 A.M. 894. See also *Sukh Lal* v. *Devi Lal* 1954 A. Raj. 170, 171.

30 The Code of 1859 was originally intended for application in the Courts not established by Royal Charter, and it was not till the year 1862 (when Supreme Courts were abolished and High Courts established) that it was extended to the Courts in the Presidency Towns: see cl. 37 of the Letters Patent.

31 The view in the text is approved in *Kishori Lal* v. *Beg Raj* 1952 A.Punj. 387.

32 *U Po Thein* v. *O.A.O.K.R.M. firm;* 5 Ran. 699; 106 I.C. 368; 1928 A.R. 34; *Thevar* v. *Samban*, 6 Ran. 188; 110 I.C. 595; 1928 A.R. 143. *Cp. Raja Udairaj Singh* v. *Secy.* of State, 46 All. 553; 88 I.C. 212; 1924 A.A. 652, where the main point was that the matter was of exclusive revenue jurisdiction. As to

the High Court of Calcutta (Rau and Biswas, JJ.) in *Manjural Haque* v. *Bisseswar*[33] where the authorities were reviewed. After referring to the observations of the Privy Council in *Sheoparsan Singh* v. *Ramnandan Singh*[34] and *Fischer* v. *Secretary of State for India*,[35] which had been cited in the course of the argument in support of the two apparently opposite views, the judgment proceeds as follows:—

"We need not cite other authorities in support of either view. If we may say so, the several observations which we have quoted above are not in real conflict. What exactly is meant by the expression, 'a declaration without more', 'a merely declaratory decree' or 'a decree merely declaratory'? Let us remember that the act or order sought to be pronounced null and void in *Fischer's Case*, as in this suit, was one which deprived the plaintiff of certain *present* rights of property. In *Fischer's Case* the order of the Governor-in-Council by cancelling the separate registration of the property which had been transferred to the plaintiff robbed the transfer of all legal force and effect under a local Regulation. In the present suit, similarly, the order of the Board of Revenue, by setting aside the sale to the plaintiff, deprived him of his title and his right to get immediate possession of the property from the Collector. In each case, therefore, the plaintiff stood deprived of certain present rights of property, and the declaration of the offending order as null and void restored or would restore those rights. We venture to suggest that a declaration of this kind is not "a merely declaratory decree", since it has the effect of giving relief besides serving to define rights. On the other hand, the declaration provided for in the illustrations under s. 42 (now s. 34) of the Specific Relief Act may properly be said to be 'merely declaratory decrees'." After examining the illustrations, the judgment proceeds: "It would, therefore, seem that the expressions, 'merely declaratory decree' and 'declaration without more used in the Privy Council judgments in *Kathama Natchiar's Case*[36] and *Sheoparson Singh's Case*[37] refer to a declaration which merely serves to define rights, present or future, without giving present relief. The power of the Courts in India to make merely declaratory decrees in this sense is, under the above decisions, governed entirely by s. 42 (now s. 34) of the Specific Relief Act. But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of the Code of Civil Procedures, *e.g.*, s. 9 or Order VII, r. 7 of the Code and not by s. 34 of the Specific Relief Act. Such a view would be inconsistent not only with their Lordships' observations in the above two cases but also in *Fischer's case*.[38] On this view, the present suit will not be governed by s. 34 of the Specific Relief Act.[39] This passage was adopted by the Andhra High Court.[40]

In *Ramaraghava Reddy's case* a certain temple was declared a public temple. Defendants 1-5 filed a petition to have the order set aside and for declaration that certain properties were private properties of the defendants. There was a compromise decree declaring the temple to be a public temple and the properties were declared to be private properties of defendants 1-5. The plaintiffs brought a suit for declaration that the compromise decree was not valid and binding on the temple and the defence was provisions of s. 42 (s. 34 of the new Act) had not been complied with and the suit was not maintainable.

The Supreme Court held that s. 42 (of the old Act) is not exhaustive of the cases in which a declaratory decree may be made and such a decree can be given independently of s. 42. The worshippers of a temple can therefore maintain a suit for declaration outside the purview of s. 42 that a compromise decree by a Shevait is not binding on the deity. A declaration of this character is itself a substantial relief and has immediate coercive effect.[41] The worshippers of a

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the somewhat complicated relation of this enactment to O. XXI, r. 63, of the Civil Procedure Code, see *Tulsi Das* v. *Shiv Dat*, 9 Lah. 167; 103 I.C. 763; 1927 A.L. 631; *Fariduddin Ahmad* v. *Murtaza Ali Khan* (1935) 11 Luck. 486; 158 I.C. 338; 1936 A.O. 67; *Bhola Nath Shankar Das* v. *Lachmi Narain* (1930) 53 All. 316; 1931 A.A. 83.

33 (1944) I Cal. 644, A.I.R. 1943 Cal. 361, 47 C.W.N. 408.

34 (1916) 43 I.A. 91; 43 Cal. 694; 33 I.C. 914.

35 (1899) 26 I.A. 16; 22 Mad. 270.

36 (1875) 2 I.A. 169.

37 See note 34, *supra*.

38 See note 35 *supra*.

39 In *Sib Charan* v. *Manik Chandra* 1950 A.Assm. 141, there was a difference of opinion between the two learned judges as to whether *Manjural Haque's Case (supra)* applied. See also *Uday Chandra Paul* v. *Parmar* 1941 A.Cal. 153; 44 C.W.N. 1063; 196 I.C. 185: *Zeb-ul-Nisa* v. *Din Mohammad* (1941) Lah. 451; 193 I.C. 641; 1941 A.L. 97.

40 *Subarna Rekka* v. *Ramakrishna Deo* (1968) A.AP. 239, 271.

41 *Ramaraghava Reddy* v. *Shishu Reddy* (1966) supp. S.C.R. 270, (1966) 2 S.C.A. 353; (1967) A.SC. 436; *Fischer* v. *Secy. of State* 26 I.A. 16; 22 Mad. 270; *Pratap Singh* v. *Bhabhuti*, 40 I.A. 182; appld; *Sheop-*

temple are in the position of *cestue que trustent* or beneficiaries in a spiritual sense;[42] but they are not entitled to sue for possession as they do not exercise the power of the deity of suing to protect its own interests.[43]

The Calcutta High Court has held that S. 34 Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be granted. So the court can give a decree independently of the requirements of that section. An order, judgment or decree can be declared null and void on proving fraud or collusion on the part of the adverse party. In this case an heir challenged the validity of the grant of probate and it is submitted that he had a legal right to property and as such the suit was within the purview of S. 34 Specific Relief Act.[44]

Again the same Court held that S. 34 is not an exhaustive code for the purpose of declaratory relief in India and suits can be brought under the general provisions of the Civil Procedure Code. For the purpose of S. 34 the plaintiff has to prove that he is entitled to a legal character or a legal right to property. Where a shareholder on behalf of himself and other shareholders brought a suit for declaration for certain relief against the Directors of the company and others, the suit was held maintainable being for the benefit of the company. It is submitted that the decision is erroneous. S. 34 as its history shows is exhaustive and shareholders suing for the benefit of an incorporated company have a right to challenge an alienation by the Directors as both the company and the shareholders have a legal right in the property alienated.[45]

Decree under General Provisions of Law.—The Madhya Pradesh High Court also has held that a declaratory decree can be granted under general provision of law, relying on s. 9 and 0.7 r. 7 Civil Procedure Code.[46] In that case the plaintiff alleged that the parties had settled accounts between them and a certain amount was found due from the plaintiff but the defendant was demanding a sum of money over and above the sum which was settled, due on the ground of further dealings. The plaintiffs prayed for a declaration that no such amount was due from them. This suit brought on a notice of demand by the defendant was held to be vexatious and not conferring any legal right or right to a legal character and was therefore not maintainable.[47] But no section of 0.VII, r. 7 seems to have been raised and the scope of S. 34 did not arise.

In a later Supreme Court judgment the bench was of the opinion that S. 42 of 1877 Act was merely a statutory recognition of the well established relief of declaration but it does not exhaust every kind of declaratory relief or circumscribe the jurisdiction of the court. In this case a holder of a mortgage decree, who was also the assignee of another creditors' decree, in execution of which the property in suit was attached, sought a declaratory decree of his own rights and the rights of any future purchaser of the property. The court held that such a declaratory action was maintainable and such a decree could be awarded taking into consideration 0.21 r. 95 Civil Procedure Code.[48]

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rasad Singh v. *Ramanandan Prasad Singh* 43 Cal. 694; 43 I.A. 91; (1916) A.PC. 78; dist.; *Sanat Kumar* v. *Hemchandra* (1961) A.Cal. 411, 419.

42 *Ramaraghava Reddy* v. *Shishu Reddy* (1966) Supp. S.C.R. 270; (1966) 2 S.C.A. 353; (1967) A.SC. 436; *V. Tirathaswami* v. *V. Tirathaswami* 27 Mad. 435, 451 appd.

43 *Ramaraghava Reddy* v. *Shishu Reddy* (1966) supp. S.C.R. 270; (1966) 2 S.C.A. 353 (1967) A.SC. 436; *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* 40 Mad. 212; *Chidambaranatha Thambiram* v. *Nallasiva* 41 Mad. 124; appd.; *Abdur Rahim* v. *Mohamad Barkat Ali* 55 I.A. 96; (1928) A.PC. 16 appld.

44 *Sisir Kumar Chandra* v. *Smt. Manorama Chandra* (1975) 1 Cal. 35; (1972) A. Cal. 283, 290.

45 *Asansol Electric Supply Ltd.* v. *Chunilal Deo* 75 Cal. WN 704, 719; *Rama Sharma Reddy* v. *Seshu Reddy* (1967) ASC 436, refd. to.

46 *Ram Narayan* v. *Mangaram Radhasham* (1979) A.M.P. 61, 64. Halsbury, Laws of England (Hailsham Ed.) Vol. 19 para 511; *Sheo Singh Rai* v. *Smt. Dakho*, 5 I.A. 67; *Film Exchange Ltd.* v. *Brij Nath Singh* (1975) A.S.C. 1618.

47 *Ram Narayan* v. *Mangeram Radhasham* (1979) A.M.P. 61, 65 reld. on; *Fairclough Dodd & Jones* v. *Jantok Ltd.* (1956) 3 All. E.R. 921; Benjaman on Sale (1st ed.) p. 680 para 1352; *Household Machines Ltd.* v. *Cosmos Exporters Ltd.* (1946) All. E.R. 622 disting.

48 *Supreme General Film Co. Ltd.* v. *H.H. Tej Suryavanshi* (1975) A.S.C. 1810; 1812; *Vena Reddi Ramchandra Reddy* v. *Kundruru Sesher Reddy* (1966) Supp. S.C.R. 270 (1967) A.S.C. 436 folld.

Difference between Ss. 34 & 37 & 38 of 1963 Act.—The difference between s. 34 on the one hand and ss. 37 and 38 on the other is that in the case of the former the Court cannot grant a declaratory relief where further relief is capable of being granted. In the latter case there is no such restriction and injunction can be granted without any prayer for declaration although in many cases declaration is inherent in the grant of an injunction.[49]

Discretion of the Court.—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."[50] It has accordingly been held that a decree should not be passed—

(1) in a suit by a Hindu widow against her mother-in-law and a son adopted by the latter, for a declaration that the adoption is invalid and that a will made by the mother-in-law bequeathing the whole of her husband's property to the adopted son is invalid for the purpose of transferring the estate;[51]

(2) in a suit by a reversionary heir against a Hindu widow and a devisee under her will, for a declaration that the will is invalid for the purpose of transferring the estate.[52] See s. 14, Hindu Succession Act (1956);

(3) for a declaration that the election of the defendant as a member of the Bengal Legislative Council is invalid;[53]

(4) in a suit by a purchaser of a reversionary interest against the trustees of a deed of settlement and the beneficiaries, for a declaration of his rights under the deed, when the circumstances are such that to give a declaratory decree would be to offer direct encouragement to speculative purchasers of doubtful titles;[54]

(5) where the case is of such a character that the decree, if passed, would be or might become ineffective;[55]

(6) where there was an alleged wrong entry (without contest at the time) made many years earlier in the *khewat*, there had been long delay on the plaintiff's part, and the declaration prayed for would not have bound all parties interested;[56]

(7) where a declaration was sought with regard to immovable property situated in a foreign country;[57]

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49 *Indumatiben* v. *Union Bank of India* (1969) A.B.423.

50 *Narain Mitter* v. *Kishen Soondory Dassee* (1873) I.A. (Suppl.) 149, 162; 11 Beng. L.R. 171, 190; ***Kathama Natchiar* v. *Dorasinga*** **(1875) 2 I.A. 169, 181-182;** ***Sheoparsan Singh* v. *Ramnandan Singh*** (1916) 43 I.A. 91, 97; 43 Cal. 694, 704-705; 33 I.C. 914; *Joseph* v. *Calcutta Corporation* (1916) 43 I.A. 243, 248; 44 Cal. 87; 36 I.C. 912; *Ma Htay* v. *U Tha Hline* 2 Rang. 649; 88 I.C. 66; 1925 A.R. 184 (plaintiff's conduct was fraudulent, but it seems his claim was wrong on all points); *Khushi Ram* v. *Nand Lal* 1933 A.L. 866; 147 I.C. 399; *Hanno Lal* v. *Badri Das* (1945) All. 658, 1945 A.A. 278 (declaration of valid adoption refused on the ground that the minor was not a party).

51 *Rani Pirthi Pal Kunwar* v. *Rani Guman Kunwar* (1890) 17 I.A. 107; 17 Cal. 933.

52 *Thukurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh* (1904) 31 I.A. 67; 26 All 238; *Vijiasami* v. *Sasivarma* (1905) 28 Mad. 560, 562; *Deoki* v. *Jwala Prasad* 50 All. 678; 113 I.C. 737; 1928 A.A. 216, does not seem consistent with these authorities, which were not cited. A reversioner in whose favour a surrender was made cannot ask for a declaration that the surrender is void: *Jeka Dula* v. *Bai Jivi* (1937) 39 Bom. L.R. 1072; 174 I.C. 24; 1938 A.B. 37.

53 *Bhupendra Nath* v. *Ranjit Singh* (1914) 41 Cal. 384; 20 I.C. 676.

54 *Bhujendro Bhusan* v. *Trigunanath* (1881) 8 Cal. 761.

55 *Maharaj Narain* v. *Shashi* (1915) 37 All. 313; 29 I.C. 53; *Biswanath Saran* v. *Mujtaba Husain* (1941) 16 Luck. 742, 195 I.C. 402; 1941 A.O. 422; *Muhammad Israil* v. *Patna City Municipality* (1942) 21 Pat. 481; 1943 A.P. 34; *Gulzar Ahmad* v. *U.P. Government* 1950 A.A. 212.

56 *Aftab Ali Khan* v. *Akbar Ali Khan* (1929) All. L.J. 794; 121 I.C. 209; *Shiam Lal* v. *Mohammad Ali* 1935 A.A. 174; 153 I.C. 73.

57 ***Subramania* v. *Ramasami*** **1951 A.Asm. 531.**

(8) "The plaintiff brought a suit for declaration that a sale by her husband was benami and without consideration and for declaration of her title to the property and for confirmation of possession and in the alternative for recovery of possession. The suit was dismissed. In appeal the plaintiff dropped the prayer for possession."[58]

which was held to be covered by the proviso to s. 42 (now s. 34) and the appeal was dismissed.

(9) "By an agreement *A* agreed to purchase from *B* 50 shares of a company for Rs. 6,000. Transfer deed of the shares and the scrips were handed over to one *J* on the condition that on the payment of Rs. 6,000 by *B* the documents will be handed over by *J* to *A* and the price to *B*. *J* colluded with *A* and without payment handed over the documents to *A*. *B* brought a suit for declaration of ownership of shares and that they were not validly transferred."

The suit was held not to be maintainable as further relief could be sought for return of documents and for injunction and cancellation of the documents of transfer. It was also held that suit should not be dismissed but amendment should be allowed to include "consequential" relief.[59]

The Federal Court have left open the question whether a suit lies under s. 42 now s. 34 against a Provincial Government for a declaration that a provincial statute is *ultra vires*.[60]

The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under this section.[61]

An appellate Court will not dismiss a suit where the plaintiff though entitled to further relief of injunction deleted it in the trial Court and only prayed for and obtained a decree for declaration nor can an unsuccessful party raise the question of possession as a consequential relief which the plaintiff was entitled to ask for but did not do.[62]

A suit to set aside a decree against a minor for want of sanction of the Court under the mandatory provisions of O. 32, r. 7 (2), will be dismissed if the Court, after going into the merits, finds the decree to be for the benefit of the minor.[63] Where a reversioner is not entitled to a decree as to a major portion of the property alienated by a widow the Court will not in its discretion give a declaration as to a small portion.[64]

A suit does not lie merely to set aside an assertion.—Thus a plaintiff who is actually in receipt of rents from the defendants, his tenants, cannot sue to set aside a mere allegation of the defendants that they were holding the land under a certain tenure.[65] But it is otherwise where the tenants not only set up a certain tenure, but exercise rights in the land inconsistent with the tenure under which the plaintiff alleges they hold the land, though consistent with the

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58 *Nirmal Chandra* v. *Kshetra Mohan* (1962) A.P. 160.

59 *Bhagat Singh* v. *Satnam Transport Co.* (1961) A.Puj. 278; folld. in *Union of India* v. *Pearl Hosiery Mills* (1961) A.Puj. 281; contra *Mani Singh Harnam Singh* v. *Sher Singh* (1961) A.Puj. 102; (amendment not allowed in second appeal).

60 *Thakur Jagannath Baksh* v. *The United Provinces* 1943 F.C. 29, at p. 35, (1943) F.C.R. 72, at p. 88. See also *Bhairabendra Narayan* v. *State of Assam* 1953 A.Assm. 162.

61 (1904) 31 I.A. 67; 26 All. 238, note 47, *supra*.

62 *Dattatraya* v. *Shakuntalabai* (1956) A.N. 95.

63 *Ishar Singh* v. *Pritam Singh* (1961) A.Puj. 500.

64 *Jamuna* v. *Ramanup Singh* (1960) A.P. 182; *Rani Prithipal Kunwar* v. *Rani Guman Kanwar* 17 I.A. 107; 17 Cal. 933 (P.C.) reld. on.

65 *Nilmony Singh* v. *Kally Churn* (1875) 2 I.A. 83; 14 Beng. L.R. 382; *Ahmad Yar Khan* v. *Haji Khan* 1944 A.L. 110, 216 I.C. 82.

tenure set up by them.[66] Note that in ill. (g) above there is no mere allegation of ownership, but a demand for possession.

"Person entitled to any legal character or to any right as to any property."—Legal character or any right to any property are species of the same genus, viz. "legal rights". "Legal character" however does not appear to be a phrase common to jurisprudence nor does it appear to be used in statutes except s. 42 of Specific Relief Act (s. 34 of the new Act) and s. 41 of the Indian Evidence Act. But what was intended to be meant was 'legal status',[67] A man's "legal character" is the same thing as his status which is constituted by the attributes the law ascribes to him in his individual and personal capacity.[68] No suit is maintainable under this section unless the plaintiff is a person entitled to some legal character or to some right as to property, and the declaration sought is that he is entitled to such character or to such right.[69] The plaintiff is not entitled to a declaration of his right to a *patta* under an unregistered deed, although the defendant admits his claim, because in the absence of registration no title passes.[70] A declaration in respect of the correctness or otherwise of an electoral roll, when the election is already over, would be useless and is not granted.[71] But a right to stand as a candidate for being elected as a Municipal Commissioner is a valuable right and is a right of a legal character.[72] The Court will not make such a merely negative declaration as that *A* does not infringe *Z*'s trade mark by selling goods under a mark *X* to which *A* makes no exclusive claim.[73] The right of the owner of a building to receive compensation from a public body for the removal of fixtures attached to the building is a right to property, and he may sue for a declaration of such right.[74] A person entitled to property on the death of a Hindu widow may sue, where the parties are referred by a Revenue Court to a Civil Court, for a declaration that the widow is in possession of the property not as heir of a separated Hindu, but as the widow of a deceased coparcener in lieu of maintenance.[75] A landlord who is in possession through his tenants may sue the defendant who claims the land

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66 ***Kali Kishen*** v. *Goolam Ali* (1886) 13 Cal. 3, 11.

67 *Shanta Shamsher* v. *Kamani Bros. Ltd.* (1959) A.B. 201.

68 *Lalji Haridas* v. *Mulji Manilal* (1966) A.Guj. 159; (1966) Guj. 971; *Rama Krishna* v. *Narayana*, 39 Mad. 80, 82; (1915) A.M. 584, 585; See Bannerjee : on Specific Relief T.L.L.; and *Noor Jehan Begum* v. *Eugene Tiscenko* (1942) 2 Cal. 165; (1942) A.Cal. 325, 329 (per Nassim Ali J); rel. on.

69 ***Sheoparsan Singh*** v. ***Ramanandan Singh*** (1916) 43 I.A. 91, 97; 43 Cal. 694; 33 I.C. 914; *Deokali Koer* v. ***Kedar Nath*** (1912) 39 Cal. 704; 15 I.C. 427; *Haji Mahammad* v. *Province of Bengal* (1942) 1 Cal. 211, 201 I.C. 248; 1942 A.Cal. 343; *Naran Chandra Dalapati* v. *Sidh Nath Singh* (1940) 2 Cal. 443; 190 I.C. 200; 1940 A.Cal. 445; *Satruhan Prasad* v. *Udai Pratap* 1940 A.P. 502; 187 I.C. 207; *Nand Lal* v. ***Kharaiti Lal*** 1938 A.L. 574; 178 I.C. 128; *Ganesh Khopra Mills Co.* v. *Municipal Corporation of Karachi* 1946 A.S. 112, 223 I.C. 107. Suit lies for a declaration that plaintiff is the real decree-holder of a decree obtained by his agent: *Abdul Gaffoor* v. *Ma Sultano* 1931 A.R. 24; 130 I.C. 366. Suit lies for a declaration that a prior mortgagee, who is in possession of a portion of a mortgaged house sold to him on an order for sale of the whole house obtained by a subsequent mortgagee, is entitled to a charge on the portion purchased by him : *Makhan mal* v. *Gokal Chand* 1932; A.L. 237, 138 I.C. 699.

70 *Kaisar Vardha* v. *Marvat Rao* 1951 A.Hyd. 63.

71 *Abdul Ahad* v. *Ashfaq Ali* 1933 A.O. 423; 147 I.C. 792. Elections: *Kali Prasad* v. *Mukutadhari Prasad* (1932) 12 Pat. 209; 146 I.C. 225; 1933 A.P. 155; *Maijuddin Khan* v. *Janakiballabh Datta* (1932) 60 Cal. 438; 145 I.C. 248; 1933 A.Cal. 492; *Khanchand* v. *Jacobabad Municipality* (1945) Kar. 462, 1946 A.S. 98, 225 I.C. 86; *Krishnaveni Ammal* v. *Soundararajan* (1945) Mad. 412, 1945 A.M. 53. Suit for mere honours without right does not lie; *Chitti Babu* v. *Venkatasubbu* 1933 A.M. 264; 143 I.C. 104. No declaration that defendants had no right to do picketting: *Dipchand Kundanmal* v. *Manakchand Multanmal* (1939) Nag. 429; 182 I.C. 18; 1939 A.N. 154. No declaration that the plaintiff is not a 'dealer' within the meaning of an Act: *Visheshwar Singh* v. *Province of Bihar* (1948) Pat. 820, 1952 A.P. 129.

72 *Sat Narain* v. *Hanuman Parshad* 1946 A.L. 85, 224 I.C. 322.

73 *Mohammed Abdul Kader* v. *Finlay Fleming & Co.* (1928) 6 Rang. 291; 111 I.C. 136. Suit for a declaration that certain proceedings of Religious Endowments Board deciding that plaintiff is not entitled to certain honours in a temple does not lie: *Ramanuja Jeeyar* v. *Board of Commissioners for Hindu Religious Endowments* 1935 A.M. 621; 69 Mad. L.J. 14; 156 I.C. 480. Declaration may be made of a right to say prayers in a mosque : *Jiwan Khan* v. *Habib* (1933) 14 Lah. 518; 144 I.C. 658; 1933 A.L. 759.

74 ***Joseph*** v. *Calcutta Corporation* (1916) 43 I.A. 243; 44 Cal. 87; 36 I.C. 912.

75 ***Ram Manorath Singh*** v. *Dilraji* (1914) 36 All. 126; 23 I.C. 252. *Kanhai Lal* v. *Jai Lal* (1922) 45 All. 164; 69 I.C. 840; 1923 A.A. 54. Distant and contingent reversioner cannot claim declaratory relief; *Daya* ***Shankar*** v. ***Mohammad Ibrahim*** 1933 A.O. 555, *Fateh Mohammad Khan* v. *Gurbux Singh* 1949 A.E.P. 210; ***Sukhdarshan Singh*** v. *Chanan Singh* 1951 A.Peps. 81. Mahomedan reversioner: *Karim* ***Baksh*** v. ***Rahmon*** 1933 A.L. 555; 144 I.C. 408; *Feroze Din* v. *Khair Din* 1933 A.L. 184; 145 I.C. 204.

as against him by an adverse title and has turned out the tenants for a declaration of his title as against the defendant and for possession which would be by receipt of rents from the tenants. It is a mistake to suppose that the tenants are the only persons entitled to sue in such a case.[76] A person holding a *zar-i-peshgi* lease from an occupancy tenant and who has let out the land to others may sue the lessor and the sub-lessees for a declaration of his title as *zar-i-peshgi* lessee and for possession which could only be by receipt of rents from the sub-lessees.[77] An owner of land has a right to bring a suit against any member of the public who formally claims to use the land as a public road.[78] The right of a *gor* (priest) to conduct his *yajmans* (patrons) to a temple to perform worship there on their behalf and receive presents from their patrons is a right to property, and the *gor* may sue for a declaration of such rights where those rights are interfered with.[79] A suit by a committee under the Religious Endowments Act lies for a declaration that dismissal and appointment of another is valid.[80] The founder of a *waqf* is entitled, after his death of the *mutawallis* named by him without having exercised the power of appointment conferred on them, to apply for a declaration that the right to appoint successors has devolved on himself.[81] A plaintiff may under this section sue for a declaration that the defendant is not his son[82] or that the defendant is not his adopted son.[83] Conversely a plaintiff may sue for a declaration that he is the legitimate child of a deceased person,[84] or that he is the son of *A* and not the son of *B*,[85] and a woman may sue for a declaration that she is not the wife of the defendant.[86] Illustration (h) above indicates that this is the law where an immediate right to property is in question, but in the above cases it has been held that it suffices that the status in question carries legal consequences. It has also been held that caste is a legal character, and a suit has been allowed for a declaration that the plaintiff is a member of an agricultural tribe,[87] and is not a member of the scheduled castes[88] respectively. The two caste cases were brought against the Secretary of State, and it is difficult to see how the latter was 'interested to deny' the alleged status.[89] It has been held that a suit for a declaration that the plaintiff is not a 'dealer' to avoid registration as such is not within s. 34.[90] A plaintiff in possession of property claiming to be an owner[91] thereof may sue for a declaration that a decree obtained by one of

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76 *Bissesuri* v. *Baroda Kanta Roy* (1884) 10 Cal. 1079. Unsettled condition among landlords and tenants is good ground for declaratory decree: *Muthukumaraswamia* v. *Subbaraya* 1931 A.M. 505; 133 I.C. 193. A landlord is entitled to file a suit for a declaration that a decree obtained against his tenants has been obtained by collusion, if that decree is likely to affect him in future: *Kundan Lal* v. *Hukum Singh* 1952 A.Punj. 115. Suit lies for a declaration that the Record of Rights is wrong and for its correction; *Sarasijaksha* v. *Karpur Kamini* 1937 A.Cal. 745; 42 C.W.N. 96. Declaration where land is held under common title and defendant disputes part of such title; *Sukhdeo Singh* v. Mathra Singh 1933 A.L. 412; 142 I.C. 606.

77 *Sita Ram* v. *Ram Lal* (1896) 18 All. 440 [F.B.] *Ghulam Hussain* v. *Mahammad Hussain* (1909) 31 All. 271.

78 *Chuni Lall* v. *Ram Kishen Sahu* (1888) 15 Cal. 460 [F.B.]. Each denial of title gives a fresh cause of action: *Ram Lal* v. *Thakurji Mandir* 1933 A.L. 920; 146 I.C. 136.

79 *Kalidas* v. *Parjaram* (1891) 15 Bom. 309. See also *Beni Madho Pragwal* v. *Hira Lal* (1921) 43 All. 20; 59 I.C. 873; but otherwise if the presents are not connected with a religious office: *Bansi* v. *Kanhaiya* (1921) 43 All. 159; 59 I.C. 659.

80 *Golam Hossain Shah* v. *Altaf Hossain* (1933) 61 Cal. 80; 149 I.C. 1215; 1934 A.Cal. 328.

81 *Rugghan Prasad* v. *Dhanno*, 49 All. 435; 99 I.C. 1045; 1927 A.A. 257. A beneficiary under a *waqf* can sue the *mutawalli* to establish his right: *Niamatunnissa* v. *Hafizul Rahman* (1933) 8 Luck. 482; 144 I.C. 473; 1933 A.O. 261. Declaration that plaintiff is *mutawalli* is competent: *Md. Jafar Hussain Khan* v. *Md. Taqi Khan* 1933 A.Oudh. 517; 145 I.C. 1003.

82 *Vaktuba* v. *Agarsingji* (1910) 34 Bom. 676; 7 I.C. 945. Declaration that plaintiff is the adoptive father of defendant: *Bansilal* v. *Shankarlal* 1933 A.N. 292; declaration of non-paternity and consequent non-liability to pay maintenance; *U Arzeina* v. *Ma Kyin Shwe* (1940) Rang. 668; 192 I.C. 439; 1940 A.Rang. 298.

83 *Chinnasami* v. *Ambalavanna* (1906) 29 Mad. 48.

84 *Abdul Karim* v. *Sarraya Begam* (1945) Lah. 489, 221 I.C. 375, 1945 A.Lah. 266 (F.B.).

85 *Bhoop Singh* v. *Tarif Singh* 1952 A.A. 392.

86 *Abdul Barik* v. *Abeda Khatoon* 1955 A. Trip 2.

87 *Ghulam Rasul Khan* v. *Secretary of State* (1925) 6 Lah. 269.

88 *Secretary of State* v. *Dhobu Ram* (1944) Lah. 168.

89 The difficulty was raised but not resolved in this case.

90 *Visheshwar Singh* v. *Province of Bihar* (1948) Pat. 820, 1952 A.P. 129.

91 *Gandla* v. *Sivanappa* (1915) 38 Mad. 1162; 26 I.C. 232. But see *Ganga Ghulam* v. *Tapeshri Prasad* (1904) 26 All. 606, 607. and *Kunhamed* v. *Kutti* (1891) 14 Mad. 167.

the two defendants against the other affecting the plaintiff's property was collusive and is not binding on the plaintiff. Even if the plaintiff is not in possession he may sue for a declaration that a decree against his tenant has been obtained by collusion, if that decree casts a cloud upon his ultimate rights.[92] A suit may be brought under this section by the Mahomedan inhabitants of a village for a declaration that an *idgah* and the land adjoining is situated in the village is *waqf* property.[93] The right to attach a particular property is a right as to that property.[94] A suit by a person for a declaration that an order of removal from the Indian Civil Service was illegal and that he was still a member thereof will lie.[95] But a suit against a University for a declaration that a candidate has passed an examination or for an injunction compelling the University to promote him is not maintainable. That would be an unwarranted usurpation of the academic functions of the University.[96]

A suit does not lie under this section for a declaration that a valid personal contract still subsists between the plaintiff and the defendant, or conversely for a declaration that the plaintiff is not liable under a certain contract.[97] Such a suit is not for a declaration that the plaintiff is entitled to a legal character or to any right as to any property.[98] Likewise, a decree-holder cannot sue for a declaration of the debtor's title to property.[99] A suit by a mere creditor of the transferor that a document of transfer is a sham does not lie under section 42 (s. 34 of 1963), though such a suit will be maintainable by the transferor.[1] If in execution of a decree the property of a third person is sold and purchased at an auction sale, such third person need not sue for setting aside the decree as long as he is not disturbed in his possession and he can in defence of his possession raise the plea of the decree not being binding on him.[2] The section has, however, been held to be applicable, wrongly it is submitted, to a case where the plaintiff sought a declaration that the defendants owned a share in Blackacre, in order to establish that a Revenue officer had erred in refusing permission to the defendants to sell a share in Whiteacre to the plaintiff.[3] The ground of the decision was that the test was whether the plaintiff had an interest in seeking such a declaration, but this ignores the plain words of the section. A declaration is not granted if it affects only the pecuniary relationship between the parties to a contract,[4] unless it is necessary to have the pecuniary right declared before a suit can be based upon it.[5] A suit for declaration that a contract does not subsist and the plaintiff is therefore not liable for damages for its breach is not maintainable as a declaration regarding pecuniary liability of a person cannot be considered to be declaration about the legal character or any right to property[6] A rate-payer has an interest in the property of the Municipality and can maintain a

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92 *Kundan Lal* v. *Hukam Singh* A.I.R. 1952 Punj. 115.

93 *Muhammad Alam* v. *Akbar Husain* (1910) 32 All. 631. But see *Wajid Ali Shah* v. *Dianat-ul-Lah Beg* (1886) 8 All. 31; *Sifat Ali* v. *Ali Mian* (1933) All. L.J. 513; 144 I.C. 298; 1933 A.A. 284.

94 *Jamnabai* v. *Dattatraya* (1935) 60 Bom. 226; 38 Bom. L.R. 251; 162 I.C. 260; 1936 A.B. 160. There is nothing in s. 42 which bars a suit for a declaration that a certain sale is void: *Mangtulal* v. *Daya Shankar* 1936 A.P. 572; 165 I.C. 749. Right to attach property is a mere procedural right and does not entitle one to a declaration: *Maung Ba Maung* v. *Maung Ba Yin* [1940] Rang. 59; 183 I.C. 728; 1939 A.R. 332.

95 *I. M. Lall* v. *Secretary of State* (1944) Lah. 325, 1944 Lah. 240 on app. 75 I.A. 255 on another pt. But a suit by a servant for a declaration that he was wrongfully dismissed is not a suit to assert a legal character: *Andhra University* v. *Durga Lakshmi* 1951 A.M. 870.

96 *State Medical Faculty* v. *Kshiti Bhushan* (1961) A.Cal. 31.

97 *Madanlal* v. *State of Madhya Bharat* 1955 A.M.B. III.

98 *Ramakrishna* v. *Narayana* (1916) 39 Mad. 80; 26 I.C. 883; *Andhra University* v. *Durga Lakshmi* 1951 A.M. 870. A declaration that the plaintiff was a holder for value of a cheque was allowed in peculiar circumstances in *Girdhari Lal* v. *Palaniappa Mudali* 119 I.C. 158; 1929 A.M. 572, *sed qu.* Suit does not lie for declaration that defendant would be liable to compensate plaintiff in case the latter had to pay: *Nathu Ram* v. *Mula* 1937 A.L. 25; 169 I.C. 932.

99 And *semble*, not even if the property has been attached: *K. R. M. A. Firm* v. *Maung Po Thein* 4 Rang. 22; 95 I.C. 98; 1926 A.R. 124; *Krishnaveni* v. *Soundararajan* (1945) Mad. 412. *Subbaraidu* v. *Satyanarayana* (1962) A.AP. 25. *Contra Ouseph Skaria* v. *Cherian Joseph* (1965) A.Ker. 288, where observations were obiter.

2 *Kedarnath Lal* v. *Sheo Narain Ram* (1957) A.P. 408.

3 *Thakur Dei* v. *Bishwanath Singh* 1953 A.A. 251, *per* Mushtaq Ahmad J.

4 *Gopaldas* v. *Mul Raj* 1937 A.L. 389; 171 I.C. 144.

5 *Chettinad Mercantile Bank* v. *Piehammai* (1946) Mad. 200.

6 *Mahabir Jute Mills* v. *F. Kedar Nath Ram Bharose* (1960) A.A. 254.

suit against the Municipality for declaration that a sale by the Municipal Committee was illegal and in contravention of the statute.[7]

The right to use a street as a thoroughfare is a right which a Court might properly declare; and the right to pass along a street playing music is a right which the Courts may recognise in the case of religious processions if an inherent right is shown,[8] and in the case of non-religious processions if music is an appropriate observance of that particular procession, but always subject to the right of other citizens to use the highway, and to any orders issued by the authorities to prevent disturbances and to control the traffic.[9]

A suit which is not for a declaration of plaintiff's right to property or to his legal character but is a suit to challenge the defendant's pretensions to a legal character or right to property in outside section 42 of the old Act (s. 34 of 1963).[10] This was a suit for declaration and injunction brought as a representative suit. A suit for declaration lies even if the "legal character" is not as to any property but merely casts a cloud over the title of the plaintiff's wife arising after the plaintiff's death.

The plaintiff executed a will bequeathing to the defendant property after his own death and that of his wife. Apprehending that the defendant in order to affect the title of the plaintiff's wife after plaintiff's death would create mischief, the plaintiff destroyed the will and brought a suit for declaration that the defendant was not his adopted son. The suit was held maintainable.[11]

A suit lies for a mere declaration that the plaintiff was not a signatory to a document and it was a forgery. It would be immaterial if he averred that no consideration passed nor possession given.[12]

The plaintiff obtained a decree of preemption against a tenant to whom the land had been sold by the proprietor in November 1956 and obtained title to the land on May 5, 1958; by deposit of price. The right of preemption was abolished by a statute coming into force on 30.7.1968. The plaintiff's petition for execution was dismissed on May 2, 1959, and the mutation also was refused. On March 28, 1960, the plaintiff brought a suit for declaration of title and that the defendant vendees were merely tenants.

The suit was held maintainable as no further relief could be claimed and as a cloud had been cast on his title by refusal of mutation. The relief was no doubt discretionary but that particular case was a fit one for the exercise of discretion.[13]

A, a Hindu, dies leaving a widow, *B*. *R*, *A*'s executor, applies for probate of *A*'s will. *S* files a caveat, but the caveat is dismissed, and an order is made for a grant of probate to *R*. Subsequently *S* sues *R* and the widow for a declaration that he is the next reversioner to the estate of *A* and, as such, is entitled to apply to the Court having probate jurisdiction for revocation of the grant of probate. *S* is not entitled to sue under this section, as he is not entitled to any legal character or to any right to property. The reason is that even as a reversioner he cannot have any right to *A*'s estate *unless A died intestate,* and the grant of probate (until revoked) is conclusive that *A* did not die intestate.[14] We purposely refrain from citing other cases where the only matter really in dispute was the special custom of some tribe or sect.

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7 *Ajudhia Nath* v. *Amar Nath Gupta* (1961) A.Punj. 352.

8 *Muhammad Jalil Khan* v. *Ram Nath Katua* (1930) 53 All. 484, 1931 A.A. 341; *Martin & Co.* v. *Faiyaz Hussain* 1944 A.P.C. 38, 47 Bom. L.R. 575. Declaration that certain members of a community have a right of taking out processions with music on public roads: *Muhammad Jalil Khan* v. *Ram Nath Katua* (1930) 53 All. 484; 1931 A.A. 341. Authority on the matter of processions and the like is in a regrettably unsettled state, *cp*. footnote 18 to commentary on s. 34, under head "scope of the section", above.

9 *Chandu Sajan* v. *Nyahalchand* 1950 A.B. 192 (F.B.), not following *Venkatesh* v. *Abdul Kadir* (1918) 42 Bom. 438, 1918 A.B. 162, 46 I.C. 740.

10 *Sanat Kumar* v. *Hemchandra* (1961) A.Cal. 411, 419.

11 *Ramsunder Bhagat* v. *Rambharosi Bhagat* (1957) A.P. 131.

12 *Rambharosa* v. *Smt. Binda Devi* (1956) A.P. 203.

13 *Ganga Ram* v. *Shiv Lal* (1964) A.Puj. 260.

14 *Sheoparsan Singh* v. *Ramanandan Singh* (1916) 43 I.A. 91, 43 Cal. 694; 33 I.C. 914.

The Delhi High Court in the case of Sikh Gurdwaras has held that the term "legal character" is synonymous with "legal status".[15] In this case a suit for declaration challenging the legality of an award and the decree following thereon in regard to certain elections to the Gurdwara Committee was challenged by some Sikh worshippers of the Gurdwara and they were held to have no legal character.[16]

Declaration as to right to possession.—Ills. (a) and (g) above show that a person in possession may sue for a declaration in certain events. Where a person is in possession of land, and the defendant, alleging that the land is *waqf* property and that he is the *mutawalli* thereof, interferes with his tenants and prevents them from paying rents to him, and it is found that the defendant is not the *mutawalli* nor possessed of any interest in the land, such person is entitled to a declaration as against the defendant that he is *lawfully entitled to possession* and to an injunction restraining him from interfering with his possession. It is not necessary for him to be entitled to such a declaration to negative that the land was *waqf* property. It was so held by the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*:[17] "The possession of the plaintiff [which was for a period of 6 years] was sufficient evidence of title as owner as against the defendant. By s. 9 (now s. 6) of the Specific Relief Act (Act I of 1877) (now Act 47 of 1963) if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession."

A suit for declaration of his title by a person in possession, on whose title a cloud has been cast by an auction sale of the property, is maintainable and is outside s. 42, now s. 34 of Specific Relief Act.[18]

A pledged his shares with a bank. Before his death he made a will appointing his wife to be the executrix of the will. After *A*'s death the widow gave a notice to the bank intimating that she was arranging to pay off the debt and redeem the pledge and requested the bank not to sell the shares in the meanwhile but the bank sold the shares without notice to her. She brought a suit for declaration that her right to redeem was unaffected and for an injunction against the company whose shares had been pledged, not to register the transfer.[19]

It was held that under section 211 of the Succession Act the entire property vested in the executrix, and that the plaintiff having accepted the office of executrix under the will could not file a suit as an heir of the testator as if on intestacy and must obtain a probate before filing the suit. Thus without obtaining the probate of the will the plaintiff could not be said to have a legal character or right to property within section 42 (s. 34 of 1963 Act).[19]

The plaintiff who was not a member of the company was appointed a joint Managing Director from which office he was removed by a resolution of the Company. His suit under s. 42 was held not maintainable as he was not entitled to a "legal character" within s. 42 (s. 34 of the new Act).[20] And the plaintiff not being a member of the Company was not entitled to place any reliance on the Articles of the Company.[21]

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15 *Sikh Gurdwara Prabandhak Committee* v. *Jagmohan Singh* (1971) 2 DeL 515, 527; *Major General Shanta Shamsher Bahadur Rana* v. *Kamani Bros. (P) Ltd.* (1959) A.B. 201; *Wajid Ali Shah* v. *Dianatullak Beg*. 8 All. 31 folld.; *Sat Narain Gurdwara* v. *Hanut Parshad*, 47 Puj. L.R. 841 disting.

16 *Shiromani Gurdwara Prabhandak Committee* v. *Jagmohan Singh* (1971) 2 Del. 515.

17 (1893) 20 I.A. 99; 20 Cal. 834; *Gangaram* v. *The Secretary of State for India* (1896) 20 Bom. 798; *Hanmantrav* v. *The Secretary of State for India* (1901) 25 Bom. 287; *Ayyaparaju* v. *The Secretary of State for India* (1914) 37 Mad. 298, 300; 25 I.C. 894; *Panchayat Board, Akumalla* v. *Venkata Reddi* 1946 A.M. 322; *Fakirbhai* v. *Maganlal* 1951 A.B. 380, 384.

18 *Upendra Nath* v. *Jitendra Nath* (1959) A.Cal. 252.

19 *Narasayyamma* v. *Andhra Bank* (1960) A.AP. 273. *Sheo Prasad Singha* v. *Ramananda Prasad* 43 Cal. 694 (P.C.); 43 I.A. 91 (1916) A.PC. 78 folld.

20 *Shanta Shamsher* v. *Kamani Bros. Ltd.* (1959) A.B. 201.

21 *Ibid.*

"Interested to deny."—A suit may be brought under this section not only against a person denying, but a person interested to deny, the plaintiff's right to property. The words "interested to deny" have been interpreted to mean that 'the person interested to deny a legal character or a right to property is a person with a rival claim of some sort and with some interest resembling in its nature that of the person whose legal character or right is denied'.[22]

A plaintiff can maintain a declaratory suit against a person, who denies his right or even if he is interested in denying his right. Therefore a Hindu son is entitled to bring such a suit challenging the right of his father's unsecured creditor to proceed against his share in the joint family property.[23]

It is not necessary that the defendant should deny a benamidars legal character. It is enough if a claim might be set up by the defendant which may hinder the exercise of his right.[24] A benamidar has a "legal character" and qua third parties he enjoys a representative capacity although he has no beneficial interest in the property or business of the real owner. This would entitle him to sue under s. 42 of Specific Relief Act (new s. 34) any person who denies such legal character.[25]

The plaintiff brought a suit for declaration that he was a benamidar for defendants qua certain transactions and was not liable to income tax on those transactions and for injunction against defendants restraining them from denying that the transactions were not on their account; and also for injunction against Income tax Officers restraining them from including those items in plaintiffs assessment. At the time of bringing the suit no assessment had been made only enquiries had been made by the income tax authorities.

The suit was held maintainable and was not barred by the proviso to section 42 (s. 34 of the new Act). The further relief that he would not be liable for the transactions or income tax thereon was between the defendants *inter se* but did not prevent the taxing authorities from proceeding according to law and there was no contravention of the bar of section 67 of Income Tax Act of 1922.[26]

Where an order is made by a magistrate under the provisions of the Criminal Procedure Code against a person directing him to remove an *otta* standing in front of his shop as an obstruction to the public way, such person may institute a suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood is his property, and that it does not form part of the public road. Public roads are under the Land Revenue Code (Bombay Act V of 1879) vested in the Government of Bombay, and the Government therefore are "interested to deny" the plaintiff's title to the land.[27]

Magistrate's order.—A suit for a declaration that the marriage between the parties to the suit is dissolved is maintainable when the defendant is interested to deny the legal character claimed by the plaintiff.[28] The question whether the parties are properly married is a matter of

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22 *Governor-General in Council* v. *Mohamad* 1944 A.N. 382, (1945) Nag. 527 (the Crown is not interested to deny' the decision of an Income-Tax Officer).

23 *Udmiram* v. *Balramdas* (1956) A.N. 76; *Smt. Inder Devi* v. *Kirparam* (1930) A.L. 303 reld. on. *Gokuldos* v. *Rambux* 11 I.A. 126; 10 Cal. 1035; refd. to; *Lalji Haridas* v. *Mulji Munilal* (1966) A. Guj. 159 (interested in denying).

24 *Lalji Haridas* v. *Mulji Manilal* (1966) A.Guj. 159.

25 *Lalji Haridas* v. *Mulji Manilal* (1966) A.Guj. 159, 162; *Ram Kissen Das* v. *Satya Charan* 77 I.A. 128; (1950) A.PC. 81; refd. to in *Dr. S. Dutt* v. *University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050; *Commissioner of Income Tax* v. *Abdul Rahim & Co.* (1965) 55 I.T.R. 651 (1965) A.SC. 1703; and *Commissioner of Income Tax* v. *Bagyalakshmi & Co.* (1965) 55 I.T.R. 660. 664; (1965) A.SC. 1708. 1709 reld. on; *Shanta Shamsher* v. *Kamani Bros. Ltd.* (1959) A.B. 201 dist. (The plaintiff had no legal character.) *Chapsey* v. *Jethabhai* (1907) 9 Bom. L.R. 514, 525 refd. to.

26 *Lalji Haridas* v. *Mulji Manilal* (1966) A.Guj. 159, 164; (1966) Guj. 971.

27 *The Secretary of State for India in Council* v. *Jethabhai* (1893) 17 Bom. 293; *Bhagwan Baksh Singh* v. *Secretary of State for India in Council* 1937 All. 736, at p. 756; 171 I.C. 322; 1937 A.A. 569; *Salamat Begam* v. *Sheikh Ikram* 1933 A.A. 663; 145 I.C. 728; *Mohammad Habib Khan* v. *Badi-ul-Zaman* (1932) 14 Lah. 414; 1933 A.L. 195; 141 I.C. 443.

28 *Noor Jehan Begum* v. *Eugene Tiscenko* (1942) C.W.N. 465; 200 I.C. 176; 1942 A.Cal. 325; *Coral Indira* v. *Joseph* 1953 A.M. 858.

status and the Court gives judgment *in rem* on the status of the parties and in a properly constituted suit the husband is entitled, if he establishes that there is a decree of divorce which should be recognised, to the relief claimed, that his first marriage was properly dissolved and that his second marriage is valid.[29]

Where the defendant admits the plaintiff's right or the plaintiff's title to any property, this section has no application.[30]

"Further relief."—The Law Commission recommended the repeal of the proviso on the ground that its interpretation had led to difficulties but the legislature has not accepted the recommendation probably because it prevents multiplicity of proceedings and also, it appears, on the ground of loss of revenue. A suit should not be dismissed if a plaintiff, being able to seek further relief, omits to do so. All that is provided by this section is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed for.[31] Where the plaintiff omits to seek further relief, and applies for an amendment in the Court of first instance, the Court should allow the amendment.[32] Where the objection that the plaintiff has omitted to seek further relief is taken for the first time in appeal, the Court should not refuse to make the declaration, but allow the plaintiff an opportunity of amending the plaint.[33] But no such amendment should be allowed where the objection is taken in the Court of first instance and the plaintiff notwithstanding persists in continuing the suit as framed.[34] Where in a suit under O. XXI, r. 102, Civil Procedure Code, plaintiff claimed a declaration and possession, but subsequently struck out his claim for possession, it was held that the suit was not governed by the proviso to s. 34 and was maintainable.[35] The provisions of s. 42 (s. 34 of the new Act) are not applicable to suits under O. 21, r. 63, of the Civil Procedure Code.[36]

Belated objection.—Belated objection to the maintenance of a suit for declaration of legal right to a religious office without consequential relief on the ground of its not being in accordance with proviso to S. 34 is not maintainable, the objection was taken after the matter had been to the Supreme Court.[37]

Where a plaintiff was dispossessed of suit property long prior to the bringing of his suit for declaration of title and perpetual injunction restraining the defendant from interfering with his possession, it was held that the suit was not maintainable under S. 34 proviso, and the court could not grant the relief of possession under the general provision of O. VII r. 7 Civil Procedure Code.[38]

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29 *Kunstler* v. *Kunstler* (1969) 3 All E.R. 673.

30 *Municipal Corporation of Rangoon* v. *Saw Willie* 1942 A.R. 70.

31 *Sakharam* v. *The Secretary of State for India* (1904) 28 Bom. 322; *Kunj Bihari Prasadji* v. *Keshavlal* (1904) 28 Bom. 567.

32 *Kalabhai* v. *The Secretary of State of India* (1905) 29 Bom. 19, 29; *Mohammad Sadiq* v. *Allah Bakhsh* (1929) 120 I.C. 531.

33 *Limba* v. *Rama* (1889) 13 Bom. 548; *Chomu* v. *Umma* (1891) 14 Mad. 46; *Charan Das* v. *Jamna Devi* (1928) 10 Lah. 403; 112 I.C. 48, does not seem reconcilable with these decisions, though on principle it seems correct that particular acts authorised by an existing operative instrument cannot be declared invalid without cancelling the instrument. Cp. *Bonta Singh* v. *Diwan Singh*, 115 I.C. 539; 1929 A.L. 11; *Bibi Zubaida* v. *Mohan Ram* 1937 A.P. 229; 170 I.C. 84. Plaintiff cannot be compelled to ask for consequential relief arising during pendency of a suit; *Hurmat Ali Shah* v. *Tufail Mohammad* (1934) 16 Lah. 729; 156 I.C. 830; 1935 A.L. 332; *Abid Ali Khan* v. *Secretary of State* 1951 A.N. 327, 337; *Jethu Singh* v. *Kishan Singh* 1951 A.Peps. 48. It is open to the appellate Court to allow amendment converting suit for declaration into one for possession: *Bal Mukand* v. *Madan Gopal* 1935 A.Lah. 91; 157 I.C. 1024.

34 *Suryanarayanamurti* v. *Tammanna* (1902) 25 Mad. 504, 506; *Narayana* v. *Shankunni* (1892) 15 Mad. 255, 257-258; *Raj Narain Das* v. *Shama Nanda Das* (1899) 26 Cal. 845; *Shiv Ram* v. *Bhag Devi* (1918) Punj. Rec. no. 118, p. 374; 48 I.C. 838; *Atma Ram* v. *Godhu Ram* (1932) 14 Lah. 306; 141 I.C. 409; 1933 A.L. 712.

35 *Ram Chandra* v. *Sunderlall Singh* 1938 A.P. 558; 176 I.C. 862.

36 *Manna Singh* v. *Wasti Ram Saraf* (1960) A.Puj. 296.

37 *Syed Saulat Hussin* v. *Syed Zimuddin* (1981) A. Raj. 29.

38 *Pandiranath* v. *Ramachandra* (1974) Karnataka 664, 668.

In a suit where the plaintiffs prayed for a declaration that they were entitled to a two-fifths share of property in the possession of the defendants, the Allahabad High Court held that the proviso to s. 34 did not apply, as relief by way of partition would be granted by the Collector.[39] This appears to be unsound. The relief is granted by the Court though the Collector is the officer of execution. In any case the plaintiffs should have asked for joint possession.[40]

A suit for declaration and injunction and for appointment of a receiver is not maintainable when the relief of possession is available, the defendants being in possession.[41]

Where a suit for declaration of a share in the suit property, the plaintiffs further claimed partition and delivery of possession accordingly, it is not necessary to claim a further relief by way of delivery of possession.[42]

A suit for a declaration of right to pre-empt would not lie if not followed by a prayer for consequential relief.[43] And a suit for a declaration that a decree was obtained by fraud does not lie in the absence of a prayer to set it aside.[44]

Injunction is "further relief" within the meaning of the proviso.[45] And so is cancellation.[46] A suit therefore for a declaration and an injunction or for a declaration and cancellation is a suit in which further relief *is* sought.[47] Where the plaintiff, a minor claiming right, title and possession of the suit property sued for declaration that the *Kabala* executed by his mother was a nullity and for permanent injunction restraining the defendants from interfering with his rights and possession a further prayer for cancellation of the instrument is not necessary.[48] A suit by a shareholder for a declaration and injunction will lie for a declaration that a notice calling an extraordinary general meeting to pass a resolution to declare a dividend is *ultra vires* the powers of the company as such a resolution can be passed at an ordinary general meeting and the rate of dividend to be passed has to be recommended by the Directors.[49] And such a suit is not speculative. A declaratory decree can be passed if the suit is brought honestly and is not speculative.[50] Where a person obtains a decree under s. 9 (s. 6 of the new Act), the defendant in possession can bring a suit for declaration of title and injunction against the decree-holder. There is nothing in s. 9 (s. 6 of the new Act) which takes away the remedies of a person who is in possession as of right to remain in possession.[51] A suit for declaration by a trustee for the

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39 *Rupan Rai* v. *Subh Karan Rai* (1919) 41 All. 207; 49 I.C. 367.

40 The criticism in the text was not accepted by a bench of the Nagpur High Court in *Munna Bai* v. *Sarda Bai* (1946) Nag. 312. It was observed that the principles laid down by the P.C. in pre 1877 cases—*Sadut Ali Khan* v. *Abdool Gunney* (1873) I.A. (Suppl.) 165, 171; *Katama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 187—are not modified or abrogated by s. 42. As for joint possession, the Court remarked that the plaintiff did not desire it, and as relations were strained it would not meet the necessities of her case. See also *Province of Orissa* v. *Durjodhar Das* 1951 A.Or. 342, 346.

41 *Kumar Ranjan Bannerjee* v. *Manabendu* (1974) A.Cal. 342. *Anilibda Debi* v. *Madnabendu Narayan Roy* (1942) A.Cal. 245 and *Kalipada Mondal* v. *Kalicharan Mondal* (1949) A.Cal. 204 folld.

42 *Aniradha Padhan* v. *Chhai Padhan* (1981) A.Or. 74.

43 *Chanran Das* v. *Amir Khan* (1921) 48 Cal. 110; 67 I.C. 606, P.C.

44 *Kamla Kant Jha* v. *Muktinath Jha* 1942 A.P. 309; 197 I.C. 185.

45 *Kunj Bihari Parsadji* v. *Keshavlal* (1904) 28 Bom. 567; *Deokali Koer* v. *Kedar Nath* (1912) 39 Cal. 704; *Sundar Singh Sanatan Dharam High School Trust* v. *Singh Rajput High School* (1937) 65 I.A. 106; (1938) Lah. 63; 172 I.C. 993; 1938 A.PC. 73; *Giribala* v. *Ushangani Debi* 1955 A.Asm. 177. See s. 39 of the Act.

46 *Tacoordeen* v. *Nawab Syed Ali* (1874) 1 I.A. 192; 13 Beng. L.R. 427. See s. 27 of the Act.

47 Conversely a suit merely for declaration will not be entertained where the real object is to set aside a decree: *Rajbans Sahay* v. *Askaran Baid* 125 I.C. 113; 1930 A.P. 227, or to set aside a document which is merely voidable and not void: *Tirupathi* v. *Lakshmana* 1953 A.M. 545.

48 *Ganesh Chandra Bag* v. *Rashbehari Chakrabarti* (1978) A.Cal. 486, 488 *Humayun Begam* v. *Shah Mohammad Khan* (1943) APC 94; 49 Cal. W.N. 49 *Radha Shankar Roy* v. *Shaktipada Roy*, 39 Cal. W.N. 520 Diss. fur.

49 *Raghunandan* v. *Swadeshi Cloth Dealers Ltd.* (1964) A.Cal. 247; 68 C.W.N. 302; *Bishwanath* v. *New Central Jute Mills Ltd.* 64 C.W.N. 970 reld. on.

50 *Raghunandan* v. *Swadeshi Cloth Dealers Ltd.* (1964) A.Cal. 247; *Ajaib Singh* v. *Sham Singh* 1925 A.L. 127; and *Khushilal* v. *Nandlal* (1933) A.L. 866 refd. to.

51. *Gopalakrishnan Pillai* v. *Venkkatesam Pillai* (1967) 1 M.L.J. 346; *Narasaya* v. *Subbayya* (1963) Mad.

trust property without a prayer for possession is sustainable where the property is in possession of tenants entitled to continue in possession under a statute.[52]

A person claiming a right to act as a coshebait and for being allowed to act as such can maintain a suit for declaration without a further prayer for possession when the nature of the property being endowed property is not denied. And if he sues for injunction he need not pray for joint possession as injunction will secure to him all the rights that he claims.[53] Hence a suit will lie for declaration that defendants are not properly appointed trustees and shebaits and for an injunction restraining them from acting as such and interfering with the estate of the deceased.[54]

According to the Articles of a company a director did not need to be a shareholder and no right was conferred to a stipulated remuneration but a remuneration to be paid out of the funds of the company could be prescribed. A director, who was a shareholder, but has no service agreement, was excluded from directorship for absence from Board meetings. He sued for declaration and consequential relief of injunction. He was held to have sufficient proprietary interest to enable him to sue for the reliefs.[55]

The Pakistan Supreme Court[56] has held that a suit for declaration and injunction can be treated even in the Supreme Court as a suit for specific performance after taking into consideration the substance of the plaint, because any equitable defence in one would also be open to him in the other. But where in addition to an injunction the plaintiff might have prayed for possession, but omits to do so, the Court should not make the declaration. Thus a plaintiff suing for a declaration that he is the Sheik of Kalli and entitled as such to all the properties attached thereto, and for an injunction against the defendant to restrain him from dealing with the properties, ought to pray for possession of the properties if they are in the defendant's possession at the date of suit. The reason is "that the further relief which the plaintiff is bound to claim is such relief as he would be in position to claim for the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration.[57] But a plaintiff suing for a declaration that a conveyance of property by defendant *A* to defendant *B* taken by *B* with notice of a prior agreement for sale of the property by *A* to the plaintiff is not binding on the plaintiff, and for specific performance of the agreement, is not obliged to pray for delivering up and cancellation of the conveyance; in such a case the suit is primarily one for specific performance, that is, for execution of a deed of sale of the property by *A* to the plaintiff.[58] *A* agreed to sell immovable property to *B*, but fraudulently had the property mutated in favour of *C*. *B* sued for declaration and for perpetual injunction. It was held that the relief of declaration could not be granted but relief of injunction restraining the vendor *A* from alienating the property to any one other than *B* was granted on the basis of S. 91 of Trusts Act and because the agreement creates a kind of trust. It is submitted that an agreement to sell creates no interest in the property under S. 54 Transfer of Property Act except to sue for specific performance and the cases referred are distinguishable.[59] Judgment creditors suing their debtor and a transferee from him, and praying a declaration that the transfer is void as against creditors and they are entitled to proceed against the property are not bound to pray for a cancellation of the deed.[60] A settlee in whose favour suit property had been settled can

122; refd. to; *Parmanand* v. *Chimmawati* (1955) A.M. 64 dist. as only the relief of injunction was claimed there.

52 *Veerappa* v. *Venugopala* (1967) A.M. 404; (1966) 2 Mad. 173. *Gangaram* v. *Shivlal* (1964) Punj. 555; (1964) A.Punj. 260; and *Shishu Reddi* v. *Ramaraghava Reddi* (1964) A.AP. 118 reld. on.

53 *Sankatha* v. *Brij Mohan* (1958) A.A. 371.

54 *Sanat Kumar* v. *Hem Chandra* (1961) a.Cal. 411.

55 *Hayes* v. *Bristol Plant Hire Ltd.* (1957) 1 All. E.R. 685; (1957) 1 W.L.R. 499. See also *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878) 9 Ch.D. 610.

56 *S. Sibtain Fazli* v. *Star Film Distributors* PLD (1964) S.C. 337, 355.

57 *Abdulkadar* v. *Mahomed* (1892) 15 Mad. 15; *Anila Bala* v. *Madhabendu* (1942) 46 C.W.N. 20; 74 Cal. L.J. 341; 1942 A.Cal. 245.

58 *Kannan* v. *Krishnan* (1890) 13 Mad. 324.

59 *Keshavlal Lakshman Das* v. *Narsinghbhai Kalidas Patel* (1976) A. Guj. 154, 156; *Central Trust and Safe Deposit Co.* v. *Srider* (1916) A.C. 266; 272; *Soni Lalji Jetha* v. *Kalidas* (1967) A.S.C. 978, 982 refd. to.

60 *Ma Sein* v. *P.L.S.K. Firm* (1929) 7 Rang. 477; 120 I.C. 228.

maintain a suit for declaration of his title without getting set aside the subsequent sale of the property of the settler. But there may be circumstances when such alienations have to be set aside.[61] Where the plaintiff a transferee from the defendant who transferred the property in dispute to the plaintiffs to defraud his creditors and the fraud succeeded, brought a suit for declaration of title but the Court finding him not to be in possession, his suit for declaration simpliciter was held not to be maintainable.[62]

Under this section a plaintiff who is able to seek further relief than a mere declaration of title is obliged to seek such relief; if he omits to do so, the Court will not make the declaration asked for. Thus a plaintiff out of possession suing for a declaration of title to land ought to pray for possession, if the defendant is in adverse possession.[63] But he is not obliged to do so if the defendant is not in possession or if he is in lawful possession in any case and the dispute relates only to the character of his possession.[64] A suit for declaration of title and confirmation of possession is maintainable and is not barred by the proviso to S. 34 Special Relief Act. The record of rights neither creates nor confers nor affects title.[65] In a suit for declaration of title, confirmation of possession and permanent injunction the plaintiff has to prove his title. An unregistered deed of lease can only prove the nature of possession and not the terms, conditions and nature of tenancy. Occupancy tenancy under the Orissa Tenancy Act being a creation of statute, cannot be created by contract and non-occupancy rights are neither heritable nor transferable.[66] Where the plaintiff sued for a declaration that the entry in the record of rights showing the defendants as his tenant was erroneous and that the plaintiff was in possession through the defendants as his agents, he need not ask for the further relief of possession and the suit is not barred under proviso to S. 67.[67] Plaintiff can sue for declaration of title without any consequential relief where the property is in possession of tenants.[68] But a suit for declaration that the lease in favour of a tenant in possession is void is not maintainable without further relief for possession.[69] Or where the defendant was in possession as a licensee which licence the plaintiff had not terminated.[70]

"In order that a suit can be held to be unmaintainable by the application of section 42 of the (old) Specific Relief Act, it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for delivering up of possession."[71] A tenant forcibly dispossessed of land by the landlord brought a suit for declaration of being a cultivat-

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61 *Thirupathi Pillai* v. *Ganthimathi Ammal* (1966) 2 M.L.J. 325; *Raja of Ramnad* v. *Arunachalam Chettiar* 24 M.L.J. 529; and *Muppudathi Pillai* v. *Krishnaswami Pillai* (1959) 2 M.L.J. 225 (F.B.) dist.

62 *Shia Sharan Prasad* v. *Sridhar Prasad Singh* (1974) A.P. 51, 54.

63 *Bikutti* v. *Kalandan* (1891) 14 Mad. 267; *Narayana* v. *Shankuni* (1892) 15 Mad. 255; *Muttakke* v. *Thimmappa* (1892) 15 Mad. 186; *Kunhiamma* v. *Kunhunni* (1893) 16 Mad. 140; *Krishnabhupati* v. *Ramamurti* (1895) 18 Mad. 405; *Rathnasabapathi* v. *Ramaswami* (1910) 33 Mad. 452; *Raj Narain Das* v. *Shama Nando Das* (1899) 26 Cal. 845; *Ishwari Singh* v. *Narain Dat* (1914) 36 All. 312; 23 I.C. 555 [where the land was waste land]; *Dwarka Prasad* v. *Mst. Jasoda* 1933 A.A. 958; *Raj Kishore* v. *Madan Gopal* (1931) 13 Lah. 491; 1932 A.L. 636; *Shankar Narayan* v. *Puttu Bhatta* 1932 A.B. 175; 34 Bom. L.R. 125; 139 I.C. 678; *Faqir Bux* v. *Thakur Prasad* (1941) 16 Luck. 832; 194 I.C. 588; 1941 A.O. 457.

64 *Tekait Harnarayan Singh* v. *Darshan Deo* (1924) 3 Pat. 403; 83 I.C. 741; 1924 A.P. 560; *Sindhal Parmar* v. *Mir Bharalal* 1950 A.Kutch 4; *Abdul Rahim Khan* v. *Fakir Mohamad* (1946) Nag. 518, 1946 A.N. 401. Suit for declaration of ownership of house occupied by a tenant on the basis of a will of a deceased owner: *Gian Chand* v. *Bhagwan* 1932 A.Lah. 97; 135 I.C. 502.

65 *Patta Mahapatrani* v. *State of Orissa* (1972) A.Or. 248; (1972) Cutt. 283.

66 *Chandrakanta Pani* v. *Iallochan Pani* (1973) A.Or. 68.

67 *Kanailal Dholey* v. *Ralicharan Chatterjee* (1977) A.Cal. 449; *Venareddy Ramoraghwareddy* v. *Konduru Sesni Reddy* (1977) A.SC. 436 refd. to.

68 *Jyotiromyee Debi* v. *Durgadas Bannerjee* (1976) A.Cal. 238, 242; *D. Ramchandra Reddy* v. *D. Kanta Reddy* (1973) A.A.P. 189.

69 *Ghulam Mohiuddin* v. *Official Assignee* (1978) A.Cal. 463; *Sailendra Nath* v. *Charu Charan* (1929) A.Cal. refd. to; *Amla Bala Devi* v. *Madhubendu Narain* (1942) A.Cal. 245; *Ramsaran* v. *Ganga Devi* (1972) A.SC. 2685; *Jugraj Singh* v. *Jaswant Singh* (1971) A.SC. 761 reld. on.

70 *Shanti Saroop* v. *Radhasoami Satsang Sabha* (1969) A.A. 248.

71 *Malaiyya* v. *Perumal* (1913) 36 Mad. 62; *Hafiz Mohi-ud-din* v. *Fatima Bano* 1954 A.J. & K. 38. So where property is joint and exclusive possession cannot be given: *Kaniz Sugra Bibi* v. *Fidai Begam* (1920) 120 I.C. 108.

ing tenant under Tamil Nadu Tenancy Act but possession was not sought under S. 6 and therefore the suit was dismissed.[72] Nor is he obliged to pray for possession if the property is in the hands of an officer of the Court[73] (unless the Court holds that the defendant is entitled to continue in possession, e.g., as bailee,[74]) or if it is in possession of the Court of Wards pending the adjudication of rival claims to the property.[75] In the case of property under attachment under section 145 Cr.P.C. a suit for declaration without further relief of possession lies and it is not hit by proviso to s. 42 of the Specific Relief Act as the property is in *custodia legis.*[76] Similarly a suit would lie for a declaration *simpliciter* that the plaintiff is the owner of a lorry seized by the Police and kept in its custody because the possession of the Police is for the benefit of the true owner.[77] The plaintiff brought a suit for declaration alleging to be the owner of a motor truck which was given on hire to defendant No. 1, but the defendant No. 2 claimed to be its owner and he had hired it out to defendant No. 3. This dispute was taken to the police for investigation and the High Court in decision gave it to defendant No. 3 as custodian. The suit for declaration was held to be maintainable as the property was in *custod Legis* and it was not affected by the truck remaining in defendant's possession at the conclusion of the investigation.[78] Where the Civil Court finds that at the time of attachment the property in dispute was in possession of the plaintiff who was its owner and the magistrate erroneously found the defendant in possession which the Court is entitled to find, the plaintiff's suit for injunction restraining the defendant from interfering with his rights without further suing for possession is maintainable.[79] If during the pendency of the suit the possession is handed over to the defendant by the Criminal Court, the proper procedure according to Allahabad High Court, is to bring a fresh suit for possession. It is submitted that if the suit was properly framed at the time it was brought, the subsequent passing of possession will not affect its efficacy.[80] A purchaser of a pistol from the owner, who had a valid licence, was deposited in the police *malkhana.* A suit for declaration *simpliciter* of ownership and for the grant of a licence is maintainable. Further relief of possession is not necessary as the State is only a custodian of the pistol.[81] A suit for a mere declaration is maintainable for setting aside an order of the Registrar of Co-operative Societies referring the matter of damages for a defamatory statement made by a member against a Secretary because the question is one of jurisdiction of the Civil Court.[82] But if the Court of Wards does not hold possession as a stakeholder, but is merely managing the property for certain limited purposes, the plaintiff must pray for possession against the defendant through the Court of Wards.[83] When the property in dispute is in possession of a receiver no relief of injunction need be asked for along with the relief of declaration.[84]

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72 *Subban Nadar* v. *Nallaperumal Pillai* (1973) A.M. 432.

73 *Vedanayaga* v. *Vedammal* (1904) 27 Mad. 591; *Annapurna Dasi* v. *Sarat Chandra* (1942) 46 C.W.N. 355, 1942 A.Cal. 394, See also *Brij Bhukhan* v. *Durga Dat* (1898) 20 All. 258; *Neelamoni Sahu* v. *Khetrabasi* 1954 A.Or. 37; *Sundaresa Iyer* v. *S.S.V. Nidhi Ltd.* 1939 A.M. 853.

74 *Janaki Amma* v. *Parameswaran Nair* 1954 A.T.C. 407.

75 *Jagannath Gir* v. *Tirguna Nand* (1915) 37 All. 185; 28 I.C. 139. See also *Fakir Chand* v. *Akunda* (1887) 14 Cal. 586, 591-592.

76 *Deo Kuer* v. *Sheo Prasad Singh* (1965) 3 S.C.R. 655; (1966) A.S.C. 359; *Dukhan Ram* v. *Ram Nanda Singh* (1961) A.P. 425; overruled; *Sundaresa Iyer* v. *S.S.V. Nidhi Ltd.* (1939) Mad. 986; (1939) A.M. 853 appd. *Sundar Singh Mallu Singh S.D.H. School Trust* v. *Managing Committee* 65 I.A. 106; (1938) A.P.C. 73; and *Humayun Begum* v. *Shah Mohammad* (1948) A.PC. 94 appld.; *Jugraj Singh* v. *Jaswant Singh,* (1971) A.S.C. 761 *Contra* pltff. neither asked for cancellation of order of Collector nor for injunction and suit was for declaration that defdts. neither owners nor were they entitled to it under Collector's order.

77 *Gurdial Singh* v. *Sunda Hire Purchase Corporation* (1970) A.P. 7; *Deo Kuer* v. *Sheo Prasad Singh* (1963) 3 S.C.R. 655; (1966) A.SC. 359 reld. on.

78 *Autolete Financiers Ltd.* v. *Swastika Finance Corp. Ltd.* (1971) A.D. 310 *Fateh Shah* v. *Babob Shah* (1927) A.L. 128 reld. on.

79 *Dhanwanti* v. *Ramai* (1979) A.A. 348; *Mukhram* v. *Puran* (1960) All. L.J. 145 Folld.; *Jugraj Singh* v. *Jaswant Singh* (1971) A.SC. 761 disting.; *Santosh Chandra* v. *Smt. Gyanan Darsee* (1975) A.MP. 193.

80 *Jagdish* v. *Rajendra* (1975) A.A. 395.

81 *Narain Singh* v. *State of U.P.* (1981) A.A. 246.

82 *Himangshu Bhusan* v. *Nirmal Kumar* (1962) A. Cal. 488.

83 *Surendra Narayan* v. *Bhairabendra* 1950 A.Cal. 386, 390.

84 *Gangappa Ramappa* v. *Kalappa Sankarappa* (1973) A.Mys. 190.

The plaintiff sued for declaration of title to funds held by Government on behalf of the defendants on two grounds: (1) heirship to the last male holder and (2) family custom giving him priority over the daughters in whose names the funds were held. Both the daughters and the Government who were defendants pleaded against the plaintiff's case.

A mere declaratory suit was held unmaintainable as the Government in this case was not a mere stake holder and *pro forma* defendant but it was a contesting defendant.[85] But the Court allowed amendment on terms. Where land in dispute has been requisitioned by the Government, the plaintiff may sue merely for a declaration of his right to the entire amount of compensation money.[86] A suit for a declaration that the plaintiff is entitled to the reduction of a tax assessment will lie, without a prayer for an injunction restraining the Government from collecting the excess, seeing that the Government is sure to respect the decision of the Court.[87] The fact that the property is in the possession of a third party who is interested in supporting the defendant's title does not oblige the plaintiff to pray for possession in addition to a declaration. "The restrictions imposed under s. 42 (now s. 34) of the Specific Relief Act must be held to refer to the consequential relief properly obtained by the plaintiff as against the defendant in the suit, and are not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant.[88] But where the third party is clearly in possession on behalf of the defendant, and his possession is hostile to the claim of the plaintiff, the consequential relief of possession is required.[89]

A plaintiff suing for a declaration that property bequeathed by his father to the defendant (his brother) was ancestral, and that his father had no power to bequeath it, and that he was entitled to it by survivorship along with the defendant, ought to pray for partition of the property even if it be in the possession of tenants.[90] Similarly, a plaintiff suing for a declaration of his right to succeed on his father's death to a *talukdari* estate to the exclusion of the defendant who claimed to be a legitimate son of his father, and to whom during his minority the Talukdari Settlement Office was making an allowance for his maintenance under the Broach and Kaira Incumbered Estates Act, 1881, ought to pray for an injunction restraining the defendant from receiving the allowance.[91] Where the plaintiffs, alleging that the defendant was in possession of a *mutt* and of the *mutt* properties under a false claim of title as successor of the late Jheer, sued for a declaration that he was not the duly appointed successor of the late Jheer and for an appointment of some duly qualified person as Jheer, it was held that no such declaration could be made, as the plaintiff had omitted to ask for consequential relief, namely, that the *mutt* properties be handed over to the person so appointed.[92] The office of a *mahant* cannot be separated from the properties which form the endowment of the office; and therefore a plain-

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85 *Anjuman Ara Begum* v. *Nawab Asif Kader* (1955) 2 Cal. 109 *Fischer* v. *Secretary of State* 26 I.A. 16; and *Chaudhary Mohammad Mazur-ul-Haq* v. *Bisseswar Bannjerjee* (1944) 1 Cal. 644; 47 C.W.N. 408 dist.

86 *Lalit Kumar* v. *Bhagoban Ch. Sarma* 1950 A.Asm. 133.

87 *Rajah of Venkatagiri* v. *Province of Madras* (1947) Mad. 190.

88 *Subramanyan* v. *Paramaswaran* (1888) 11 Mad. 116, 122; *Banta Singh* v. *Diwan Singh* 115 I.C. 539; 1929 A.L. 11, adds nothing to the authorities already cited. See also *Humayun Begum* v. *Md. Khan* 1943 A.P.C. 94; *Radha Gobinda* v. *Nilkantha Narayan* 1951 A.P. 556; *Indra Narain* v. *Ganga Ram* 1955 A.A. 683.

89 *Sannamma* v. *Earappa* 1950 A.Mys. 77.

90 *Suryanarayanamurthi* v. *Tammanna* (1902) 25 Mad. 505. Alienation of ancestral property without necessity; *Raj Kishore* v. *Madan Gopal, Supra*, note 48; *Purdns* v. *T. Ammal* 1937 A.R. 427. Alienation by widow void after her life-time; *Raghunath Baraei* v. *Jainarain* 1932 A.A. 661. (1932) All. L.J. 99; 137 I.C. 145. Suit was held not maintainable where a daugher-in-law of a decree-holder asked for a mere declaration that the money was really the self-acquired property of her husband and not joint family property with decree-holder as manager, and did not ask for recovery of money from the decree-holder; *Natesa Ayyar* v. *Mangalathammal* 1933 A.M. 503; 144 I.C. 602. Suit held not competent where plaintiff asked for a mere declaration of his right to receive a state pension, the Court holding that the relief prayed for was to conceal the real relief, a claim to eleven years' arrears of pension: *Somchand* v. *State of Saurashtra* 1953 A.Sau. 21.

91 *Sardarsinghji* v. *Ganpatsinghji* (1890) 14 Bom. 395 (Candy J. *doubting*).

92 *Strinivasa* v. *Strinivasa* (1893) 16 Mad. 31; *Bhup Narayan* v. *Hira Lal* 1936 A.P. 185; 161 I.C. 709; *Mohammad Musa* v. *Nabi Bakhsh* 1938 A.L. 616; 177 I.C. 781; *Masjid Shahid Ganj* v. *S.G.P. Committee* 1938 A.L. 369; 175 I.C. 945 [F.B.]; *jamiat Dawat* v. *Mohammad Sharif* 1938 A.L. 869.

tiff who asks for a declaration of his title to the office of a *mahant* and is not in possession of its properties must ask for possession in a suit under s. 34 or his suit will fail.[93]

A suit for declaration of the charge of maintenance on *Waqf* property being tantamount to right in property is maintainable and a prayer for mere enhancement is not necessary as that is not consequential relief.[94] But where a gaddinashin exercised a deed of trust creating a Religious Association and transferred properties to it, a suit for mere declaration to declare that document void will not be maintainable where the further relief of possession can be sought.[95]

The cases cited above mark the extreme limits of the application of the proviso to this section. Worshippers of a deity seeking a declaration that certain lands are the property of the deity need not ask for the appointment of a *mahant* and pray for an order of restoration of the property to the *mahant*.[96] The trustees of a temple, suing for a declaration that certain proceedings of a District Temple Committee removing them from that office are illegal, are not obliged to pray that they should be reinstated in their office, unless there has been an actual ouster of the plaintiffs from the office of trustees.[97] In an Allahabad case, the plaintiff, alleging that he was the owner and in possession of a house, and that defendant *A* had without any title mortgaged the house to defendant *B*, and that *B*, having obtained a decree on the mortgage against *A*, had caused the house to be proclaimed for sale, sued *A* and *B* for a declaration that the house was not liable to be sold in execution of the decree. It was held that the plaintiff was entitled to a declaration, and that the omission of a prayer to set aside the mortgage and the decree was no bar to the declaration. The Court said, "There was no obligation on the plaintiff, even under the proviso to section 42 (now s. 34), to have sued to set aside the mortgage or the decree, and, indeed, it is doubtful in our opinion if he had asked for such relief that he could have succeeded"[98] A suit for declaration is "alone competent" where a member of a coparcenery claims that compensation given for excess lands under the Punjab Occupancy Tenants (Vesting of Proprietary) Rights Act is also coparcenery property because the further relief would be sought under section 4(3) of that Act.[99]

Where a compromise decree passed in two previous suits threw a cloud on the title of the temple to certain properties, the trustee can bring a suit for declaration of the decrees being null and void.[1] A declaratory suit is maintainable in a case where the plaintiff seeks a right to a share in a promissory note which the defendant had sued upon and which was likely to be decreed recovered. There was no other relief available against the defendant.[2]

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93 *Kondaswami* v. *Vagheesam* (1942) Mad. 13; 196 I.C. 721; 1941 A.M. 822 (F.B.) The court observed that it might be regrettable that a person wrongly ousted from his office and the properties attached to it should have to pay a court-fee based on the value of the properties before filing a suit to redress his wrongs. Many of the unsuccessful cases under s. 34 have been an attempt to avoid payment of court-fee in excess of the Rs. 10 chargeable for a simple declaration; *cf. Zeb-ul-Nisa* v. *Din Mohammad* (1941) Lah. 451; 193 I.C. 641; 1941 A.L. 97; *Humayun Begun* v. *Md. Khan, supra,* note (62), *per* Lord Atkin.

94 *Smt. Nawab Shahrukh Jahan Begum* v. *Salliyed Enayat Hussain* (1975) A.A. 452.

95 *Association Baba Bagga Singh* v. *Guman Singh* (1972) A.Raj. 263, 268; *M.K. Rappui* v. *John* (1969) 2 S.C.C. (1970) 2 S.C.R. 124 followed.

96 *Monmohan Haldar* v. *Dibbendru Prosad* 1949 A.Cal. 199. The consequential relief would be barred by s. 92, C.P.C. See *infra* note 81.

97 *Ramanuja* v. *Devanayaka* (1885) 8 Mad. 361. But see *Mt. Janki* v. *Baldeo* 1955 A.P. 449, which appears to be at variance with this decision.

98 *Ganga Ghulam* v. *Tapeshri Prasad* (1904) 26 All. 606. Creditors got a declaration that the wife of insolvent debtor was in possession of his property under a collusive decree; *Chattru Mal* v. *Mst. Majidan* (1934) 15 Lah. 849; 150 I.C. 888; 1934 A.L. 460; mere declaration that certain order passed by Revenue Board without jurisdiction, held, competent; *Sachindra Kumar* v. *Nabendra* 1934 A.Cal. 155; 57 C.L.J. 569; 149 I.C. 712; *Government of Pepsu* v. *Pratap Singh* 1952 A. Peps. 119.

99 *Abhay Chand* v. *Ram Chand* (1966) A.Puj. 526; (1966) 2 Puj. 208.

1 *P. Sangili* v. *Ramakrishnan* (1974) A.M. 160.

2 *Ramchandra Reddy* v. *Kanta Reddy* (1973) A.AP. 189; *Mahabir Jute Mills* v. *Kedar Nath* (1960) A.AP. 254 reld. on; *Ramakrishna Pattai* v. *Narayana Pattai,* 39 Mad. 80 disting.; *Deo Koer* v. *Sheo Prasad Singh* (1966) A.SC. 359 reld. on.

A mere declaration that certain joint family property, attached in execution of a decree against the father, was not liable to attachment has been held to be competent, without a prayer for an injunction restraining the defendant from executing his decree by such attachment, on the ground that the mere declaration would be efficacious in that the executing court would be bound to accept a copy of the decree. Verma J. observes that illustration (a) to former s. 42 does not indicate that a further prayer for an injunction must be made.[3]

A suit by the son under O. 21 r. 63 C.P.C. for declaration to establish his right in the ancestral property and as such its not being liable to be attached and sold in execution of a decree against the father is a declaration where consequential relief is prayed for because impliedly by an injunction or relief that the decree is not binding on the son is prayed for.[4] The Delhi High Court declined to grant a declaration in a suit where the plaintiff prayed for a declaration of being a lawful legatee under a will — the property being immovables in Saharanpur District and movables in Delhi and Saharanpur. The ground was that the plaintiff had adroitly framed his plaint to avoid payment of higher Court fee. It is submitted that every litigant is entitled to so frame his pleadings as to pay minimum of fees if that is legally possible and Law Courts are not tax collectors.[5]

Agreement not to partition joint House property.—An agreement by brothers not to partition joint property is not enforceable not being for consideration.[6]

A suit by a minor coparcener for a declaration that a sale by the elder brother as Karta is void as not being for legal necessity or benefit of the estate or in the alternative for a declaration that the sale is ineffective and void as against his own share is maintainable without any consequential relief.[7] A sale by a father was set aside by a suit for declaration and possession brought by a minor son on the ground of want of necessity and benefit to the estate. But out of consideration money a portion was found to be for necessity. A decree for possession was given on the condition of restituting the benefit, i.e. Rs. 800.[8] In setting aside an alienation made by the mother of a Mahomedan minor son, the Court has a discretionary power under s. 41 (s. 33 of 1963) to order restitution by refund of the amount by which the estate is benefitted.[9] In the absence of a personal covenant a guardian of a minor selling the minor's estate is not liable to reimburse on the failure of the contract to repay[10] nor can the minor be ordered to refund;[11] but see s. 33 of 1963 Specific Relief Act.

The High Court of Madras has held that a plaintiff suing for a declaration of title to land ought to pray for payment of arrears of rent. The Court said: "The object of the proviso to section 42 (now s. 34) is to avoid multiplicity of suits and to prevent a person getting a declaration of right in one suit and, immediately after, the remedy already available in another."[12] On the other hand, it has been held by the High Court of Calcutta that "further relief" within the meaning of this section does not include a claim for arrears of rent and that omission to sue for arrears of rent is no bar to the Court making the declaration asked for. The Court said: "The further relief referred to in the proviso is, we think, further relief in relation to the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying."[13] A plaintiff suing the defendants for a

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3 *Munnu Chamar* v. *Hari Narain* (1946) All. 856, 860 1947 A. All. 352, 229 I.C. 47.
4 *Sitaram* v. *Maharaja Govindsinghjoo Deo* (1974) A.M.P. 173; *Shamsher Singh* v. *Rajendra Prasad* (1974) 1 S.C.R. 270; (1973) A.S.C. 2384 folld.
5 *Anil Kumar Handa* v. *Smt. Suman Bala* (1980) A.D. 103, 105.
6 *Kashinath Das* v. *Pravash Chandra Das* (1978) A. Cal. 509.
7 *Baldeo Singh* v. *Gopal Singh* (1967) A.M.P. 221.
8 *Ramnath Singh* v. *Desraj Singh* (1957) A.P. 495.
9 *V.S.T. Kadir Meerai Beevi* v. *Mukammad Koya* (1956) A.M. 368; See *Mohoree Bibee* v. *Dharmodas Ghose* 30 I.A. 114, 125; 30 Cal. 539.
10 *Daneyi Gurumurhy* v. *Raghu Podhan* (1967) A.Or. 68; *Ram Tuhud Singh* v. *Bisheshwar Lal Sahoo* 2 I.A. 131 refd. to.
11 *Duneyi Gurumurthy* v. *Raghu Podhan* (1967) A.Or. 68; *Mohoree Bibee* v. *Dhurmodas Ghose* 30 I.A. 114, 125; 30 Cal. 539.
12 *Kombi* v. *Aundi* (1890) 13 Mad. 75.
13 *Fakirchand* v. *Anund Chunder* (1887) 14 Cal. 586-591.

declaration that they are his tenants is not obliged to pray for possession.[14] In a suit under s. 92 of the Civil Procedure Code (public charities), no consequential relief can be claimed beyond what is allowed by the provisions of that section.[15] [See Mulla's Code of Civil Procedure, notes to s. 92.] A suit for declaration of title to the building includes title to the land on which it is situated and no separate prayer as to land need be made.[16]

In *M.K. Rappai* v. *John*[17] the High Court passed a decree that the plaintiffs were next in the line of succession and that they were entitled to claim appointment as trustees but such appointment could only be in a properly framed suit. On appeal the right to be appointed trustees was set aside by the Supreme Court and it was held that a suit for bare declaration without further relief for possession and other reliefs as the facts and circumstances would require is not maintainable. Further relief in the proviso means a relief which was available at the institution of the suit. It must be a relief in relation to the legal right to property which the plaintiff is entitled to. It must be a relief appropriate to and necessary for and consequence of the right asserted.[18]

Proviso refers to date of suit.—The proviso to this section refers to the position of the plaintiff at the date of suit.[19] Hence where a suit for a declaration, when instituted, is in every respect regular, no action on the part of the defendant subsequent to the institution of the suit can affect or prejudice the right of the plaintiff.[20] Similarly any change of circumstances brought about by the plaintiff himself purchasing the property in respect of which the suit is brought does not take away the right to sue which had accrued to him prior to the date of the suit.[21]

In a later case Allahabad High Court held that the continuance of the right must be up to the date of the decree.[22] A plaintiff in possession who sues for declaration of title is not bound to amend the plaint and sue for possession as a consequent relief if during the pendency of the suit he loses possession to the defendant.[23]

Where no right to further relief shown.—Under s. 15 of the Code of Civil Procedure, 1859, it was held that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court or in some cases in some other Court, e.g., a Revenue Court.[24] Under the present section a suit would lie for a mere declaratory decree, though no consequential relief could be claimed, *e.g.*, a suit by an owner of land against any member of the public who formally claims to use such land as a public road and who thereby endangers the title of the owner,[25] or a suit for a declaration that the defendant is not the plaintiff's son.[26] Where a defendant is not in possession or not in a position to deliver

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14 *Loke Nath* v. *Keshab Ram* (1886) 13 Cal. 147, 154.
15 *Neti Rama* v. *Venkatacharulu* (1903) 26 Mad. 450.
16 *Sarma* v. *Assam Goseva Samity* (1979) A. Gau. 23.
17 (1969) 2 S.C.C. 590.
18 *Aniradha Padshan* v. *Chhai Padhan* (1981) A.Cr. 74, 79.
19 *Govinda* v. *Perumdevi* (1899) 12 Mad. 136; *Singheshwar Jha* v. *Ajab Lal Mandar* 1941 A.P. 142; 190 I.C. 756; *Abid Ali Khan* v. *Secretary of State* 1951 A.N. 327; *Jethu Singh* v. *Kishan Singh* 1951 A.Peps. 48; *Surendra Narayan* v. *Bhairabendra* 1950 A.Cal. 386; *Annapurna Dasi* v. *Sarat Chandra* 1942 A.Cal. 394, 46 C.W.N. 355. See also *Indra Narain* v. *Ganga Ram* 1955 A.A. 683. *Cp. Sri Thakurji Maharaj* v. *Kamta Prasad* 120 I.C. 443; 1929 A.All. 574; (1929) A.L.J. 1201, a curious case of suit on behalf of idols where the Court was divided on everything except that in its discretion it would not make any declaration.
20 *Ram Adhar* v. *Ram Shanker* (1904) 26 All. 215.
21 *Wamanrao* v. *Rustomji* (1897) 21 Bom. 701; *Meghaji Mohanji* v. *Anant Pandurang* (1948) 50 Bom. L.R. 274, 1948 A.B. 396.
22 *Qabool Singh* v. *Board of Revenue* (1973) A.A. 159.
23 *Santosh Chandra* v. *Smt. Gyanan Dossee* (1975) A.M.P. 193; *Shamsher Singh* v. *Rajendra Prasad* (1973) A.S.C. 2384; (1974) 1 S.C.R. 322 folld.
24 *Kathama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 187.
25 *Chuni Lall* v. *Ram Kishen* (1888) 15 Cal. 461 [F.B.]; *Pitha Kali Matha* v. *Surendra Nath* 1934 A.Cal. 192; 58 C.L.J. 120; 150 I.C. 617. Suit lies for mere declaration that a new valuation by a municipality is not void: *Surendranath Sen* v. *Municipal Commissioners of Mymensingh* (1933) 61 Cal. 276; 152 I.C. 694; 1934 A.Cal. 673.
26 *Vaktuba* v. *Agarsinghji* (1910) 34 Bom. 676, 681-682. *Mt. Latifanbai* v. *Mst. Sakinabai* (1939) Kar. 432; 181 I.C. 770; 1939 A.S. 107. A beneficiary of trust property can sue for mere declaration of his right

possession of the properties in suit, no "further relief" than a declaration of the right to possession is available to the plaintiff, the proviso to s. 34 is no bar to the granting of such a declaration.[27] A suit will lie for a mere declaration that a person is a co-tenant, when the further relief of partition would be outside the jurisdiction of the Court.[28]

A suit under S. 53 Transfer of Property Act for declaring a transfer as void against the creditors is in the nature of declaratory suit under S. 34 Specific Relief Act and no further or consequential relief is to be claimed by the plaintiff.[29]

Suit against tenant under Madras Building (Land and Rent Control) Act.—A suit for declaration of title and for arrears of rent is maintainable against a tenant. The question of possession falls under the provisions of the Madras Buildings, Land and Rent Control Act alone.[30]

The Anjuman Islamia sued for declaration that property in possession of the defendant was *waqf* property without praying for further relief for possession. The suit for declaration *simpliciter* was held maintainable as the Anjuman was not entitled to possession not being a *mutawali*.[31]

Arbitral awards.—A suit under section 42 of Act of 1877 lies to denounce a foreign arbitral award but such suits may not now be maintainable in view of section 32 of Arbitration Act, 1940;[32] as amended by s. 43 of Specific Relief Act and of s. 25 of that Act which applies to statutory awards.

K was appointed by Government of Gibraltar as a surveyor under an agreement which provided for arbitration in case of differences in relation to matters arising out of the agreement. *K* claimed a sum of money on a quantum meruit and an alternative claim for a similar sum if the contract was adjudged as frustrated. The arbitrator held that both claims arose out of the agreement within the ambit of arbitration clause. The employers brought an action claiming declaration that the arbitrator had no jurisdiction.

Sellers L.J. observed that there may be circumstances where a Court could appropriately make a declaration regarding the scope of an agreement to refer matters to arbitration, where it might not be able to grant an injunction to restrain proceedings with an arbitration beyond the agreement of reference.[33]

Reversionary heir.—The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widow's death, may sue the widow and an alienee of the estate from her for a declaration that the alienation made by her is void beyond the widow's lifetime [ill. (e)].[34] A suit is not affected by proviso to s. 42 of Specific Relief Act, (now s. 34). If the widow dies during the pendency of the suit or an appeal therefrom, the suit can be continued as a declaratory suit without making the heirs of the widow parties to the suit. S. 14 of the Hindu Succession Act does not affect the rights as to properties already alienated by the

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as he cannot sue for possession: *Ram Rup* v. *Sarn Dayal* 1936 A.L. 283; 160 I.C. 289; *Abdul Rahim Khan* v. *Fakir Mohammad* (1946) Nag. 518. Mere declaration granted of right of redemption: *Sheo Prasad* v. *Ram Khelawan* 1937 All. 653; (1937) All. L.J. 778; 171 I.C. 789. The word "relief" connotes something which is needed by the person seeking the relief; it means more than a "right": *Surya Nath* v. *Shio Karan* 1936 A.R. 316; 164 I.C. 133.

27 *Sundar Singh Sanatan Dharam High School Trust* v. *Singh Rajput High School* (1937) 65 I.A. 106; (1938) Lah. 63; 172 I.C. 993; 1938 A.P.C. 73; *Giribala* v. *Ushangini* 1955 A.Asm. 177.

28 *Munnabai* v. *Sharadabai* (1946) Nag. 312, 227 I.C. 499, 1946 A.N. 235.

29 *Kahanlal* v. *Ardeshwar Lal* (1972) A.D. 122, 1256; *Magaporthurow* v. *Subbarow* (1942) A.M. 360 folld.

30 *Balammal* v. *M. Lakshmana Naiker* (1972) A.M. 333; *Veerappa Mudaliar* v. *Vinagopaluj Mudaliar* (1967) A.M. 414 reld. on.

31 *Anjuman Islamia* v. *Nijim Ali* (1982) A.MP. 17,20; *Ram Rup* v. *Sarn Dayal* (1936) A.L. 283; *Abdul Rahim* v. *Faqir Mohammad Shah* (1946) A.N. 401 folld.

32 *Pratabmull* v. *K.C. Sethia (1944) Ltd.* (1960) A.Cal. 702; *E.D. Sassoon & Co.* v. *Ram Dutt Ramkishen Das* 49 I.A. 368; (1922) A.P.C. 374 folld. *Deokali Koer* v. *Kidar Nath* 39 Cal. 704; and *Sheoprasad* v. *Ramanandan Prasad* 43 I.A. 91; (1916) A.P.C. 78 refd. to & dist. See s. 25 of Specific Relief Act of 1963.

33 *Government of Gibraltar* v. *Kenny* (1956) 3 All.E.R. 22, 25 (C.A.).

34 *Bhagwati Charan* v. *Hirday Singh* 1952 A.P. 160.

widow. But the reversioners cannot get any benefit of the declaratory decree unless they sue for possession within the period of limitation or in a proper case are allowed to amend the plaint into one for possession.[35] Illustration (e) of s. 42 of the old Act refers to a Hindu widow's estate and has no reference to a full estate.[36] He may also sue the widow and a son adopted by her for a declaration that the adoption is invalid [ill. (f)]. But the mere fabrication by a widow of a document purporting to be an authority to her from her husband to adopt does not entitle him to claim a declaration that the document is fabricated. "The deed of authority by itself cannot affect the plaintiff's right to any property, though the further act of adoption in pursuance of the authority would. The authority is not the proximate cause of any injury to the plaintiff's rights".[37] A suit by a reversioner lies for a declaration that a gift by a widow is void after her lifetime,[38] but after her lifetime he may sue for possession and treat the alienation as a nullity.[39]

The next reversioner may also sue the widow to restrain her from wasting her husband's estate [s. 54, ill. (m), now s. 38 below]. But when he sues the widow alleging waste, and fails to prove any wrongful act on her part, he is not entitled to a mere declaration that he is the next reversionary heir. Such a declaration is unavailing as well as premature.[40]

See notes below under the head "Contingent interest".

After Hindu Succession Act of 1956.—After the passing of the Hindu Succession Act of 1956 a Hindu widow possessed of a widow's estate retrospectively becomes a full owner and a reversioner cannot bring a suit for declaration to challenge an alienation by such a widow. The Patna High Court has held that s. 14 of Hindu Succession Act would apply even where the widow has parted with her possession by sale which is challenged as sham. But that it is submitted is an erroneous interpretation of the word "possessed."[41] In another case it was held that even if a female heir had parted with possession by sale or gift of the property held by her as an heir she would be "possessed" of it within s. 14 of the Hindu Succession Act. But this view was not accepted by the Supreme Court.[42]

The object of s. 14 of Hindu Succession Act, 1956, was to improve the legal status of Hindu women enlarging their limited interest in inherited property into an absolute estate but the Act was not intended to benefit alienees who purchased from limited owners before the Hindu Succession Act.[43] Thereby the decisions holding that after the Hindu Succession Act, 1956, the reversioners under Hindu Law were no more so or had no right of reversioner or any kind of *spec successionis* were overruled.[44] But the High Courts of Bombay[45] and Orissa[46] have held that there is no right of reversioners against a female heir after the Hindu Succession Act as they have no legal character nor any interest *in praesenti* to be entitled to a mere declaration of reversionary rights.

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35 *Radha Rani* v. *Hanuman Prasad* (1966) A.SC. 216; (1958) A.A. 304 revd.; *Ram Saroop* v. *Hiralall Singh* (1958) A.P. 319 overruled.

36 *Jamuna* v. *Ramanup Singh* (1960) A.P. 182; *Kotturuswami* v. *Veeravva* (1959) A.SC. 577 reld. on.

37 *Sreepada* v. *Sreepada* (1912) 35 Mad. 592; 12 I.C. 176.

38 *Ram Tawakat* v. *Mst. Dulari* 1934 A.A. 469; 154 I.C. 412.

39 *Bijoy Gopal Mukerjee* v. *Krishna* (1907) 34 I.A. 87, 34 Cal. 329; *Suriya Kumar* v. *Girish Chandra* 1951 A.Asm. 101.

40 *Janaki Ammal* v. *Narayanasami Aiyar* (1916) 43 I.A. 207; 39 Mad. 634; 37 I.C. 161; *Thukurain Jaipal Kunwar* v. *Bhaya Indar Bahadur Singh* (1904) 31 I.A. 67, 70; *Lalu* v. *Fazal Din* (1923) 4 Lah. 106; 73 I.C. 893; 1923 A.L. 403; *Sant Prasad* v. *Charitar Singh* 1951 A.P. 539.

41 *Jamuna* v. *Ramanup Singh* (1960) A.P. 182; see *Kotturuswami* v. *Veeravva* (1959) A.SC. 577; (1959) Supp. 1 S.C.R. 968.

42 *Ram Saroop* v. *Hiralal* (1958) A.P. 319 overruled in *Kotturuswami* v. *Veeravva* (1959) A.SC. 577; (1959) Supp. 1 S.C.R. 968.

43 *Harak Singh* v. *Kailash Singh* (1958) A.P. 581 (F.B.) appd. in *Kotturuswami* v. *Veeravva* 1959 A.SC. 577; (1959) Supp. 1 S.C.R. 969.

44 *Rama Ayodhya* v. *Raghunath* 1957 AP. 480; and *Mt. Janki Kuer* v. *Chhattu Prasad* 1957 A.P. 674 overruled by S.C. See note 3 *supra*.

45 *Suganchand* v. *Sundarbai* (1960) A.B. 32; (1959) Bom. 1022.

46 *Laxmi Debi* v. *Surendra Kumar Pande* (1957) A.Or. 1.

In the Bombay case[47] the suit was for a declaration brought in 1952 by a sister of the last male holder that an adoption made by her mother would not affect her reversionary rights and the Court gave a declaration that the adoption being invalid it would not affect her right to inherit under ss. 15 and 16 of Hindu Succession Act even though she was no longer a reversioner because of the retroactive effect of s. 14 of that Act. In the Orissa case the widow of the last male holder was in possession and there was no right of reversioners which could be protected.[48]

The possession referred to in s. 14 of Hindu Succession Act has a wider meaning than actual physical possession but it must be possession in law on the date of coming into force of the Act.[49] Therefore "possession" has to be read in a broad sense and in the context means the state of owning or having in one's hand or power. It includes the possession of a licensee, lessee or a mortgagee from the female owner or the possession of a guardian or a trustee or an agent. It also includes possession by receipt of rents and profits. This would also include permissive possession.[50] The correct position is that if the female Hindu heir was in possession actual or constructive taken in its wider sense on the passing of the Hindu Succession Act then the reversioners have no right left of reversion as understood under the Hindu Law but if before the Act she had parted with possession by sale or gift, the right of the reversioners is not affected.

Possession of a trespasser either directly or through his tenants is nevertheless possession of the true owner, the Hindu female, within the expression "possession" and the Hindu female can if she only wants constructive possession sue for declaration and injunction restricting the trespasser, or his tenants from interfering with such rights.[51] But this question was not decided by the Supreme Court.[52]

Vested interest.—A person having a vested interest, though it be after a series of life-estates, is entitled to maintain a suit under this section against the first life-tenant for a declaration that the first life-tenant has no more than a life-estate and against a transferee of the entire estate from him.[53]

Contingent interest.—Both under s. 50 of the Chancery Procedure Act, 1852, and s. 15 of the Code of Civil Procedure, 1859, it was held that a mere contingent right, which may never have existence, is not sufficient to ground an action for a declaration.[54] The interest of a Hindu reversioner during the widow's life is future, and contingent. Such being the case, he could have no right under s. 15 of the Code to sue for a declaration in the widow's lifetime that an alienation made by her of her husband's estate is void beyond the widow's lifetime. But his case was treated as an exception, and it was held that he could maintain such a suit under s. 15 of the Code.[55] Since the Specific Relief Act the case is covered by illustration (e) above and it is laid down that under this section "where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed";[56] the object being the preservation of the estate.[57]

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47 *Sugandhabai* v. *Sundrabai* (1960) A.B. 32; (1959) Bom. 1022; *Hanuman Prasad* v. *Indrawati* (1958) A.A. 304; and *Bhabhani Prosad* v. *Sarat Sundari* (1957) A.Cal. 527; and *Laxmi Debi* v. *Surendra Kumar* (1957) A.Or. 1; (1956) Cut. 599 consd. & dist.

48 *Laxmi Debi* v. *Surendra Kumar* (1956) Cut. 599; (1957) A.Or. 1.

49 *Kutturuswami* v. *Veeravva* (1959) A.SC. 577, 581; *Venkayamma* v. *Veerayya* (1957) A.AP. 280 apprd.

50 *Kutturuswami* v. *Veeravva* (1959) A.SC. 577, 581-2; *Goshta Bihari* v. *Haridas Samanta* (1957) A.Cal. 557; 61 C.W.N. 325 approved.

51 *Yamunabai* v. *Harihar Pandit* (1960) A.B. 463.

52 See *Kutturuswami* v. *Veeravva* (1959) A.SC. 577. (Question not decided).

53 *Ramanand Koer* v. *Ragunath Koer* (1882) 9 I.A. 41, 53; 8 Cal. 769; *Gauhar Khan* v. *Kashmira Jan* 1945 A.Pesh. 49.

54 *Lady Langdale* v. *Briggs* (1856) 8 De. G.M. & G. 391; *Jackson* v. *Turnley* (1853) 1 Drew. 617.

55 *Isri Dutt Koer* v. *Hansbutti Koerain* (1883) 10 I.A. 150, 155-156; 10 Cal. 324; *Kathama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 191; 15 Beng. L.R. 83.

56 *Saugadar Singh* v. *Pardip Singh* (1917) 45 I.A. 21; 45 Cal. 510; 43 I.C. 484 (the argument seems to have been directed mainly to a more limited question of practice; see 45 I.A. at p. 23). See also *Sarayya* v. *Annapurnamma* (1919) 42 Mad. 699; 52 I.C. 380; *Das Ram Chowdhury* v. *Tirtha Nath Das* 51 Cal. 101; 81 I.C. 522; 1924 A.Cal. 481; *Bhagwati Charan* v. *Hirday Singh* 1952 A.P. 160.

57 *Balmukund Lal* v. *Sohano Kueri* (1929) 8 Pat. 153; 119 I.C. 817; 1929 A.P. 164.

Illustrations (e) and (f) of s. 42 of the Act 1877 though not exhaustive indicate that a reversioner in his representative capacity has a legal character of a contingent right to any property within that section. Hence a suit by a reversioner for a declaration that an alienation by a widow or an alleged adopted son or even by a third party is invalid and is not binding on the reversion is maintainable during the lifetime of the widow.[58] In the application of s. 42 of Specific Relief Act (s. 34 of 1963) it is not a question of jurisdiction of the Court to grant the decree but it is the Court's discretion to grant the decree. Therefore in cases where the plaintiff has a contingent interest which is not so remote a declaration can be given.[59] In *Nagammal's case* the husband by a deed of settlement gave to his wife a life estate after his death but subsequently he made a will and executed a deed of settlement leaving the property to the defendant and depriving his wife of all rights. And the wife brought a suit for declaration that the two documents would not affect her rights and she succeeded.[60]

If the nearest reversioner is a minor or has colluded, a remoter reversioner can sue,[61] but not one whose chances of succeeding are very remote.[62] There is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner.[63] Where there is a dispute as to the construction of a will and all the parties interested are before the Court, it may make a declaration in respect of the rights of a contingent remainderman, provided his interest is not remote.[64]

A widow had a life interest in the property in dispute. On her death the property was to devolve on her niece who brought a suit for declaration and injunction restraining the widow from alienating the property which the widow was entitled to alienate for necessity of her proper maintenance. The suit was held maintainable at the instance of the contingent interest holder, but was not decreed as she refused to arrange for proper maintenance of the widow.[65]

Declarations as to service contracts.—A suit under section 42 (s. 34 of 1963 Act) for a declaration of termination of service without a claim for further relief being invalid is not maintainable.[66] A declaration that the dismissal of the University Professor was wrongful and *mala fide* is nonetheless an effective dismissal though it may give rise to a suit for damages. And therefore the relief that he continued to be a Professor is not a surplusage and is not severable.[67] A suit for declaration that the termination of the plaintiff's service was illegal and for damages is maintainable.[68]

In cases of purported termination of service a declaration that the contract of service still subsists would rarely be made and would not be made in the absence of special circumstances because of the principle that Courts do not grant specific performance of contracts of service. Termination of relationship of master and servant will not entitle the servant to a declaration to the effect that the service had not been vividly terminated.[69] There cannot be a specific per-

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58 *N. Janakiraman* v. *Mattareddi* (1956) A.And. 141.

59 *Nagammal* v. *Agoramurthi* (1956) A.M. 248; *Raj Shatranjai* v. *Raj Bahadur Singh* (1950) A.PC. 70 (1951) 1 All. 237; (P.C.) folld.

60 *Nagammal* v. *Agoramurthi* (1956) A.M. 248.

61 *Fateh Mohammad Khan* v. *Gurbux Singh* 1949 A.E.P. 210; *Rani Iagannath* v. *Bhawani Singh* 1955 A.M.B. 99, 101.

62 *Sukhdarshan Singh* v. *Chanan Singh*, 1951 A.Peps. 81.

63 *Rama Rao* v. *Raja of Pittapur* (1919) 42 Mad. 219; 49 I.C. 835; and see the paragraph "Reversionary heir," page 926.

64 *Raj Shantranjai* v. *Raj Bahadur Singh* (1950) 77 I.A. 98. 52 Bom. L.R. 485, 1950 A.P.C. 70. See also *Tarak Chandra* v. *Anukul Chandra* 1946 A.Cal. 118.

65 *Smt. Maya Basak* v. *Smt. Kalidasi Dassi* (1980) A.Cal. 45, 50; *Raj Shataranjai* v. *Raj Bahadur Singh* 77 I.A. 98; (1950) A.P.C. 70; *Tarak* v. *Anukul* 49 Cal. W.N. 718; (1946) A.Cal. 116 reld. on.

66 *Parmanand* v. *District Board*, (1962) A.P. 452.

67 *Dr. S. Dutt* v. *University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050.

68 *Machiraju Parthasarathy* v. *Tobacco Export Promotion Council* (1976) A.A.P. 321, 325.

69 *Francis* v. *Municipal Committee of Kualalampur* (1962) 3 All. E.R. 633; (1962) 1 W.L.R. 141; (P.C.); & *Barber* v. *Manchester Regional Hospital Board* (1962) 3 All E.R. 322; (1962) 1 W.L.R. 181; & *Vidyodava University of Ceylon* v. *Silva* (1964) 3 All E.R. 865 (1965) 1 W.L.R. 77; rel. on in *Dr. Bool Chand* v. *Kurukshetra University* (1968) A.S.C. 292; (1968) 1 S.C.R. 434; *Dr. S. Dutt* v. *University of Delhi* (1959) S.C.R. 1236; (1958) A.SC. 1050; *Surendra Nath* v. *Indian Airlines Corporation* (1966)

formance of service and a master can terminate the service for no reason whatsoever. But this would not apply to an office where the body employing the servant has done so under some statutory or other restriction.[70] Where the service is under a statute it cannot be determined arbitrarily. It can be exercised for good cause; in this case in the interest of the University and after due inquiry in accordance with the rules of natural justice.[71]

In *Dr. Bool Chand's Case*[72] the appellant was appointed the Vice-Chancellor of the Kurukshetra University but for his having previously been compulsorily retired from the Indian Administrative Service he was first suspended and then called upon to show cause why he should not be removed from service. He made a representation but also filed a writ of mandamus in the High Court. His services were however terminated. He then applied for a writ of certiorari. But the High Court refused the prayer which on appeal was upheld by the Supreme Court.

A decree for declaration that the plaintiff's dismissal was illegal for want of formalities and he continues in service will not be passed as the relief is discretionary and the circumstances in that case justified the dismissal. Further even if such a decree was to be given it could be nullified by giving a proper notice and then terminating his services.[73]

The Calcutta High Court has held that where some employees of the Hindustan Steel Ltd.[74] were transferred from one unit to another a suit by them for declaration that their seniority would count from the date of their joining service in their respective units and not from the date when they were transferred to their particular unit is not maintainable on the ground that such employees of the Corporation could not claim to have a right to legal character because that character must result from law and not from contract. Such employees, it was held, were not servants of the Central Government, which owned all the shares of the Corporation, nor of the Corporation or body which had been set up under a particular statute. The relationship between them was purely contractual — master and servant. The Court relied on the *U.P. State Warehousing Corporation* v. *Chandrakrian Tyagi*[75] which it may be pointed out was later overruled by the Supreme Court in *Sukhdev Singh* v. *Bhagat Ram.*[76] It is submitted that it is difficult to distinguish between the instant Calcutta case and *Sukhdev Singh* v. *Bhagat Ram* unless there was a difference between the nature and quality of the rules applying to the plaintiffs and those employers in Bhagat Ram's case.

A suit by an unsuccessful candidate that the appointment of defendants to the post of a lecturer in the University was illegal and for *interim* relief would not lie where the plaintiff claims no right to legal character or to property and the balance of convenience is in favour of the defendants.[77]

For other cases of termination or continuance of service see under Injunctions, s. 42 of the present Act (and also see under sec. 14).

A.Cal. 272, 280; *Vine* v. *National Dock Labour Board* (1957) A.C. 488 (H.L.); (1956) 3 All. E.R. 939; *Jerome Francis* v. *Municipal Councillors* (1962) 3 All E.R. 633; (1962) 1 W.L.R. 1411, 1417; (P.C.); & *Secretary of State* v. *I.M. Lall* (1945) F.C.R. 103; (1945) A.F.C. 47; on app. 75 I.A. 225; (1948) A.PC. 121; & *Vidodaya University of Ceylon* v. *Silva* (1964) 3 All. E.R. 865 refd. to.

70 *Ridge* v. *Baldwin* (1964) A.C. 40; (1963) 2 All E.R. 66 *Dr. Boolchand* v. *University of Kurukshetra* (1968) A.S.C. 292; (1968) 1 S.C.R. 434; *Surendra Nath* v. *Indian Airlines Corporation* (1962) A.Cal. 272.

71 *Dr. Bool Chand* v. *University of Kurukshetra* (1968) A.SC. 292; (1968) 1 S.C.R. 434; *State of Orissa* v. *Dr. (Miss) Binapani* (1967) A.S.C. 1269, 1271; *Ridge* v. *Baldwin* (1964) A.C. 40; (1963) 2 W.L.R 66 rel. on; *Surendra Nath* v. *Indian Airlines Corporation* (1962) A.Cal. 272.

72 *Dr. Bool Chand* v. *University of Kurukshetra* (1968) A.Sc. 292 (1968) 1 S.C.R. 434.

73 *United Karnatak Insurance Co. Ltd.* v. *Govardhana Rao* (1961) A.Mys. 49.

74 *Salil Kumar Mukherjee* v. *Hindustan Steel Limited,*, 82 Cal. W.N. 885, 890.

75 *U.P. Warehousing Corporation* v. *Chandrakrian Tyagi* (1970) 2 SCR 250 (1970) ASC 1244.

76 *Sukhdev Singh* v. *Bhagat Ram* (1975) 3 SCR 619; (1975) ASC 1331.

77 *Dr. Narayana* v. *Dr. R. Vaidyamurthi* (1975) A.Knt. 117; (1974) Kart. 1275; *Sheopurdan Singh* v. *Ramanandan Singh* 43 I.A. 91, 97 (1916) A.PC. 78, 80 reld. on.

A Court can decree a suit for arrears of salary of a dismissed Government servant although he did not pray for setting aside the order of dismissal but he did make all the necessary allegations for the purpose.[78]

Amendment of plaint by adding further relief.—The Pakistan Supreme Court allowed amendment of a plaint in the Supreme Court by adding a prayer for possession even where a legal right accrued by lapse of time because the amendment did not alter the nature of the suit and even though a valuable right was taken away the refusal for amendment would in the circumstances of the case be inequitable and a hardship.[79] In that case the plaintiffs since the date of auction-purchaser had been trying to assert their own rights.

Effect of declaration.

35. [43] A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

This section is verbatim the same as s. 43 of the repealed Act, which had the following illustration:

A, a Hindu, in a suit to which *B*, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnised and an order for the restitution of his conjugal rights. The Court makes the declaration and order. *C*, claiming that *B* is his wife, then sues *A* for the recovery of *B*. The declaration made in the former suit is not binding upon *C*.

There is a difference of judicial opinion whether this section must be read subject to s. II of the Code of Civil Procedure, 1908. It has been held in two cases that this section bars a subsequent suit, although the previous decree may not operate as *res judicata* under s. 11,[80] but there is an *obiter dictum* in a later case that the section has not the effect of abrogating the limitations imposed by s. 11 as to the competence of the court which tried the former suit to try the subsequent suit.[81] The Andhra Pradesh High Court has held that this section does not incorporate the limitation laid down in s. 11 C.P.C. as to the competency of the Court to deal with the later suit. The language of this section is not in a restrictive form. It was enacted at a time when the rule of *res judicata* had not been embodied in the Code in its present comprehensive form incorporating therein the substance of s. 43 of Specified Relief Act (s. 35 of 1963). It cannot be that the legislature having specifically provided in s. 11 C.P.C. the conditions for its operation, intended to make an exception in the case of declaratory suits and decrees. Therefore s. 43 of Specific Relief Act (now s. 35 of the new Act) should be read subject to s. 11 of C.P.C.[82]

The section makes it plain that a declaration made in respect of the adoption of a certain person is not a judgment *in rem*.[83]

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78 *Qamar Ali* v. *State* (1959) A.MP. 46.
79 *Karamat Ali* v. *Mohammad Yunus* P.L.D. (1963) S.C. 191, 202; *Mahomad Zahoor Ali Khan* v. *Mt. Thakurasee Rutta Kuer* (1921) A.PC. 50; *Charandas* v. *Ameer Khan* 11 M.I.A. 468.
80 *Subbayya* v. *Nagayya* A.I.R. 1936 Mad. 951, 71 M.L.J. 619, 166 I.C. 75; *Rajah Chattar Singh* v. *Roshan Singh* (1946) Nag. 159, 1946 A.N. 277.
81 *Sarangapani* v. *Venkata* 1952 A.Mad. 384, 388
82 *Veeranna* v. *Sayamma* (1958) A.AP. 363 (F.B.); (1952) A.M. 384 appld.
83 *Munvaraj* v. *Venkatapati* 1955 A.Hyd. 172. (1955) A.Hyd. 172.

PART III

PREVENTIVE RELIEF

Introduction to Part III.—It is not practicable here, and it would be unprofitable for any reasonable Indian purpose if it were practicable, to enlarge on the law and practice of injunctions in England.[1] The governing principles, however, are fairly simple, and the nice questions formerly raised by the jurisdiction being confined to Courts of equity are now matter of the past. An injunction is a specific order of the Court forbidding the commission of a wrong threatened, or the continuance of a wrongful course of action already begun, or in some cases (when it is called a mandatory injunction) commanding active restitution of the former state of things. Obedience to a negative injunction, however, may in fact involve much more than simple forbearance, for example where the execution of necessary public works in a particular way is restrained as being a nuisance, and an alternative way free from that objection has to be found. Disobedience to an injunction is punishable as contempt of Court by imprisonment in the case of a natural person and sequestration in the case of a corporation or quasi-corporate body.

An injunction will not be granted where there is an adequate remedy in damages. This rule is parallel to that which, as we have seen, limits the remedy of specific performance: it does not apply to the protection of purely equitable rights (in the technical English sense of equity jurisdiction), for the plain reason that for violation of such rights there could be no damages at all, the Court of Chancery having no power to award them. Subject to this rule the remedy is said, like that of specific performance, to be discretionary; but, the parallel still holding, this does not prevent constant practice from having made it really matter of right in its most important and usual applications. Where a continuing nuisance is proved to violate an established legal right, the Court cannot refuse an injunction merely on its own estimate of the balance of convenience in the particular case. Accordingly in a large proportion of the reported decisions it will be found that the real matter in dispute was not the propriety of the remedy, but the legal recognition of the right said to be infringed, or the validity of some justification or excuse set up in defence. Such cases do not only concern procedure, but belong not less to the substantive law of the classes of rights involved. The illustrations to s. 54 of the former Act will offer examples to the judicious reader. In practice the points of law may be and often are inextricably mixed with controversy about the facts, which is rather apt to take the form of conflict between expert witnesses; and many of the reports are valuable chiefly as exhibiting the manner in which the Court applies the settled law to disputes of fact in more or less novel circumstances.

The special application of this remedy to obligations undertaken by contract has given rise to some trouble in England. If *A* has expressly agreed with *B not to do a certain thing* — not to compete with him in his business for a limited time after leaving his employment, to take one common example — if the agreement is enforceable by law, and if damages would not be an adequate remedy to *B* for a continuing breach of this agreement, then the Court will protect *B* by restraining *A* from acting in defiance of his contract.[2] So far there is no serious difficulty. But an undertaking to forbear is not necessarily expressed in negative terms. *A* covenants that *he will take all the electrical energy he requires* from the X Co., at a specific price (or scale of prices) and with various ancillary conditions. Read according to its strict affirmative tenor, this is an idle agreement, for *A* is not bound to take any current at all from the X Co. To make it significant and really operative as intended, it must be read as an undertaking by *A* not to take electrical energy from any other source of supply.[3] This again, is only matter of reasonable con-

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1 See Halsbury's Laws of England, 4th Ed. Vol. 24 (Injunction).

2 "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done ... it is the specific performance, by the Court, of the negative bargain which the parties have made": *Lord Cairns, Doherty* v. *Allman* (1878) 3 App. Ca. 709, 720.

3 *Metrop. Electric Supply Co.* v. *Ginder* [1901] 2 Ch. 799. See *infra* S. 42 Subnomine "Negative Covenants."

struction. But there may be a *negative undertaking coupled with a positive contract* of a kind which the Court will not — because it cannot completely or equitably — enforce by specific performance, such as a contract for skilled personal services. If the Court cannot compel *Z* to act or sing, to paint a picture, or manage a technical business for *A*, will it restrain him from doing for *B* that which he has promised but refuses to do for *A*? After some hesitation this was answered in the affirmative.[4] But then must such a negative undertaking be expressed? That it need not be in grammatically negative terms is obvious; to hold to the mere verbal form would be to save judicial trouble at the expense of justice. But a contract to serve *A* for a certain time is not, without more, a contract not to serve any one else. For a time it seemed as if the law would go further, and from a contract for specially skilled service extending over a certain time would imply (and accordingly enforce by injunction) a promise not to render like service elsewhere during that time. The Specific Relief Act was framed when authority to that effect stood unreversed.[5] Some years later, however, the Court of Appeal laid down that even a man's positive contract to give "the whole of his time" to his employer does not import a negative undertaking on which an injunction can be grounded. "Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do ... but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will."[6] This is the present law of English Courts and of jurisdictions where English decisions are followed;[7] but the law of India fixed by the Specific Relief Act before it was so settled, is otherwise, as appears by illustration (d) to former s. 57, though the text is not quite so explicit, and by the decisions rendered under that section. Such divergence are unfortunate; there is no doubt that the intention of the Specific Relief Act was to reproduce English law. But, in the absence of any provisions for the periodical revision of coditying Acts, it is inevitable that they should sometimes occur.

No further special comment from an English point of view, beyond notes on the illustrations, appears to be called for.

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4 *Lumley* v. *Wagner* (1852) I D.M.G. 604; 91 R.R. 193. See under S. 42 *infra* Subnomine "Negative Covenants implied."

5 *Montague* v. *Flockton* (1873) L.R. 16 Eq. 189, overruled by *Whitwood Chemical Co.* v. *Hardman* (see next note).

6 *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 426, per Lindley L.J.

7 See *Mortimer* v. *Beckett* [1920] 1 Ch. 571.

CHAPTER VII

INJUNCTIONS GENERALLY

Preventive relief how granted.

36. [52] Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

This section is the same as s. 52 of the repealed Act.

"At the discretion of the Court."—"The right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act (I of 1877) now Specific Relief Act (47 of 1963) S. 52 (s. 36 of 1963 Act) of 1877 Act places the grant of an injunction in the discretion of the Court — a discretion to be exercised of course as the discretion of Courts always is".[8] "The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal" [see s. 20 (1), above] and discussion of the subject under ss. 38, 39 & 41 *infra*. In an application for interlocutory injunction the applicant must establish a probability or a strong *prima facie* case that he is entitled to the right of whose violation he complains and subject to this the governing consideration is the maintenance of the *status quo* pending the trial.[9] While temporary injunctions are governed by O. XXXIX, r. 1, of Code of Civil Procedure, still the principles under the Specific Relief Act relating to permanent injunctions are applicable.[10] The plaintiff must make out a strong *prima facie* case as to his right.[11]

Right of Privacy.—The right of privacy being a customary right the court has to see in what cases it should be enforced. Where the windows of the house of the defendant overlooked the outer and not the inner courtyard of the plaintiff's house and the courtyard opened on a wide lane between the two houses and it could be overlooked from the roof of the first storey of the defendant's house, the Court will not grant a prohibitive injunction, nor if the dirty water flows from the house of the defendants on a wide lane as the lane was not private property.[12]

Balance of convenience.—The balance of convenience is in favour of the plaintiff newspaper where wholesalers had threatened a boycott of the newspaper for a week and then start the sales again and the plaintiffs had shown *prima facie* an actionable wrong. Interlocutory injunction was granted because the defendants sought to induce the wholesalers to reduce orders on only a day or two's notice; and it was no defence that defendants did not know the terms of the plaintiff's contract with wholesalers; and that the pressure was not exerted directly but through retailers.[13] "At the discretion of the Court" there is a discretion to give an inter-

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8 *Tituram* v. *Cohen* (1905) 32 I.A. 185. 192; 33 Cal. 203. 218; See however *Ramdas Khatau & Co.* v. *Atlas Mills Co.* (1930) 55 Bom. 659; 33 Bom. L.R. 19; 130 I.C. 583; 1931 A.B. 151, where s. 38 was held not to be exhaustive the Court being of opinion that there was jurisdiction to grant an injunction, wherever just and convenient, even in cases outside the provisions of s. 38 and that nothing in *Tituram* v. *Cohen, supra,* was inconsistent with this view. A different view has however been taken in Lahore: *Attar Singh* v. *Vishan Das* (1937) 18 Lah. 345: 171 I.C. 730; 1937 A.L. 545.

9 *Donmar Products Ltd.* v. *Hart* (1967) 2 All E.R. 338; *Harman Pictures* v. *Osborne* (1967) 2 All E.R. 324.

10 *Mac Laboratories (P) Ltd.* v. *V.R. Nathan* (1967) 1 ,.L.J. 353.

11 *Donmar Products Ltd.* v. *Hart* (1937) 2 All E.R. 338; *Harman Pictures* v. *Osborne* (1937) 2 All E.R. 324; *London Borough of Hounslow* v. *Twickenham Garden Ltd.* (1970) 3 All E.R. 326 (enforcement of a licence when success at the trial probable).

12 *Diwan Singh* v. *Inderjeet* (1981) A.A. 342.

13 *Daily Mirror Newspapers* v. *Gardner* (1968) 2 All E.R. 163; *J.T. Stratford* v. *Lindley* (1964) 3 All E.R. 102; (1965) A.C. 269 applied.

locutory injunction. It is given when success at the trial is probable. *London Borough of Hounslow* v. *Twickenham Garden Ltd.* (1970) 3 All. E.R. 326. (enforcement of rights by licenser).

But this observation about direct and indirect pressure was modified in a later judgment.[14]

Interlocutory injunction can be issued on a Sunday for restraining a father from taking children of marriage out of the jurisdiction even before a writ or originating summons. Sunday being a *dies non juridicus.*[15] Just as an interlocutory injunction can in a case of sufficient cogency be granted *ex parte* so can it for similar reasons be discharged or varied *ex parte.*[16] Mandatory injunction can be granted at an interlocutory stage. *Comet Radiovision Services* v. *Farewell Tandberg* (1971) 3 All. E.R. 230.

Temporary and perpetual injunctions.

37. [53] (1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

This section is the same as s. 53 of the repealed Act.

Temporary injunctions.—See the Code of Civil Procedure, 1908, O. XXXIX.

Refusal of interim injunction.—In a suit for specific performance of contract to sell shares and for *interim* injunction restraining the defendants from transferring shares or exercise voting rights, *interim* injunction was not granted due to delay and readiness and willingness of the plaintiff being doubtful. The defendant had cancelled the contract after waiting for two months.[17]

Interlocutory Injunction.—The Courts in England have laid down in some of the recent cases the principles governing the grant of interlocutory injunctions. They are given herein. It has been held that where the plaintiff has a claim for money against the defendant for which he makes out a *prima facie* case, the Court has jurisdiction to grant an interlocutory injunction *ex parte* restraining the defendant from disposing of the assets.[18]

Patent, infringement of.—The House of Lords in a case of infringement of a patent where the plaintiff sought an interlocutory injunction laid down the principles thus in the following circumstances.

An interlocutory injunction on a balance of convenience, was granted by the Patent judge on the plaintiffs giving an undertaking for damages. The Court of Appeal reversed the decision on the ground that the plaintiff had not made out a *prima facie* case and the rule was well established that an interlocutory injunction would not be granted on mere consideration of balance of convenience unless the evidence showed that the probability was that the plaintiff would establish a right to permanent injunction. On appeal the House of Lords held that the grant of interlocutory injunction was governed by the same principle as those in other actions and there was no rule of law that the court was precluded from considering whether on a balance an interlocutory injunction should be granted unless the plaintiff established a *prima facie* case or probability of success at the trial. All that was necessary was that the claim was not frivolous or vexatious i.e. there was a serious question to be tried.[19]

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14 *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 530.
15 Re N (infants) (1967) 1 All E.R. 161.
16 *London City Agency Ltd.* v. *Lee* (1969) 3 All E.R. 1376.
17 *Jagdish Prasad Potdar* v. *Peter Robinson* (1979) A.Cal. 348.
18 *Nippon Yusen Kaisha* v. *Karageorgis* (1975) 3 All E.R. 282 (C.A.)
19 *American Cynamid Co.* v. *Ethicon* (1975) 1 All E.R. 504, 508 (H.L.)

Injunction — Interlocutory.—Even though the plaintiff's failure to show a reasonable case for getting a permanent injunction, which will weigh heavily against the plaintiff, yet it would not preclude the grant of an interlocutory injunction as a matter of law, as there were special cases where *status quo* would be maintained; if the act of the defendants would cause disruption which was unjustified and damages would not be an adequate remedy. The offer of a guarantee by a third party was rejected by the Court as it lacked particularity and emerged at a late stage of the proceedings and it was from a foreign party and there was no information if it would be able to remit the money due to foreign exchange regulations.[20]

Injunction — Service Contract.—The Court of Appeal in a case where a solicitor sought an injunction against his conveyancing clerk for breach of covenant of service laid down the following principle.

A plaintiff need not establish that he had a *prima facie* case but merely that there was a serious question to be tried and the Court had to consider where the balance of convenience lay. In considering this the relative strength of each party's case is the last factor where it was otherwise even after the compensationability of either party by damages had been considered by the Court and the preservation of the *status quo*, the Court had to go into the balance of convenience generally leaving out of account the probable upshot of the action. The Court held that the balance of convenience was in favour of refusal to grant interlocutory injunction; because there was no clear evidence of the plaintiff's suffering any damage. But if it was granted, the defendant who was a solicitor's conveyancing clerk would lose his job and might find it difficult to get another job with a solicitor, while the action was pending. The restrictive clause being too wide the defendant was more likely to succeed.[21]

Supply of Petrol. — The plaintiff agreed to buy the petrol and diesel required for its filling stations from the defendant. The latter stopped supply when, according to the evidence, the supply of petrol was in an unusual condition and alternative supply was not possible. The plaintiff brought an action against the defendant and sought interlocutory injunction restraining the defendant from withholding supplies. The Court referred to the dictum that in the sale and purchase of non-ascertained goods, no specific performance can be granted and damages are a sufficient compensation. When that was lacking as in the instant case, specific performance can be granted and hence interlocutory injunction was granted.[22]

Solus tie.—The plaintiff, who had a legal charge over the property of the defendant coupled with a 'solus tie' sought an injunction restraining the defendant from a breach of the contractual obligation and an interlocutory injunction. The Court of Appeal held that where the plaintiff established a good *prima facie* case or probability of success at the trial and that the contractual obligation on which it relied had been violated and such right entitled the plaintiff to a perpetual injunction, the court will grant interlocutory injunction; the governing principle being the maintenance of *status quo* but regard should be had to the balance of convenience and the extent to which the advantage to the plaintiff could be cured by payment of damages rather than by the grant of interlocutory injunction.[23]

Foreign Corporation.—If a Foreign Corporation has an account with a bank within jurisdiction, the court will have jurisdiction even though the account is an overdraft. It can be presumed that in the case of a commercial undertaking the overdraft is secured by a collateral security representing substantial assets within jurisdiction. The mere fact that a corporation was

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20 *Evan Marshall & Co. Ltd.* v. *Bertola S.A.* (1973) 1 All E.R. 892, 1005; (C.A.); *Warner Bros Pictures* v. *Nelson* (1936) 3 All E.R. 160; *Dero-Wall International S.A.* v. *Practitioners in Marketing Ltd.* (1971) 2 All E.R. 216; *Hill* v. *Parsons & Co. Ltd.* (1971) 3 All E.R. 345; *Nubbard* v. *Vosper* (1972) 1 All E.R. 1023 at p. 1029 applied.

21 *Fellowes* v. *Fisher* (1975) 2 All E.R. 829, 840 (C.A.)

22 *Sky Petroleum Ltd.* v. *V.I.P. Petroleum Ltd.* (1974) 1 All W.R., 954, 956.

23 *Texaco Ltd.* v. *Mulbery Filling Station Ltd.* (1972) 1 All E.R. 513, 528 (C.A.); *Doherty* v. *Allman* (1878) 3 App. Cas 709 disting.

a foreign corportion is no ground for granting injunction. But on the evidence and in the absence of directors' evidence or a balance sheet or any evidence that the grant of injunction would embarrass their business, the grant of injunction about withdrawal of assets was continued.[24]

Interference with marketing.—In an action against the defendant, the Corporation of Birmingham sought interlocutory injunction against the defendant restraining him from disturbing the market held by the plaintiff. It was granted because: in the whole circumstances the balance of justice and convenience required that it be granted on the ground that (a) the plaintiff had a statutory monopoly of holding markets within the area designated; (b) the defendant was disturbing the holding of the markets; (c) there was likelihood of loss to the plaintiff (d) there was no evidence that the defendant would suffer greater hardship; (e) the Corporation would be able to meet any damage which the defendant may suffer but the defendant may not be able to compensate the loss of the plaintiff.[25]

Injunction against husband and wife — a Lebanese.—At the instance of a Bank in England a husband and wife were restrained from taking assets out of jurisdiction as the wife was Lebanese and could leave the jurisdiction at any time with the assets and against the husband as an action for fraud had been brought against him in England even though he was out of jurisdiction.[26]

Injunction against foreign Companies (Mareva).—In a proper case injunction can be granted before judgment if it appears that the debt is due and owing and there is a danger of the debtor disposing of his assets so as to defeat it before judgment. The court has jurisdiction to prevent him from disposing of those assets.[27]

Third party affected.—An injunction against a defendant, a charterer of a ship, not to remove assets out of jurisdiction or dispose of them within jurisdiction will not be granted, if it affects the rights of innocent third parties — in this case Port Authority losing additional charges — unless the plaintiff gives security for the same. The Court will protect interest of third parties affected by such injunction.[28]

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24 *Third Chandris Shipping Corporation* v. *Unimarine S.A.* (1979) 2 All E.R. 972.
25 *Corporation of Birmingham* v. *Perry Barr Stadium Ltd.* (1972) 1 All E.R. 725.
26 *Chartered Bank* v. *Daklouche* (1980) 1 All E.R. 205, 210, 212 (C.A.).
27 *Mareva* v. *International Bulk Carriers* (1980) 1 All E.R. 213, 215.
28 *Clipper Maritime Co. Ltd.* v. *Mineral Import-Export* (1981) 3 All E.R. 664 (QBD).

CHAPTER VIII

PERPETUAL INJUNCTIONS

Perpetual injunction when granted.

38. [54] (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:—

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

This section corresponds with s. 54 of the repealed Act, cl. (d) of which has been omitted. The illustrations to s. 54 were simple, but their authority is not abrogated and are useful. They are as follows:

(a) *A* lets certain land to *B*, and *B* contracts not to dig sand or gravel thereout. *A* may sue for an injunction to restrain *B* from digging in violation of his contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.[29]

(d) The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e) *A*, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) *A*, a trustee for *B*, is about to make an important sale of a small part of the trust property. *B* may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g) *A* makes a settlement (not founded on marriage or other valuable consideration) of an estate on *B* and his children. *A* then contracts to sell the estate to *C*. *B* or any of his children may sue for an injunction to restrain the sale.

(h) In the course of *A*'s employment as a *vakil*, certain papers belonging to his client, *B*, come into his possession. *A* threatens to make these papers public, or to communicate their contents to a stranger. *B* may sue for an injunction to restrain *A* from so doing.

(i) *A* is *B*'s medical adviser. He demands money of *B* which *B* declines to pay. *A* then threatens to make known the effect of *B*'s communications to him as a patient. This is contrary to *A*'s duty, and *B* may sue for an injunction to restrain him from so doing.

(j) *A*, the owner of two adjoining houses, lets one to *B* and afterwards lets the other to *C*. *A* and *C*

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29 As to payment of interest out of capital by railway companies during construction, see s. 3 of the Indian Railway Company Act, 1895 (X of 1895).

begin to make such alterations in the house let to *C* as will prevent the comfortable enjoyment of the house let to *B*. *B* may sue for an injunction to restrain them from so doing.

(k) *A* lets certain arable lands to *B* for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, *B* threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. *A* may sue for an injunction to restrain *B* from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

[*Pratt* v. *Brett* (1817) 2 Madd. 62; 17 R.R. 187, apparently undefended.]

(l) *A*, *B* and *C* are partners, the partnership being determinable at will. *A* threatens to do an act tending to the destruction of the partnership property. *B* and *C* may, without seeking a dissolution of the partnership, sue for an injunction to restrain *A* from doing the Act.

[*Miles* v. *Thomas* (1839) 9 Sim. 606; 47 R.R. 320; injunction refused on other grounds.]

(m) *A*, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her. But see s. 14(1) of Hindu Succession Act.

(n) *A*, *B* and *C* are members of an undivided Hindu family. *A* cuts timber growing on the family property, and threatens to destroy part of the family house and to sell some of the family utensils. *B* and *C* may sue for an injunction to restrain him.

(o) *A*, the owner of certain houses in Calcutta, becomes insolvent. *B* buys them from the official assignee and enters into possession. *A* persists in trespassing on and damaging the houses, and *B* is thereby compelled, at considerable expense, to employ men to protect the possession. *B* may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over *A*'s land. In a suit against several of them, *A* obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues *A* for obstructing his alleged right of way over the land. *A* may sue for an injunction to restrain them.

(q) *A*, in an administration suit to which a creditor, *B*, is not a party, obtains a decree for the administration of *C*'s assets. *B* proceeds against *C*'s estate for his debts. *A* may sue for an injunction to restrain *B*.

(r) *A* and *B* are in possession of contiguous lands and of the mines underneath them. *A* works his mines so as to extend under *B*'s mine and threatens to remove certain pillars which help to support *B*'s mine. *B* may sue for an injunction to restrain him from so doing.

(s) *A* rings bells or makes some other unncessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, *B*. *B* may sue for injunction restraining *A* from making the noise.

[*Sultan* v. *De Held* (1851) 2 Sim. N.S. 133; 89 R.R. 245.]

(t) *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and *C*, who carry on business in a neighbouring house. *B* and *C* may sue for injunction to restrain the pollution.

(u) *A* infringes *B*'s patent. If the Court is satisfied that the patent is valid and has been infringed, *B* may obtain an injunction to restrain the infringement.

(v) *A* pirates *B*'s copyright. *B* may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) *A* improperly uses the trade-mark of *B* *B* may obtain an injunction to restrain the user, provided that *B*'s use of the trade-mark is honest.

(x) *A*, a tradesman, holds out *B* as his partner against the wish and without the authority of *B*. *B* may sue for an injunction to restrain *A* from so doing.

[*Routh* v. *Webster* (1847) 10 Beav. 561; 76 R.R. 211; *Walter* v. *Ashton* [1902] 2 Ch. 282; *Burchell* v. *Wilde* [1900] 1 Ch. 551, 563.]

(y) *A*, a very eminent man, writes letters on family topics to *B*. After the death of *A* and *B*, *C*, who is *B*'s residuary legatee, proposes to make money by publishing *A*'s letters. *D*, who is *A*'s executor, has a property in the letters, and may sue for an injunction to restrain *C* from publishing them.

(z) *A* carries on a manufactory and *B* is his assistant. In the course of his business, *A* imparts to *B* a secret process of value. *B* afterwards demands money of *A*, threatening, in case of refusal, to disclose the process to *C*, a rival manufacturer. *A* may sue for an injunction to restrain *B* from disclosing the process.

Discretion as to granting injunctions.—Injunctions are of two kinds, namely (1) temporary and (2) perpetual. Temporary injunctions are dealt with in O. 39 of the Code of Civil Pro-

cedure, but the Court takes into consideration the principles laid down in s. 54.[30] Perpetual injunctions are dealt with in ss. 38 to 42 of the present Act. Whether the injunction sought is temporary or perpetual, the jurisdiction to grant is, as in the case of specific performance (s. 20), discretionary.[31] The words 'in its discretion' are absent from sections 38 and 41, but section 36 makes it clear that the remedy under both sections is discretionary.[32]

The plaintiff, the owner of the plots 774 and 775, falsely alleged that the defendant had dug a water course on the plaintiff's land to let the water flow from his lands on to the plaintiff's land and prayed for the relief of perpetual injunction. The court found that the plaintiff's land was lower and water from the defendant's land had been flowing from defendant's land on to the lands of the plaintiff's and refused the relief of injunction. It was held that the relief was equitable and discretionary and he who seeks equity must come with clean hands which the plaintiff had not.[33]

The plaintiff claimed to have been inducted as a lessee of the land in dispute after paying salami and rent which the court held not proved. His prayer for permanent injunction was therefore rejected.[34]

Perpetual injunctions.—"The granting of injunctions is now regulated by ss. 38 and 41 of the Specific Relief Act. But those sections have never been understood as introducing new principles of law in India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience".[35]

A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The obligation may arise from contract as in ill. (a), or it may be in the nature of a trust (as defined in section 2) as in ills. (b) to (h), or it may be an obligation the breach of which amounts to a tort or civil wrong of which ills. (s) and (t) are prominent instances, or it may be any other legal obligation as in ills. (i) and (z). As regards contracts the Court is to be guided, in granting an injunction, by the rules in Chapter II as to specific performance. Where there is an invasion of the plaintiff's right to, or enjoyment of, property, an injunction may be granted only in the four cases mentioned in cls. (a) to (d) of sub-sec. (3). Where a breach of trust is threatened the Court may grant an injunction, even though compensation in money would afford adequate relief [ill. (f)]; this follows from cl. (a) of sub-sec. (3). The word "obligation" is very wide in its application. It has the same meaning as in s. 2(a) of this Act.[36] Imposition of an illegal tax by a municipal committee is a breach of an obligation. A person so taxed can be granted a perpetual injunction under s. 38.[37] A vendor of land is under a duty to a purchaser to disclose latent defects which the purchaser could not with due diligence discover. If the vendor fails in this duty he does not commit a breach of contract, but he does commit a breach of an obligation, as defined in s. 2 of this Act, and the purchaser can therefore bring his case within sub-sec. (1) of sec. 38.[38]

Principles of grant of injunction.—If injunction is the only means of enforcing a right an injunction will be granted. Therefore even a minority can enforce a right of the inhabitants of

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30 *Metal Corporation of India* v. *Subbaiyer* 1952 A.Cal. 347.
31 *Tituram* v. *Cohen* (1905) 32 I.A. 185; 33 Cal. 203.
32 *Mohammed Wasi* v. *Bachchan Sahib* 1955 A.A. 68, 72 (F.B.).
33 *Ganesh Panigrahi* v. *Jura Sahu* (1973) A.Or. 232.
34 *Faqir Senapati* v. *Tahsildar Cuttack* (1978) A.Or. 123, 124; *Bashiruddin* v. *State of Orissa* (1961) Cut. 595 applied.
35 *Shamnugger Jute Factory Co.* v. *Ram Narain* (1887) 14 Cal. 189, 199.
36 *Hyderabad Stock Exchange Ltd.* v. *Ranganath Rathi & Co.* (1958) A.AP. 43; *Bhudeb Mookerjee* v. *Kalachand Malik* (1921) A.Cal. 129; 34 Cal. L.J. 315 reld. on.
37 *Montogomery Municipal Committee* v. *Sant Singh* (1940) Lah. 707; 191 I.C. 65; 1940 A.L. 377, (F.B.). A contrary view was taken in *Chunilal* v. *Surat City Municipality* (1903) 27 Bom. 403, and the Lahore case was distinguished in *Municipal Committee, Akola* v. *Shrimati Shantarani* (1945) Nag. 670, 1946 A.N. 78, and in *Madanlal* v. *State of Madhya Bharat* 1955 A.M.B. 111.
38 *Parul Bala Roy* v. *Srinibash* 1952 A.Cal. 364.

a parish and get an injunction.[39] The principle on which injunctions are granted is not that an injunction will not hurt a party against whom it is granted but on the principle that the applicant satisfies the Court that he has made out a case within the law to be clothed with an order of injunction from the Court.[40]

Considerations which apply to prohibitory and mandatory injunctions are somewhat different though the principles applicable are essentially the same.[41] Sections 38 and 41 of 1963 Act must be read together. The former lays down the conditions under which an injunction can be granted and the latter where it cannot be granted. It would be an erroneous construction to hold that the right to an injunction should be determined independently of the provisions of ss. 38 and 41 by reference to the provisions of s. 37.[42]

In *Hyderabad Stock Exchange Case:* The Hyderabad Stock Exchange Ltd. on receipt of a complaint against the plaintiff firm called upon the firm to submit its explanation. The Exchange later sent another letter asking the plaintiffs to appear before the Directors with their explanation and documents in support, if any, and also that in default they will proceed *ex parte* as there was a *prima facie* case, but the Rule mentioned by the Exchange was erroneous. The plaintiffs sent a reply asking for better and precise particulars pointing out the notice to be vague. Another notice was sent by the Exchange for the plaintiff to appear. But the plaintiffs instituted a suit for declaration and injunction which was decreed but on appeal was dismissed.

The Court held[43] that mere prospect of apprehension of injury is not sufficient. It must be shown that the act complained of is violative of plaintiff's right or if carried out will result in such violation. The plaintiff must satisfy the Court in injunction cases that his conduct has been fair and honest. In the undermentioned case it was held not to be so.[44] And the plaintiff had no cause of action for an injunction in absence of his appearing before the Directors of the Exchange and he could not start another action to have the matter dropped against him.[45]

Wherever a right exists or is created by contract by the ownership of property or otherwise cognizable by law, a violation of that right will be prohibited unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. The prohibiting power of equity therefore extends through the whole range of rights and duties which are recognised by law and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit the exercise (Pomeroy: Equity Jurisdiction Vol. IV para 1338 p. 320).[46]

Where the defendants, manufacturers of nylon which was the raw material for the purposes of the plaintiff's alleged manufacturing process, and the raw material becomes available only to "Actual users" ad interim relief of injunction was refused by the court on the ground of balance of convenience and irreparable injury not being in favour of the plaintiffs and the case being one in which the grant of permanent injunction was not made out.[47]

Injunction against persons not parties to action.—No injunction can be granted against a person not a party to an action restraining it from aiding and abetting a party to the action against whom an injunction has been granted. The proper remedy is by way of contempt.[48]

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39 *Wyld* v. *Silver* (1962) 3 All E.R. 309, 315; quoting Holt C.J. in *Ashby* v. *White* (1703) 2 Ld. Raym. 938, 953-4.

40 *Babulal Chokhani* v. *Western India Theatres Ltd.* (1957) A.Cal. 709.

41 *Puran Chand* v. *Nitvanand* (1958) A.Puj. 460.

42 *Hyderabad Stock Exchange Ltd.* v. *Rangnath Rathi & Co.* (1958) A. AP. 43.*Ram Kissen Joydayal* v. *Pooran Mull* 47 Cal. 733; (1920) A.Cal. 239 folld.

43 *Hyderabad Stock Exchange Ltd.* v. *Rangnath Rathi & Co.* (1958) A.AP. 43; Kerr: On Injunctions 6th Ed. p. 16.

44 *Hyderabad Stock Exchange Ltd.* v. *Rangnath Rathi & Co.* (1958) A. AP. 43.

45 *Hyderabad Stock Exchange Ltd.* v. *Rangnath Rathi & Co.* (1958) A. AP. 43; *Osumanyawa* v. *Sir Ojori Atta* (1930) A. PC. 260 reld. on.

46 Quoted with approval in *Bhavarilal* v. *S. Jaichand* (1975) A.Knt. 122, 123.

47 *Raman Hosiery Factory* v. *J.K. Synthetics Ltd.* (1974) A.D. 207.

48 *Eliot* v. *Klinger* (1967) 3 All E.R. 141; *Seaward* v. *Paterson* (1895-9) All E.R. Rep. 1127; (1897) 1 Ch. 545.

There can be no decree for injunction on the allegation that the defendant had acquired no right to the property in plaintiff's possession and that she had heard that the vendee was proposing to file a suit for ejectment.[49]

Breach of natural justice.—(1) An injunction against a Vice Chancellor's order suspending a student even though a quasi judicial function will be refused even though it is a breach of natural justice where the student admits commission of the offence. *Glynn* v. *Keele University* (1971) 2 All E.R. 89; *Daryappah* v. *Fernando* (1967) 2 A.C. 170; (1967) 2 All E.R. 152 (P.C.) reld. on.

(2) Disciplinary action against a fireman cannot be restrained by injunction unless disciplinary tribunal acted unfairly. *Buckoke* v. *Greater London Council,* (1971) 2 All E.R. 254.

Injunction to prevent breach of contract.—By sub-sec. (2) of this section it is provided that in dealing with cases of injunctions to prevent the breach of a contract, the Court is to be guided by the rules in Chapter II relating to specific performance. By s. 41, cl. (e), it is again enacted that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. By s. 42 it is provided that notwithstanding s. 41 cl. (e), the Court may in certain cases grant an injunction. These cases are dealt with in the notes to s. 42.

III. (a) above is a case in which the Court will grant an injunction to restrain the breach of the contract, as no amount of pecuniary compensation would afford adequate relief to the plaintiff if the contract is broken. It has been held that the limitation of the remedy to cases where pecuniary compensation would not afford adequate relief must be confined to cases of invasion or threatened invasion of the plaintiff's right to property.[50] This is no doubt a fair interpretation of the words of the section, but it is to be remembered that the remedy is discretionary, and a consideration that always weighs with a Court in exercising its discretion is whether damages would be an adequate remedy.

Amongst contracts of which the breach may not be prevented by an injunction are contracts which are dependent on the personal qualifications or volition of the parties. These contracts will not be specifically enforced [s. 14(1)(b)], and an injunction will not be granted to prevent the breach thereof. Acting upon these principles, the Courts have refused to restrain employers from determining contracts with their employees where the services to be rendered by the latter were services of a personal nature, *e.g.*, a contract to work a railway line and keep the engines and rolling stock in repair,[51] a contract to act as a manager of a tea estate,[52] a contract to manage the business of working certain patents,[53] a contract to act as agents of a company,[54] a contract to act as manager of trust properties,[55] a contract to build a building.[56] But see negative covenants for contracts not of a personal nature (*Infra* s. 42).

A manager appointed by a group of musicians under a contract cannot have the contract of service enforced by injunction as that would be enforcing a contract of personal service, that is a contract for rendering managerial services of a personal and fiduciary character amounting to a partnership or a joint venture.[57]

But in *Hill* v. *C.A. Parsons & Co. Ltd.* (1971) All E.R. 1345 injunction was given as personal confidence in the employee still continued and the termination of his service was due solely to trade union rules.

The remedy of a contractor on a wrongful termination of the contract is damages. He can-

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49 *Babu* v. *Ram Rattan* (1967) A.A. 264.

50 *Montgomery Municipal Committee* v. *Sant Singh* (1940) Lah. 707, 740 f.n. 22 (*supra*), criticising *Chunilal* v. *Surat City Muncipality* 27 Bom. 403.

51 *Johnson* v. *Shrewsbury and Birmingham Rly. Co.* (1853) 3 De G.M. & G. 914; 98 R.R. 360.

52 *Mair* v. *Himalaya Tea Co.* (1865) L.R. 1 Eq. 411; 147 R.R. 872.

53 *Stocker* v. *Brockelbank* (1851) 3 Mac. & G. 250; 20 L.J. Ch. 401, 409; 87 R.R. 87.

54 *Nusserwanjee* v. *Gordon* (1882) 6 Bom. 266, 283; *Krishna Rao* v. *Anjancyulu* 1954 A.M. 113.

55 *Ram Charan* v. *Rakhal Das* (1914) 41 Cal. 19; 19 I.C. 157. (See also *North Western Railway Administration* v. *North Western Railway Union* (1932) 14 Lah. 330; 1963 A.L. 203; *Gulab Singh* v. *Punjab Zamindara Bank* 1940 A.L. 243; 190 I.C. 819.

56 *Dewan Chand* v. *Union of India* 1951 A.Punj. 426.

57 *Page One Records Ltd.* v. *Britton* (known as Troggs) (1967) 3 All. E.R. 822.

not obtain an injunction as that would amount to specific performance.[58]

The Court will not enforce specific performance of a contract which is made under such circumstances as to give the plaintiff an unfair advantage over the defendant (s. 20); it will therefore also refuse to grant an injunction to prevent the breach of the contract.[59]

Where the case is such that the Court will not enforce specific performance of a contract or prevent its breach by an injunction, it will not restrain the party committing the breach from doing that which is only a violation of what is ancillary or incidental to the principal part of the contract. Thus a Court will not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ; so it will not restrain the company from appointing a solicitor, though under the terms of the contract between the company and its agents the agents alone have the right to appoint solicitors for the company.[60] An agreement which is indefinite cannot be specifically enforced and therefore no injunction can be granted in such a case.[61] If a contract with the Corporation of Calcutta is not in the prescribed form no specific performance of the contract can be obtained and therefore an injunction to restrain a breach of such a contract cannot be granted.[62]

A contract which is determinable cannot be specifically performed and no injunction can be granted to prevent the breach of such a contract (S. 41). And where permanent injunction cannot be granted, temporary injunction will not be granted.[63]

Acquiescence. — If the plaintiff acquiesces in the defendant discharging the water from his house through pipes in the wall of the plaintiff for a long period, he cannot get the discretionary relief of mandatory injunction against the defendant.[64]

Parties right to performance of a contract.—The principle of *Lumley* v. *Gye*[65] that each of the parties to a contract has "a right to the performance of it" was extended by Lord MacNaghten in *Quinn* v. *Leathem*[66] that each of the parties has a right to have his "contractual relations" with the other duly observed, i.e. it is a violation of a legal right to interfere with contractual relations without sufficient justification and this was adopted by the Privy Council in *Jasperson* v. *Dominion Tobacco Co.*,[67] It was further extended by Denning M.R. in *Torquay Hotel Co. Ltd.* v. *Cousins*[68] to cover "deliberate and direct interference with the execution of a contract without that causing any breach" a point which was left open by Lord Reid in *J. T. Stratford & Sons Ltd.* v. *Lindley*.[69]

Breach of contract by employing unlawful means.—If one person deliberately interferes with the trade or business of another and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully even though he does not procure or induce any actual breach of a contract. If the means are unlawful that is enough. Thus in *Rookes* v. *Barnard*[70] the respondent interfered with the employment of Rookes by intimidat-

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58 *Ranjit Chandra* v. *Union of India* (1963) A.Cal. 594; *Foster* v. *Hastings Corporation* (1903) 87 LT 736 dist. Hudson: Building and Engineering Contracts 8th Ed. 405, refd. to.

59 *Callianji* v. *Narsi* (1895) 19 Bom. 764.

60 (1882) 6 Bom. 266, 283-284; minority *per se* is not a ground for refusing an injunction, if the acts sought to be restrained were done by the minor personally or at his instance: *Maharaj Bahadur Singh* v. *Paresh Nath Singh* (1904) 31 Cal. 839;*Ram Chandra* v. *Narasimha* 1931 A.B. 466; 33 Bom. L.R. 590; 130 I.C. 839, where the English cases are discussed.

61 *Sree Ambarnath Mills* v. *Custodian Evacuee Property* (1957) A.B. 119; (1957) Bom. 668.

62 *Sitaram* v. *Corporation of Calcutta* (1956) A.Cal. 18.

63 *Republic Stores (Trade)* v. *Jagjit Industries Ltd.* 81 Cal. W.N. 646.

64 *Sadasiva Chettiar* v. *Subramaniam* (1977) 1 Mad. L.J. 67, 71; *Punnamma* v. *Venkata Subba Rao* (1953) A.M. 456 reld. on.

65 (1843-60) All E.R. Rep. 208.

66 (1901) A.C. 495; (1900-02) All E.R. Rep. 1.

67 (1923) A.C. 709.

68 (1969) 1 All E.R. 522, 530.

69 (1965) A.C. 269, 324; (1964) 3 All E.R. 102, 107.

70 (1964) A.C. 1129; (1964) 1 All E.R. 367, *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 530.

ing his employer. And in *Stratford & Co. Ltd.* v. *Lindley*[71] the respondents interfered with the business of Stratford by inducing men to break their contracts of employment by refusing to handle barges, and they were held acting illegally even in regard to new business which was not the subject-matter of contract. Injunction can be granted in the case of a person interfering with the trade or business of another by unlawful means. Similarly, a person acting illegally by complying with the direction of another cannot excuse himself by pleading his being bound by contract to obey a direction even though unlawful. *Acrow Ltd.* v. *Rex Chainbelt*, (1971) 3 All E.R. 1175.

Force majeure clause.—A trade union official cannot take advantage of the *force majeure* clause if he unlawfully prevents or hinders the performance of the contract. He cannot rely on an excuse of which he himself had been "the means".[72]

The principle can be divided into 3 parts —

1. There must be interference in the execution of a contract which is not confined to the procurement of a breach but extends to a third person preventing or hindering one party from performing his contract even though it be not a breach.

2. The interference must be deliberate, i.e. the person must know of the contract or at any rate turn a blind eye to it and intend to interfere with it. See *Emerald Construction Co. Ltd.* v. *Lowthian*.[73]

3. Interference must be direct, indirect interference will not do. Indirect interference is only unlawful if unlawful means are used. Said Lord Denning M.R.: " I went too far when I said in *Daily Mirror Newspapers Ltd.* v. *Gardner*[74] that there was no difference between direct and indirect interference."

Injunction — Unlawful means. — By threatening "repercussions" the Union officials interfered unlawfully with the performance of any future order placed by a customer with a dealer in oil and fuel. The interference was direct, sufficient to warrant the grant of an injunction *quia timet*. In this case there was no trade dispute.[75]

Foreign Corporation.—Injunction can be given against a foreign corporation to stop its agents from doing acts in breach of contract either in England or abroad, notwithstanding there is no evidence that the foreign corporation had assets within the jurisdiction; it being for the corporation to produce such evidence if it wished injunction to be refused on that ground. An injunction is a remedy *in personam*.[76]

A car sold by retail sale by an authorised distributor, registered with the local authority with number plates put on and driven away by a purchaser ceases to be a new car and any advertisement by any dealer in cars that the car was new was likely to damage the manufacturers and would entitle them to an injunction as it amounted to a representation that the defendant was an authorised dealer.[77]

Injunction against defendant not to remove assets out of jurisdiction.—A Court has jurisdiction to grant, in its discretion, interim injunction restraining the defendant from removing his assets out of jurisdicition; but the discretion will be exercised whenever it appears just and convenient to do so but it should not be fettered by (i) the plaintiff should show that he has a good arguable case; (ii) the discretion is not limited to money but also extends to goods, but in the case of goods care should be taken that the defendants business does not come to a

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71 (1965) A.C. 269, at p. 324; (1964) 3 All E.R. 102, at p. 106; quoted in *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 531; *See Daily Mirror Newspapers Ltd.* v. *Gardner* (1968) 2 Q.B. 762; (1968) 2 All E.R. 163.

72 *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All. E.R. 522, 529; see *New Zealand Shipping Co. Ltd.* v. *Societe Des Ateliers etc. Chantiers de France* (1919) A.C. 1, 7, 8.

73 (1966) 1 All E.R. 1013; (1966) 1 W.L.R. 691; *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 530.

74 (1968) 2 Q.B. 762, 781; (1968) 2 All E.R. 163, 168; *D.C. Thomason & Co. Ltd.* v. *Deakin* (1952) Ch. 646, 702; (1952) 2 All E.R. 361, 384; *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 530.

75 *Torquay Hotel Co. Ltd.* v. *Cousins* (1969) 1 All E.R. 522, 532.

76 *Children's Hospital* v. *Walt Disney* (1967) 1 All E.R. 1005.

77 *Morris Motors Ltd.* v. *Lilley* (1959) 3 All E.R. 737; *Morris Motors Ltd.* v. *Phelan* (1960) 2 All E.R. 208; *Third Chandris Shipping Corp.* v. *Unimarine S.A.* (1979) 2 All E.R. 972.

standstill or cause an irreparable loss which may not be compensated by plaintiff's undertaking in damages; (iii) where it might compel the defendant to produce security, it might often be just and convenient to grant injunction.[78]

On the facts and circumstances injunction was refused as the goods were part of a plant for erection in Indonesia and if seized, the equipment would sell as scrap and fetch very little in comparison to the plaintiffs claim. This was in spite of the plaintiffs claim being *prima facie* good showing liability on the part of the defendant.[79]

Declaration instead of injunction.—There may be circumstances where a Court could appropriately make a declaration where it might not be able to grant an injunction.[80]

A father agreed to pay maintenance and created a charge on a portion of his property and its rent in favour of his son's wife and minor grandson to guarantee payment. On the father's death the husband interfered with the wife's recovery of rent. The suit for injunction by the wife failed under ss. 21(g) and 56(f) of the Specific Relief Act of 1877 [ss. 14(1)d & 41(e) of 1963].[81]

Damages in lieu of mandatory injunction.—The plaintiffs sold land to a developer company with a stipulated layout plan which the latter did not observe and houses were built in breach of the stipulation. The plaintiff sought a mandatory injunction but the court refused to grant it as demolition of houses would cause an unpardonable wastage of much needed housing. The Court therefore awarded damages in lieu of the relief of mandatory injunction which was assessed at 5% of the profits which the defendant developers would make on the development. This amount was equally apportioned between the developers and the buyers of the plots as they by their deposits and entering into contracts of purchase and of building had aided and abetted the developers in the breach. This sum was a just *quid pro quo* for the infringement of the covenant. Although there was no evidence of fall in value of the land as a result of breach of the covenant, nominal damages were not awarded as that would be a benefit to the developers for their own wrong.[82]

Right to, or enjoyment of, property.—It is not in every case where the plaintiff's right to property is invaded that a perpetual injunction will be granted. Such injunction may be granted only in the cases mentioned in cls. (a) to (d) of the third paragraph. There must, however, be a 'right to, or enjoyment of, property'.[83] The plaintiff cannot therefore sue for an injunction restraining interference with light and air, if his claim to the light depends purely upon user for less than the prescriptive period of twenty years.[84] It has, however, been held that a Court is within its jurisdiction in exercising its discretion not to grant an injunction to restrain a defendant from allowing rainwater from his eaves to fall upon the plaintiff's land, where the right has been enjoyed for over sixteen years before the date of suit, and also nearly four years thereafter.[85] This is a peculiar decision. It is true that acquiescence is a ground for refusing an injunction,[86] and that delay may deprive a plaintiff of his right if he stands by and allows the defendant to act to his (the defendant's) detriment.[87] The report of the case does not, however, deal expressly with these points, and there is no hint that even damages were granted to the plaintiff. Even if damages had been granted, it would be in the nature of a forced sale, and in the absence even of damages the case assumes the aspect of a free gift by the court

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78 *Rasu Maritima S.A.* v. *Parusahaan Pertambangan* (1977) 3 All E.R. 324, 332, 336; *American Cynanid Co.* v. *Ethican Ltd.* (1975) 1 All E.R. 504 appld.; *Nippon Yusen Kaisha* v. *Karageorgs* (1975) 3 All E.R. 282; *Marva Compania Navir* v. *International Bulk Carriers Ltd.* (1972) 2 Llyods Rep. 519 approved.

79 *Supra* (1977) 3 All E.R. 324.

80 *Government of Gibraltar* v. *Kenney* (1956) All E.R. 22; *Den of Airlie S.S. Co. Ltd.* v. *Mitsui & Co. Ltd.* (1912) 106 L.T. 451 refd. to. See under s. 34 of 1963 *supra*.

81 *Anil Kumar* v. *Bhagirath Lal* (1962) A. Puj. 514; but see *Beswick* v. *Beswick* (1966) 3 All E.R. 1 (C.A.) where an agreement to pay an annuity to the wife of a party was enforced by way of specific performance. See on app. (1967) 2 All E.R. 1197 (H.L.).

82 *Worttam Park Estate Co.* v. *Parkside Houses Ltd.* (1974) 2 All E.R. 321, 331, 341.

83 *Agha Mahomed* v. *Wahiddino* (1947) Kar. 64, 1948 A.S. 36.

84 *Nandalal* v. *Provudayal* A.I.R. 1952 Cal. 74.

85 *Tulsamma* v. *Nandula Buchiramaiah* 1949 A.M. 826.

86 S. 41(g) of 1963 Act.

87 See notes to s. 39 of 1963 Act.

to the defendant of an easement although the prescriptive period had not yet run.

Injunction: sex shop - nuisance - what is.—Where in a locality which had restaurants, snack bars and residential houses, defendant purchased a dress shop at the corner where two streets meet and converted it into a 'sex centre and cinema club' where blue films were exhibited, the residents brought an action for injunction and damages and also sought an interlocutory injunction on the ground that the opening of the shop will be embarrassing to the residents and source of danger to young people particularly the girls who might be exposed to indecent suggestions by outsiders. The Court granted an interlocutory injunction and held that cases of nuisance were not confined to cases of physical discomfort but also included interference with reasonable domestic enjoyment of their property.[88]

Possession - protection of.—The plaintiff in possession has a right to protect his possession against any other who does not prove a better title and therefore the plaintiff is entitled to get a decree for injunction restraining such others from interfering with his possession.[89]

Against trespasser.—A person in possession of land can maintain a suit for injunction against a trespasser restraining him from interfering with his prior possession.[90]

A tenant was in possession before the Karnataka Land Reforms Act 1962 was amended by Act I of 1974. He surrendered possession to the landlord but the surrender was not in accordance with S. 25 of the Amended Act. So he must be presumed to have continued in possession and can sue for permanent injunction and obtain temporary injunction.[91]

In a suit for specific performance of a contract the plaintiff who was already in possession from the date of agreement having been given possession by the vendor, claimed temporary injunction to protect his possession relying on S. 53-A Transfer of Property Act was refused the relief claimed as the mere agreement to sell does not confer any right in property agreed to be sold.[92]

"Property" — Trade Marks.—The first Trade Marks Act in the United Kingdom was passed in 1875. Before that, the Chancery Courts had proceeded upon the footing that a trade mark was a property right, although this was not the view of the Common Law Courts.[93] The Trade Marks Act of 1875 codified what had been accepted as the law in the Chancery Courts. 'The Act is a statutory recognition of the law which had been previously laid down by the Court of Chancery'.[94] The explanation to the repealed s. 54 confirmed that the law in India was the same, and gave statutory recognition to the infringement action, or action on a trade mark, as distinguished from a passing off action.[95] After the passing of the Indian Trade Marks Act, 1940,[96] an infringement action will lie only if the mark is registered.[97] In a passing off action the property right is in the goodwill of the business.[98] In a passing off action based upon an unregistered trade mark the plaintiff is entitled to injunction restraining the defendant his servants and agents against using his trade mark but not to an order for delivery of labels or blocks or goods as the plaintiff has no property in them merely because the defendant had been passing

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88 *Laws* v. *Florinplace Ltd.* (1981) 1 All E.R. 659; *Thompson-Scwab* v. *Costaki* (1956) 1 All E.R. 652; *Metropolitan Asylum District Managers* v. *Hill* (1981-5) All E.R. Rep. 536 applied.

89 *Kallappa Setty* v. *Lakshminarayana Rao* (1972) A.Sc. 2299, 2300; *Karthiyayami* v. *Govindran* (1980) A.Ker 224, 227; *Nair Service Society* v. *K.C. Alexander* (1968) A.S.C. 1165 folld.

90 *Biswanath Bandhopadhya* v. *Purnamoni Dassee* (1979) A.Cal. 1, 3; *Perry* v. *Clissold* (1907) A.C. 73 quoted in *Nair Service Society* v. *K.C. Alexander* (1968) A.S.C. 1165.

91 *Thunga Bai* v. *Vishalakshmi Heggadthi* (1975) Karnt. 739; (1975) A.Knt. 111, 113.

92 *Krishnamoorthy Kounder* v. *Paramasiva Kounder* (1981) A.M. 310.

93 *M'Andrew* v. *Bassett* (1864) 33 L.J. Ch. 561.

94 *per* Romer L.J. in *Bow* v. *Hart* (1905) 1 K.B. at p. 594.

95 The distinction is succinctly stated by Cozens-Hardy M.R. in *Faulder* v. *Rushton* (1903) 20 R.P.C. 477. In re. The Century Spinning and Manufacturing Co., Ltd. (1947) 49 Bom. L.R. 52.

96 Repealed and re-enacted in the Trade Marks and Merchandise Marks Act, 1958.

97 s. 20 (Act V of 1940), now s. 27 of the Trade and Merchandise Marks Act, 1958.

98 *Spalding* v. *Gamage* (1915) 32 R.P.C. 273, 284.

off his goods as those of the plaintiff.[99] In illustration (w), above the word 'improperly' means that the defendant has used the plaintiff's trade mark on goods not belonging to the plaintiff. The proviso to the illustration requires that the plaintiff's use of the trade mark must be honest. For Copyright and Patents see later.

The owner of a strip of land which vested in a municipality as a public street can bring a suit for injunction restraining the municipality from putting up constructions on the land but cannot sue for possession of the land on the ground that by making constructions the municipality has ceased to use the land as a public street and as such it revests in the owner. The Allahabad High Court has held that the soil of the land and so much of it as is necessary for its user as a street is owned by the municipality. But by its perversion the owner cannot ask for the land to be returned to his ownership.[2]

Where an owner constructs on his own land in accordance with the corporation sanction and without any contravention of the municipal rules, the owner of an adjoining building cannot in the absence of any contractual obligation between the plaintiffs and the defendant maintain a suit for injunction on the ground of unproved contravention of rules.[3]

"Know-How."—A new form of property right has come into existence, which is referred to as "know-how". In *Rolls-Royce Ltd.* v. *Jeffrey*[4] Lord Radcliffe said: "I see no objection to describing this as an asset. It is intangible, but then so is goodwill."

Defamation.—An interlocutory injunction is not granted in regard to a libellous matter where the plea of justification is raised unless it is clear that the plea must fail.[5] Before a Court can grant an *interim* injunction the plaintiff must take out a *prima facie* case and that there is a prospect of such immediate and pressing injury which cannot be adequately compensated by damages. But if there is material before the Court that the defendant can prove justification or truth of the statement it will not exercise its jurisdiction to grant an injunction.[6] The Court will not restrain the publication of an article even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest, the reason for that is that justification and fair comment are for the jury and not for a judge. But a better reason is the importance in the public interest that the truth should be out. There is no wrong done if it is true, or it is fair comment on a matter of public interest.[7]

The defendants had published in their newspaper defamatory statements against a sugar mill accusing it of overcharging, cheating and forgery. The plaintiffs brought a suit for damages and perpetual injunction and prayed for an interim injunction. The defendants pleaded justification and produced a receipt showing a lesser amount charged whereas a higher price was received. The plaintiffs admitted that and pleaded that they were entitled to charge a higher price and that they had given separate receipt for the excess price and produced their accounts.

They were held entitled to interim injunction as they made out a *prima facie* case.[8]

Simulating of voice—Libel: In an action for libel and injunction on the ground of one actor simulating the voice of another in a broadcast, the claim of injunction on the ground of libel was abandoned but on the ground of passing off was pressed which was refused on the

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99 *Indian Dental Works* v. *Dhanakoti Naidu* (1962) A.M. 127; *Jamal Noor Mahomed Sait* v. *Abdul Kareem & Co.* (1934) A.M. 211; 57 Mad. 600; and *Gasper & Co.* v. *Leong Chey & Co.* (1934) A.R. 297; 12 Rang. 534; dist.

1 'That they have not copied any other persons's mark and that the mark does not involve any false representation' *per* Lord Westbury L.C. in *M'Andrew* v. *Bassett* f.n. 93 (*supra*).

2 *Ku Aamina Saadat Ali* v. *Municipal Board Bahraich* (1980) A.A. 376, 378; *Municipal Board Mangalore* v. *Mahadevji Maharaj* (1965) A.S.C. 1147 refd. to.

3 *Lalit Mohan Mitra* v. *Samendra Kumar Ghosh* (1977) A.Cal. 174, 177; *Paul* v. *Robson*, 41 I.A. 180; *Nandlal* v. *Provudayal* (1952) A.Cal. 74; *Krishna Kali Mullick* v. *Babulal Shaw* (1965) A. Cal. 148, 68; *Smt. Paul Bala Roy* v. *Srinibash Choumal* (1952) A.Cal. 364 reld on.

4 (1962) 1 All E.R. 801, 805.

5 Argyll v. *Argyll* (1965) 1 All E.R. 611, 614.

6 *National Sugar Mills* v. *Ashutosh Mukherjee* (1962) A.Cal. 27; *Thomas* v. *Williams* (1880) 14 Ch.D. 864; and *Beddow* v. *Beddow* (1878) 9 Ch.D. 89; and *Collard* v. *Marshall* (1892) 1 Ch. 571 reld. on. See *infra*.

7 *Fraser* v. *Evans* (1969) 1 all E.R. 8, 10; *Bonnard* v. *Perryman* (1891-94) All E.R. 965, 968; (1891) 2 Ch. 269, 282 reld. on.

8 *National Sugar Mills Ltd.* v. *Ashutosh Mukherjee* (1962) A.Cal. 27.

ground that the issue was the same, i.e. whether the voice could reasonably be understood to be the voice of the plaintiff and the question of damages. Another ground of refusal was the question whether voice can be regarded as property.[9]

Religious Rights. — The right of a *gon* (priest) to conduct his *yajmans* (patrons) to a temple and perform worship there on their behalf and receive remuneration for his services is a right to the enjoyment; of property; if the right is invaded, the Court will grant an injunction, the invasion being such that pecuniary compensation would not afford adequate relief.[10] A plaintiff holding a *sanad* from Government in which he is described as *vicharanakarta* of Tirumalai and Tirupati temples, *vagaira* (and others), the expression "*vagaira*" including some thirty minor temples may obtain an injunction restraining the defendant, who is a *dharmakarta* of the said two temples and of three minor ones only from using a seal bearing on it the words "Tirumalai Tirupati *vagaira* devastanam dharmakarta", though the plaintiff has no property in the word "*vagaira*", it connotes an extension of the defendant's rights as *dharmakarta* to which he has no title, and it invades, or threatens to invade, the plaintiff's rights in respect of the minor temples of which the defendant claims to be, but is not, *dharmakarta*.[11] Similarly the establishment of another temple of the same name, and the installation of an identical image, were restrained by injunction, on the application of the *pujaris* who were entitled to receive the offerings that many pilgrims had been in the habit of making at the old temple.[12] A suit for injunction lies against a defendant restraining him from interfering with the right of the community with their right of user of a piece of land as a cremation ground.[13]

Muslims right to say "Ameen".—Every Muslim is entitled to enter a mosque dedicated to God for prayers and he can utter aloud the word "*Ameen*" not with any *mala fide* intention or to disturb the congregation. Therefore one group of Muslims who utter the word "*Ameen*" can restrain the group of Muslims who prevent them from doing so.

A defendant has been restrained by injunction from registering a society under the name of Indian National Congress, lest subscriptions be diverted from the world famous organisation.[15]

Even where a plaintiff has only a possessory title to land, he is entitled to an injunction if his right to the enjoyment of the property is threatened with invasion.[16] Where a lease has expired, and under the terms of the lease, bricks lying upon the land have been forfeited to the lessor, an injunction may be issued against the erstwhile lessee restraining him from removing the bricks.[17] A person in wrongful possession is not entitled to an injunction against the rightful owner to protect his possession. The mere fact that if the rightful owner were to sue for possession it might fail on the plea of limitation is no justification for such an injunction.[18]

An injunction is not the appropriate remedy where the plaintiff has been ousted from possession, and a suit for possession will give him full relief.[19]

In a suit for declaration and for injunction to restrain the defendant from interfering with plaintiff's possession as a sub-tenant a temporary injunction can be given to the said effect and

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9 *Sim* v. *Heinz & Co.* (1959) 1 All E.R. 547.
10 *Kalidas* v. *Parjaram* (1891) 15 Bom. 309; *Moro* v. *Anant* (1897) 21 Bom. 821; *Beni Madho Pragwal* v. *Hira Lal* (1921) 43 All. 20; 59 I.C. 873, otherwise if the presents are not connected with a religious office: *Bansi* v. *Kanhaiya* (1921) 43 All. 159; 59 I.C. 659.
11 *Sadagopa* v. *Rama Kishore* (1899) 22 Mad. 189.
12 *Purshottam Das* v. *Bai Dahi* (1940) Bom. 339, 1940 A.B. 205.
13 *Jwala* v. *Ram Dutta* (1964) A.A. 437.
14 *Farzand Ali* v. *Nasir Beg* (1980) A.A. 342, 343; *Empress* v. *Ramzan Ali*, 7 All. 461; and *Ataullah* v. *Azimullah*, 12 All. 494; and *Jungu* v. *Ahmad Ullah*, 13 All. 419 reld. on.
15 *U. Srinivas Malliah* v. *Krishna Kumar* 1952 A.Cal. 804.
16 *Fakirbhai* v. *Maganlal* 1951 A.B. 380.
17 *Karnani Industrial Bank Ltd.* v. *Province of Bengal* (1949) A.Cal. 47, 53 C.W.N. 195.
18 *Alamelu Achi* v. *Ponniah* (1962) A.M. 149.
19 *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1910) 33 Mad. 452; *Easwara* v. *Krishna Prabhu* 1953 A.T.C. 353; *Kundanmal* v. *Thikana Sirvari* (1959) A.Raj. 146.

not a temporary injunction preventing the defendant from taking possession.[20]

P a cloth dealer imported cloth at *N* Railway Station but it was seized under the Defence of India Rules by the district authorities and sold. He claimed compensation from the District Magistrate, i.e. the price of the cloth plus a profit of 10% and interest which was refused and *P* brought a suit for recovery of the above sum.

The suit was held maintainable and the plea that the plaintiff should have sued for a mandatory injunction after asking the District Magistrate for determining the amount of compensation was held unsustainable.[21]

A suit for injunction by one exhibitor of cinema films against another, restraining the latter from exhibiting cinema films in contravention of the rules under the Kerala Cinema Regulation Act, in issuing the licence is not maintainable.[22]

If under S. 87 A of U.P. Municipal Act, 1916 notices are sent to the members and reach them or in some other manner notices are served on them, but are not sent by registered post, the section is substantially complied with qua notices and a meeing so called, which passes a resolution of no-confidence, is a validly constituted meeting.[23]

Injunction simpliciter. — A suit for injunction *simpliciter* is not maintainable where the plaintiff's claim the land in dispute to be their family graveyard when they are out of possession and the defendants are in possession and have even made certain constructions on the disputed land.[24]

Clubs.—Wrongful expulsion from a club or trade union can be restrained by injunction in spite of the fact that it may enforce personal relationship between the parties.[25]

Invasion of air space.—The air space above a shop, in the absence of anything to the contrary, is a part of the premises demised and any invasion of the air space by a sign amounts to a trespass entitling the relief of a mandatory injunction.[26]

Easement of light and air. — Where an easement of light and air is disturbed, it depends upon the circumstances whether the Court will be satisfied that pecuniary compensation would not afford adequate relief. Two lines of approach to the problem are, however, discernible in the cases. One view is that interference with an easement of light and air is *prima facie* a serious injury, and relief by way of damages is not an adequate remedy, at any rate where there has been a 'wilful and impudent assumption of mastery over another's property', as it amounts to a forced sale to the defendant. The other view is that at all events in a large city, where often the only opportunity for extension of buildings is vertically upwards, damages are usually an adequate remedy.[28] This latter view is supported by the remarks of an English judge on the position in London,[29] and English criticism of this very judge[30] is rebutted by the argument that in England the primary duty of a court of equity is to give specific relief,[31] whereas under s. 38 the duty is not to grant an injunction where damages are an appropriate remedy.[32]

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20 *Zandaram* v. *Prahlad Rao* (1963) A.Guj. 160; *Nandan Pictures Ltd.* v. *Art Pictures Ltd.* (1956) A.Cal. 428 dist.

21 *Chetandas Gulabchand* v. *State of Bihar* (1958) A.P. 512; *State of West Bengal* v. *Brindaban* 61 C.W.N. 27; (1957) A.Cal. 44 reld. on.

22 *K.K. Subramaniam* v. *M.P. Sreenivasan* (1972) A.Ker. 58, 61.

23 *Gyan Singh* v. *Distt. Magistrate* (1975) A.A. 315.

24 *Hashmat Hussain* v. *Inayatullah* (1958) A.A. 706.

25 See *Young* v. *Ladies Imperial Club Ltd.* (1920) 2 K.B. 523; *Lawlor* v. *Union of Post Office Workers* (1965) Ch. 712; (1965) 1 All E.R. 353; (1965) 2 W.L.R. 579.

26 *Kelson* v. *Imperial Tobacco Co. Ltd.* (1957) 2 All E.R. 343.

27 *Nandkishor* v. *Bhagubhai* (1884) 8 Bom. 95; *Mathura Das* v. *Gopi Kishan* 1950 A.Ajm. 67.

28 *Dhunjibhoy* v. *Lisboa* (1889) 13 Bom. 252; *Ghanasham* v. *Moroba* (1894) 18 Bom. 474; *Sultan Nawaz Jung* v. *Rustomji Namabhoy* (1896) 20 Bom. 704; *Mahomed Auzam Ismail* v. *Jaganath Jamnadas* 3 Rang. 230, 89 I.C. 800, 1925 A.R. 327. Three of these cases were bench decisions relating to Bombay City, and a fourth that of a single judge as to Rangoon City. In none of the four cases was the bench decision in 8 Bom. 95 *(supra)* cited.

29 *Per* Pearson J. in *Holland* v. *Worley* (1884) 26 Ch.D. 585, 587.

30 *Per* Bacon V.C. in *Greenwood* v. *Hornsey* (1886) 33 Ch.D. 471, 476.

31 The jurisdiction to award damages was not conferred until 1858, Lord Cairns' Act — 21 & 22 Vict. c. 27.

32 *Per* Sargant C.J. in 13 Bom. 252, 262 (*supra*).

Where the disturbance is such as to render the plaintiff's house useless for the business carried on by the plaintiff in the house, the case is one for a perpetual injunction.[33]

Light and water.—An occupier of a house portion who suffers in light and air because of the construction of a wall by the defendant can sue for injunction and all the owners and occupiers of the property are not necessary parties though they may be proper parties.[34]

A stranger cannot erect a wall on land adjoining to the plaintiff's wall wherein the plaintiff has opened out windows for light and air as such stranger has no right to interfere with the plaintiff's rights. It is not necessary for the plaintiff to establish prescriptive rights against a wrongdoer.[35]

Where the defendants had opened a sprout for the flow of water and the sprout was an old one the rights of the parties can be protected by giving a direction to the defendants to keep the pipe in proper repairs.[36]

Continuing trespass. — Repeated violation of a person's right to property cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained. In such a case the appropriate remedy is a perpetual injunction.[37] [see ill. (o)] and lawful possession a sufficient title as against the trespasser.[38]

Relator action to enforce public right.—In *Bastow's case*[39] it was held that the Attorney-General can sue for injunction to enforce a public right although that right was conferred by a statute that prescribed remedies for its infringement and it was more within the Attorney-General's administrative discretion to choose the remedy rather than for the Court's judicial discretion. But in granting relief the Court must exercise its discretion independently of the Attorney-General's decision to institute the proceedings. It is not in every case of contravention of a statute that injury is caused to the public. But on appeal the injunction was granted[40] and it was held that where there are trivial breaches of a statute and it was desirable that the defendants should be stopped from deliberately flouting the law an injunction would be granted.[41]

Co-sharers and Partners; landlord and tenant, etc. — It was at one time laid down without qualification that the Court will grant a perpetual injunction to restrain one of several co-sharers, from appropriating to himself land in which each of his co-sharers, has an interest and from building upon it, and if he has proceeded to build upon it, the Court will grant a mandatory injunction under s. 39 directing that the building so far as it has proceeded be pulled down.[42] But later decisions show there is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction.[43] Injunction in the case of co-owners is granted where the

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33 *Yaro* v. *Sana-Ullah* (1897) 19 All. 259; and see *Mt. Jas Kaur* v. *Mt. Bhag Devi* (1932) 13 Lah. 806; 140 I.C. 238; 1933 A.L. 29; *Madanlal* v. *Amar Chand* 1950 A.Ajm. 68; *Mohamad Mahmud* v. *Hafiz Abdul* (1945) 20 Luck. 82, 1945 A.O. 15. A building which merely cast a shadow on the plaintiff's blind wall was held not to constitute a nuisance: *Hakim Mal* v. *Mrs. Earle* (1931) 12 Lah. 736; 1931 A.L. 443· 131 I.C. 104.

34 *Alifannessa* v. *Ali Akbar* (1958) A.Asm. 83.

35 *Anopchand* v. *Misrilal* (1963) A.Raj. 184; *Achamma* v. *Venkamma* 5 M.L.J. 24; & *Mohi-ud-Din Kunhi* v. *Gopalkrishna* (1953) A.M. 849 reld. on.

36 *Joti Parshad* v. *Shotambar Nath* (1964) A.A. 193.

37 *Apaji* v. *Apa* (1902) 26 Bom. 735; *Moolchand* v. *Chhoga* (1963) A.Raj. 25; *Ardishir Jivanji* v. *Aimai Kuvarji*, 53 Bom. 187; (1929) A.B. 94.

38 *Uttam* v. *Tabu* (1929) 115 I.C. 480.

39 *Attorney-General* v. *Bastow* (1957) 1 All E.R. 497; *A-G.* v. *Ashby Recreation Ground Co.* (1903) 1 Ch. 101, 107; *Attorney-General* v. *Smith* (1958) 2 All E.R. 557.

40 *Attorney-General* v. *Harris* (1959) 2 All E.R. 393.

41 *Attorney-General* v. *Harris* (1960) 3 All E.R. 207 (C.A.) (1959) 2 All E.R. 393 (reversed).

42 *Shadi* v. *Anup Singh* (1890) 12 All. 436 [F.B.[.

43 *Shamnugger Jute Factory Co.* v. *Ram Narain* (1886) 14 Cal. 189, 200-201; *Akshay Kumar Shaha* v. *Bhajagobinda Shaha* 57 Cal. 92, 1930 A.Cal. 341; *Khimji Mulji* v. *Popatlal Bhanji* 1951 A.Sau. 85; *Chhedi Lal* v. *Chhotey Lal* (1952) 1 All. 227, 1951 A.A. 199 (F.B.), returning to the view of Mahmood J. in *Paras Ram* v. *Sherjit* (1887) 9 All. 661. In *Darshan Lal* v. *Harkesh Singh* 1951 A.A. 338, a bench court was not referred to the recent full bench ruling. The learned judges tend to assume that an injunction will automatically be granted against a co-sharer who appropriates part of the land and builds upon it. This is, however, no longer good law.

act complained of amounts to waste of the joint property or to an illegitimate use thereof or to ouster of the plaintiff from possession and enjoyment of the property.[44] The closing of the door of a staircase which affords access to the roof,[45] or of a door which affords the only access to the portion in the plaintiff's occupation,[46] is an act amounting to an ouster, and it may be prevented by a perpetual injunction. But the mere fact that a tank has been excavated by the defendant on a portion of the joint land, and that a part thereof was fit for cultivation, does not constitute such an injury as would justify an order directing the defendant to refill the tank,[47] nor is the placing of water and drainage pipes a trespass or derogation from the rights of the other co-sharer which will found a claim for a mandatory injunction.[48]

Where a co-owner trespasses upon a narrow common lane which is incapable of partitioning and is further narrowed, a mandatory injunction for demolition will be granted.[49] Any interference by a co-owner of a party wall by raising or lowering its height will give the other owner a right to maintain a suit for a mandatory injunction. Mere compensation is not sufficient.[50] If one of the co-owners of a party wall without the consent of other owner raises its height the other co-owner is thereby deprived of his right of reasonable user of the wall and can sue for a mandatory injunction. But opening niches (*alas*) and almirahs is a reasonable user of the wall for which no consent is required.[51] Or where despite plaintiff's protests the defendant persists in his unlawful act.[52]

Where a tenant of a shop made a structural change in that he dug the floor deep to put a floor at a lower level the court will be justified in giving a mandatory injunction even where the plaintiff had sought a prohibitory injunction.[53]

Party wall.—A party wall exclusively built by the plaintiff on defendant's land could under an agreement between the parties be built upon and roofed over by the defendant. The wall was for the convenience of the plaintiff but he had no right in the wall and no further recourse in respect of the wall. The wall was pulled down by the defendant in order to be rebuilt and with the idea of opening a window and a door in it. The plaintiff was held not to be entitled to a mandatory injunction to have the wall restored.[54]

Owners of a party wall desirous of interfering with a common wall should obtain the consent of the others interested.[55] But if the consent is unreasonably withheld to an alteration the aggrieved party can obtain injunction as such refusal amounts to ouster.[56] Similarly in the case of encroachment on common land by one of the co-owners the other co-owners can take objection but the question of demolition and injunction will be granted or withheld according to circumstances of each case, mere co-ownership does not give this right.[57]

Injunction against execution of decree.—The first defendant obtained a decree for eviction against the plaintiff who was his tenant. He then sold the property to the second defendant. In the agreement of sale the first defendant reserved the right to execute the decree

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44 *Anant* v. *Gopal* (1985) 19 Bom. 269,270; *Shamsuddin* v. *Abdul Aziz* 1932 A.L. 423; 138 I.C. 691; *Ali Jan* v. *Mohammad* 1932 A.L. 89; 133 I.C. 872; *Ganpat* v. *Annaji* 23 Bom. 144.
45 *Soshi Bhusan* v. *Gonesh Chunder* (1902) 29 Cal. 500.
46 *Anant* v. *Gopal* (1895) 19 Bom. 269.
47 *Joy Chunder* v. *Bipro Churn* (1887) 14 Cal. 236, following (1887) 14 Cal. 189; *supra*.
48 *Kothari* v. *Kakasing* 1953 A.Sau. 97.
49 *Chhagan Lal* v. *Kesarlal* (1959) A.Raj. 97; *Subbayya* v. *Soma Lingam* (1920) A.M. 223; *Yusuf Alim* v. *Muhammad Din* (1927) A.L. 718; reld. on.
50 *Balvant Yalneshwar* v. *Srinivasa Appaji* (1959) A.My. 244.
51 *Roopchand* v. *Punamchand* (1962) A.Raj. 227.
52 *Murari Lal* v. *Balkishan* (1926) A.N. 416; *Moolchand* v. *Chhoga* (1963) A.Raj. 25.
53 *Parmeshwari Dass Chenna* v. *Bhola Nath* (1981) A.D. 77.
54 *Karuppiah Pillai* v. *Narayana Mudaliar* (1967) 1 MLJ 91; Katiar: Law of Easements & Licences (5th Ed.) p. 555 quoted.
55 *Ramachandra Rao* v. *Chinnaswamy Kandar* (1967) 1 MLJ 316. *Philip* v. *Chinnaswamy Iyer* (1956) A.TC. 57.
56 *Ramachandra Rao* v. *Chinnaswamy Kandar* (1967) 1 MLJ 316.
57 *Puran Chand* v. *Nityanand* (1958) A.Puj. 460; *Chhedilal* v. *Chhoteylal* (1951) A.A. 199 (F.B.) folld.; *Khimji Mulji* v. *Popatlal Bhanji* (1951) A.Sau. 85; *Darshanlal* v. *Harkesh Singh* (1951) A.A. 338 dist. *Lingraj Misra* v. *Bhubaneshwar* (1962) A.Or. 31.

against the tenant but the sale deed was not produced in Court. The plaintiff brought a suit for declaration and injunction claiming to be the lawful tenant and praying for restraining the defendants against evicting him. The plea taken was that the first defendant no longer being the landlord could not evict the tenant and the second defendant had made no claim. The suit was decreed by the High Court and upheld by the Supreme Court.[58]

In a common well the water is associated with the land attached and cannot be used by one co-sharer to the exclusion of the others.[59]

Easement of watering land.—The plaintiff who had an easement connected with his plot of land sued for injunction restraining the defendant from interfering with his right of easement. It was held that they were entitled to relief on proving their right of easement and interference therewith on proof of substantial damage. In this case the right of easement was the right to water for irrigating his plot of land.[60]

An auction-purchaser of property which was auctioned as being the separate property of a co-owner can be restrained from taking possession if another co-owner is in possession and his possession is sought to be disturbed by the auction-purchaser.[61]

Partners.—An injunction can be granted as between partners where the complaining partner is excluded wrongfully from the enjoyment of the affairs of partnership or where the assets of the partnership are misused.[62] But mere squabbles and improperties arising from infirmities of temper are not sufficient ground for an injunction; e.g. relations becoming strained on account of differences. In such cases the proper remedy is dissolution of partnership.[63]

It is a settled rule of law that no tenant, whether he has an occupancy right or not, is at liberty to erect houses upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding. If he does erect a house for other than agricultural purposes, the Court will grant an injunction restraining him from altering the character of the land, and it will also grant a mandatory injunction under s. 39 directing him to remove the building.[64] Where a land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the purposes of the tenancy, and the landlord may obtain a perpetual injunction restraining the tenant from erecting the factory;[65] see ill. (k) above.

In a suit for possession by a landlord against his tenant on forfeiture of the lease and also for rent or alternatively for mesne profits with possession, the landlord prayed for injunction against breach of covenant of lease; the tenant pleaded injunction could not be obtained on the footing of continued subsistence of lease. Injunction was granted as injunction was an alternative claim without prejudice to claim for possession.[66]

Consent unreasonably withheld.—In a lease relating to an undeveloped site it was provided that the lessee shall erect an hotel according to design, plan and specifications as the lessor may in absolute discretion approve. The Privy Council held that notwithstanding the "absolute discretion" clause, the lessor could not unreasonably withhold consent and that the lessee could submit a fresh plan where one plan had lapsed.[67]

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58 *Dhanlaxmi G. Shah* v. *Sushila S.P. Masurakir* (1981) A.SC. 478.
59 *Mahadeo* v. *Umaraj* (1977) A.A. 283; *Sivarama Pillai* v. *Marichami Pillai* (1971) A.M. 230.
60 *Sarab Lall Jha* v. *Ucheshwar Jha* (1972) A.P. 490; 52 Pat. 34.
61 *Siva Reddy* v. *Nizam-ud-Din* (1966) A.AP. 373; *Udaynath Sahu* v. *Ratnakar* (1967) A.Or. 139 (S. 44 of T.P. Act applied).
62 *Bishambar Dayal* v. *Moolchand* (1964) A.Raj. 179; *Ganpat* v. *Annaji* 23 Bom. 144.
63 *Bishambar Dayal* v. *Moolchand* (1964) A.Raj. 179; *Yenidje Tobacco Co.; in re* (1916) 2 Ch. 426 refd. to.
64 *Ramanadhan* v. *Zamindar of Ramnad* (1893) 16 Mad. 407.
65 *Surendra Narain* v. *Hari Mohan* (1904) 31 Cal. 174.
66 *Calabar Properties Ltd.* v. *Seagull Autos Ltd.* (1968) 1 All E.R. 1.
67 *Commissioner for Railways* v. *Avrom Investments Pty. Ltd.*, (1959) 1 W.L.R. 389 (P.C.); *Ramachandra Rao* v. *Chinnaswamy Kandar* (1967) 1 MLJ 316; *Philip* v. *Chinnaswamy Iyer* (1956) A.TC. 57.

An injunction would lie even if its effect is to terminate a lawful agreement between the vendee and his purchaser, since, as a matter of principle, a Court will not refuse to enforce an earlier contract against a party because he had entered into a later contract inconsistent with it. It is immaterial that the plaintiff might get no benefit from it.[68]

Apprehended breach by purchaser.—*S* sold to *T* who under a lease from *S* was operating horse racing at Aintree. There was a restrictive clause that during the lifetime of *S* the land will not be used for a purpose other than horse racing and the permitted purposes did not include development of a housing estate. But *T* was not to remain liable on parting with all interest in the land. *T* agreed to sell the land to *C* knowing that it was being acquired for use for building purposes. *S* was also entitled to the use of the private stand and a private box. *S* brought an action *inter alia* for injunction to restrain *T* and *C* from permitting land to be used for purposes other than permitted purposes.

Injunction was granted against *T.* & *C.* against threatened user but it was limited in duration.[69]

Nuisance.—As regards nuisance, where it is of the kind to injure the health or seriously imperil the life of those complaining of it, the Court will not hesitate to prevent it by way of injunction. But where it goes no further than to diminish the comforts of human life, there will always be a question whether the Court will proceed against him who causes that nuisance by injunction or compensate the sufferer in damages.[70] See ills. (s) and (t), above, and the case of *Jawand Singh* v. *Muhammad Din.*[71] Where the noise from the defendant's mill adds considerable noise to the noise in a noisy locality interfering with the physical comfort of the plaintiff, a permanent injunction can be granted.[72]

Where an owner constructs on his own land in accordance with the Corporation sanction, and without any contravention of the municipal rules the owners of an adjoining building cannot, in the absence of any contractual obligation between the plaintiffs and the defendant maintain a suit for injunction on the ground of unproved actionable nuisance.[73] But an injunction will lie against a quarrying company in regard to vibrations and dust from the working of the quarry although nuisance arising from vibration has to be approached on a different footing from that of noise or smell.[74]

In his suit the plaintiff complained that the smoke from the defendant's brick kiln had charred the branches of fruit trees and seriously affected the fruits in the plaintiff's grove.

The Court granted a decree for injunction as the nuisance was not trivial or prospective nor contingent or remote.[75] If an already existing nuisance of a *nabdan* had not been objected to for a long time no objection can be taken by its being shifted from one place to another unless the nuisance is thereby aggravated.[76] An injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance [s. 41, cl. (f), below]. The Court will not grant an injunction in a mere *quia timet* action, where there is no proof of injury having occurred and no well-founded and reasonable apprehension of injury in the near future, but merely an apprehension which may or may not be well founded.[77]

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68 *Sefton* v. *Tophams Ltd.* (1965) 3 W.L.R. 523, 541.

69 *Sefton* v. *Tophams Ltd.* (1965) 3 All E.R. 1; (1965) 3 W.L.R. 523, 540 (Per Sellers Harriman L.JJ.; Russell L.J. *contra*).

70. *Bhicaji* v. *Pirojshaw* (1916) 40 Bom. 401; 33 I.C. 192; *The Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy* (1884) 8 Bom. 35, 91-92. *Raj Singh* v. *Gajiraj Singh* (1958) A.A. 335; *St. Helens Smelting Co.* v. *William Tipping* (1865) 11 H.L. Cas. 642, refd. to.

71 (1920) 1 Lah. 140; 51 I.C. 728.

72 *Radhey Shiam* v. *Guruprasad* (1978) A.A. 86.

73 *Lalit Mohan Mitra* v. *Samendra Kumar Ghosh* (1977) A.Cal. 174, 177; *Paul* v. *Robson*, 41 I.A. 180; *Nandlal* v. *Provu Dayal* (1952) A.Cal. 74; *Krishna Kali Mullick* v. *Babulal Shaw* (1965) A.Cal. 148, 68 Cal.; *Smt. Parul Bala Roy* v. *Srimibash Chormal* (1952) A.Cal. 364 reld. on.

74 *Attorney General* v. *P.Y.A. Quarries Ltd.* (1957) 1 All E.R. 894.

75 *Raj Singh* v. *Gajraj Singh* (1958) A.A. 335; *St. Helens Smelting Co.* v. *William Tipping* (1865) 11 H.L. Cas. 642 refd. to.

76 *Basai* v. *Hassan Raza Khan* (1963) A.A. 340.

77 *Fletcher* v. *Bealey* (1885) 28 Ch.D. 688; but See *Leeds Industrial Co-operative Society Ltd.* v. *Slack* (1924) A.C. 851; (1924) All E.R. Rep. 259 *Infra* p. 953 n. 71.

There is a difference between the right of an owner to open windows overlooking a neighbour's land and doors opening on such land so as to be used for passage over such land. In the former case compensation can be granted in lieu of an injunction but in the latter there is an invasion of the neighbour's rights which, except in special circumstances, is not met by pecuniary compensation.[78]

If the defendants indulge in acts, e.g. prostitution which constitute a sensible interference with the comfort and convenient enjoyment of plaintiff's residence, having regard to the usages of civilised society and to the character of the neighbourhood, an interlocutory injunction will be granted.[79]

In a suit by a neighbour for injunction against the defendant constructing a projection in a narrow street against the bye-laws of the Municipal Board, the Board is not a necessary party.[80]

Any person, access to whose house abutting on a highway is obstructed by obstruction placed on the highway, can sue for injunction to have the obstruction removed.[81]

Opening door.—A problem that has several times been before the Courts is the question of the appropriate legal remedy available to a landowner against an owner of a house on adjoining land, who opens a door in his house immediately abutting on to the plaintiff's land. The correct decision seems to be that of a bench of the Patna High Court, who awarded the plaintiff an injunction restraining the defendant from trespassing.[82] A judge of the Lahore High Court awarded only compensation to the plaintiff in like circumstances,[83] but the element of forced sale inherent in this decision suggests that the remedy was inadequate; the plaintiff could not build a wall to close the opening as he could in the Patna case, the learned Chief Justice issued a mandatory injunction, ordering the closing of the door.[84] The decision must be confined to the facts of that case. In a *quia timet* action the plaintiff has to prove imminent danger of a substantial kind or that the apprehended injury will be irreparable.[85]

Breach of Trust.—See ills. (b) to (h), above. As to definition of "trust," see s. 2, above.[86]

Waste.—See ills. (1), (m) and (n) above.

Patent, copyright and trade-mark.—The plaintiff's firm, a public relations consultant, was appointed by the Greek Government with a clause in the contract imposing on it an obligation of confidence but with no corresponding obligation on the Greek Government. A copy of the plaintiff's report was surreptitiously obtained and came into the hands of a journalist who threatened to publish an article which it was admitted would be defamatory of the plaintiff and the plaintiff sued for injunction restraining the defendants on the ground of apprehended libel, breach of confidence and infringement of copyright.[87]

But injunction was refused, because copyright does not subsist in the information contained in the report but in the literary form in which the information is dressed. If the report were to be reproduced in full taking the entire literary form, it might be a case for injunction but may not be where short extracts are printed.[88] See ills. (1), (v) and (w) above, and ill. (g) to former s. 55 given below under s. 39.

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78 *Pabia* v. *Badia* (1957) A.Raj. 175.
79 *Thompson-Schwab* v. *Costaki* (1956) 1 All E.R. 652; *Sedleigh-Denfield* v. *O'Callaghan* (1940) A.C. 880; (1940) 3 All E.R. 339, 340 appld.
80 *Raghunandan Saran* v. *Kanta Devi* (1975) A.A. 130.
81 *Bhagwanti* v. *Jiuti* (1975) A.A. 341.
82 *Meghu Mian* v. *Kishun Ram* 1954 A.P. 477. *Ahmad J.* described the remedy as a mandatory injunction, which of course it is not. Defendant had actually trespassed, otherwise this remedy would not be available: see *Fletcher* v. *Bealey* (*supra*).
83 *Kashi Nath* v. *Ram Jiwan* 1933 A.L. 847.
84 *Bhag Singh* v. *Sewa Singh* 1953 A.Peps. 150; *Kashinath* v. *Ram Jiwan supra* not folld.
85 *per* Pearson J. in *Fletcher* v. *Bealey* (1855) Ch.D. 688, 698.
86 See also *District Shahjahanpur* v. *Kailash Nath Kapur* (1946) All. 21.
87 *Fraser* v. *Evans* (1969) 1 All E.R. 8 C.A.
88 *Ibid*, 12. (Lord Denning M.R.). See also p. 942 for trade marks.

Breach of copyright.—Where the plaintiff sought an injunction against the defendant for a breach of copyright on the ground of extensive quoting from his works and for breach of confidence, the Court of Appeal refused to grant the injunction on the ground that the defendant had succeeded in showing that he might have a good case in showing "fair dealing" in quoting from the plaintiffs works, the question being one of fact and that there was good material to show that the tribunal of facts could find in favour of the defendant. Secondly the defendant might have used material which he knew the plaintiff wanted to be confidential, yet as the ethics of the plaintiff's church contained such dangerous material that it was in the public interest that it should be made known. Further there was evidence that the plaintiff had been protecting his secrets by deplorable means which was evidenced by their ethics and therefore he did not come to court with clean hands in seeking the equitable remedy of injunction. Thirdly, the defence raised by the defendant against the breach of copyright and confidence were such that the defendant should be permitted to go on with publishing his book and law would not interfere to suppress freedom of speech, except when it was abused.[89]

Trade Mark.—Permanent injunction was granted where there was an infringement of the plaintiff's trade mark "Rooh Afza" by the defendant.[90]

"Invades or threatens to invade,".—An injunction may be sued for to restrain a defendant from doing an act which threatens injury to the plaintiff's property, although no such injury has actually ensued. It must, however, be shown that injury will be the inevitable result; it will not do to say that injury may be the result:[91] see ill.(r) to this section. See *R.G. Jana Thakal* v. *Bharat Parekh & Co.* (1781) A, Knt. 208.

In *Municipal Board, Manglaur* v. *Mahadeoji Maharaj*[92] decided by the Supreme Court: a metalled road was running through a plot of land belonging to the plaintiff and on either side of the metalled road there was open space and on either side of the open space there was a municipal drain; it was held that the whole of the site between the two drains was dedicated to the public. But the municipality could not put up structures on the vacant site as they could not be said to be necessary for the maintenance or used as a public highway. The owner of the soil therefore could seek injunction restraining the municipality from acting in excess of its rights but he could not ask for possession of the pathway.

A person can apply for interim injunction against a municipality if it calls upon him to remove an alleged encroachment and upon his failure takes steps to enforce the notice.[93]

A magistrate, without any application by the licensee, an Electric Supply Undertaking, issued a notice under s. 18(3), of Electricity Act requiring demolition of the plaintiff's building.

The plaintiff's suit for injunction was held maintainable in spite of s. 56(d) of the old Act as the order for demolition was without jurisdiction.[94]

Plaintiff's dispute inter se. — Plaintiffs 1-3 who had dispute as to the title to the land *inter se* brought a suit for permanent injunction and mandatory direction to vacate against the encroaching defendant. During the pendancy of the suit, plaintiffs 1 and 2 withdrew their claim leaving the title in favour of plaintiff No. 3 but the Court found plaintiff No. 1 to be in possession. The Supreme Court held that dispute of title between the plaintiffs *inter se* was irrelevant and plaintiff No. 3 was entitled to succeed.[95]

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89 *Hubbard* v. *Vosper* (1972) 1 All E.R. 1023, 1027, 1029, 1033 (C.A.); *Fraser* v. *Evans* (1965) 1 All E.R at p. 11 applied; *Donma Productions Ltd.* v. *Bart* (1967) 2 All E.R. 338; *Narman Pictures N.V.* v. *Osborne* (1967) 2 All E.R. 324 disappd. See *American Cynamid Co.* v. *Ethicon* (1975) 1 All E.R. 504 (H.L.) (for breach of Patent)

90 *Hamdard Dawakhana* v. *Hansraj* (1974) 1 Del. 119.

91 *Pattison* v. *Gilford* (1874) L.R. 18 Eq. 259; *Bindu* v. *Jahnabi* (1897) 24 Cal. 260; *Ramdas Khatau & Co.* v. *Atlas Mills Co.* (1930) 55 Bom. 659; 33 Bom. L.R. 19; 130 I.C. 583; 1931 A.B. 151; *Tamluk Trading Co.* v. *Nabadwipchandra* (1931) 59 Cal. 363; 138 I.C. 667; 1932 A.Cal. 542: *Sheo Nandan Prasad* v. *Sheo Parson Pathak* 1942 A.P. 349; 200 I.C. 389; *Chimanram Motilal* v. *Shankarmal* (1947) 49 Bom. L.R. 439, 1947 A.B. 424.

92 (1965) 2 S.C.R. 242; (1965) A.SC. 1147.

93 *Eastern Tea Estate* v. *Silchar Municipality* (1967) A.Asm. 1.

94 *Raja Ram* v. *State of U.P.* (1963) A.A. 449.

95 *Kirshan Lal Bihari Lal* v. *Hari Raman Rao* (1981) A.SC. 1183.

A plaintiff has no right to sue for injunction against a defendant even if the latter builds in contravention of municipal rules or an undertaking given by him to observe the rules, unless the plaintiff can show substantial injury.[96]

Injunction against separated wife's or husband's interference.—A husband can obtain an injunction against a separated wife who causes interference with or molests the husband, his business, and the woman he is living with as husband and wife and the children of that union. A decree for restitution of conjugal rights does not give her a right to trespass into the husband's new house. Would this apply to Indian conditions.[97]

Where the husband continued to reside in the matrimonial house being a joint tenant with his wife and therefore legally entitled to reside, an injunction restraining him for residing in the house will only be granted where his behaviour is such as to endanger the health of the wife, whether physical or mental and it is not necessary to show violence, physical or mental or a reasonable apprehension of the same.[98]

Parent and child.—Injunction was granted against a son restraining him until the trial or till further orders from entering his mother's residence and from assaulting her to extract money from her.[99]

In a wife's petition for divorce on the ground of cruelty the wife applied for injunction against the husband to restrain him from living in the matrimonial home belonging to her. She claimed she was afraid of him. There was a dispute as to when the intercourse last took place. Injunction was refused as the husband had not lost the matrimonial right of consortium.[1]

A woman suing for divorce was granted an injunction against the husband directing him to remove the mistress and her baby whom he had brought into the house but injunction against the husband directing him to leave the matrimonial home was refused.[2]

A husband purchased a draper's business with the shop premises and a flat above out of his own savings and the conveyance was jointly to the husband and wife. The Court granted an injunction against the deserting wife restraining her from selling her interest as that would defeat the very purpose of the acquisition unless she obtained leave of the Court.[3]

After a decree absolute injunction can be given against a former husband not to molest his former wife with whom were living young children; *Beasley* v. *Beasley* (1969) 1 W.L.R. 226.

The Mysore High Court has held that a suit by a wife for an injunction against her husband restraining him from marrying a second wife is maintainable.[4]

Custody of children.—During a divorce action by a husband the wife unknown to the husband had removed the children out of the jurisdiction of the Court. The Court had, before this fact was known, granted an interim injunction against the wife restraining her from removing the children. The wife was ordered to bring back the children within seven days and it was held that she was not in contempt in the meanwhile.[5]

Jactitation of marriage.—A suit would lie for injunction against a woman falsely proclaiming herself to be wife of the plaintiff in spite of a successful claim under s. 488 for maintenance.[6] But no injunction would lie against a child of whose mother was claiming the child to be the child of the plaintiff born during lawful wedlock.[7]

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96 *Bharati Saha* v. *Anantanarayan* (1981) A.Or. 58. *Krishna Kishore* v. *Shankarsarn* (1971) A.Cr. 89. *S. Ziaullah* v. *Khotija Bibi* (1974) A.Cr. 89 reld. on.

97 *Nanda* v. *Nanda*, (1967) 3 All E.R. 401; Halsbury's Laws of England (3rd Edn.) 405, para. 1067, refd to.

98 *Phillips* v. *Phillips* (1973) 2 All E.R. 423, 425, 426 (C.A.).

99 *Egan* v. *Egan* (1975) 2 All E.R. 167.

1 *Gorulnick* v. *Gorulnick* (1958) 1 All E.R. 146.

2 *Pinckney* v. *Pinckney* (1966) 1 All E.R. 121.

3 *Bedson* v. *Bedson* (1965) 3 All E.R. 307 (C.A.)

4 *Shankarappa* v. *Basamma* (1964) A.Mys. 247.

5 *Fabri* v. *Fabri* (1962) 1 All E.R. 35.

6 *Kashmir Kaur* v. *Manohar Singh* 68 P.L.R. 194; (1966) 2 Punj. 657.

7 *Kashmir Kaur* v. *Manohar Singh* (1966) 2 Punj. 657; 68 P.L.R. 194.

See notes above, "Nuisance."

The policyholders cannot interfere with the right of an Insurance Company to amend its articles of association but they can interfere, if they are beneficiaries, within the terms of the original trust deed. But apart from that they would have a right to interfere if the company dissipates or diverts the trust fund; but putting up a building is not such a waste or diversion.[8]

A director of a company can maintain a suit for injunction against his co-directors restraining them from doing illegal acts. But if the applicant's conduct has been inequitable towards the defendants or if has been found guilty of undue influence over the defendants, the relief of injunction will not be granted.[9]

Merely because the enjoyment of the plaintiff is rendered less beneficial would not entitle him to obtain an injunction unless he can show that the defendant owes a legal duty towards him as a consequence of which the enjoyment of his property is materially affected.[10]

A permit to run buses on a particular route is a licence which is revocable and therefore is not a right in property.[11] The Motor Vehicles Act having provided penalties for the breach of conditions of a permit, a permit holder has no right to maintain a suit for injunction against another permit holder guilty of the breach because the provisions are enacted for public benefit and even if they incidentally benefit an individual then the dominant purpose will prevail.[12]

By an agreement terminable by one month's notice by either side between a dealer the Delhi Gate Company & Caltex Company the dealer agreed to sell only Caltex petroleum products and diesel oil in such quantities as were supplied by the Caltex Company to whom no liability was attached for failure or refusal to make supplies. An agreement was also entered whereby it was declared that the dealer was a licensee and entitled to use temporarily the service station in common with the Caltex Company. But during the continuance of the licence the dealer was to be in sole possession of the property but that was not to create any right, interest or tenancy in favour of the dealer who was to pay a fixed fee per gallon of petrol and of diesels purchased purchased by it. The Caltex Company gave a notice of termination of the agreement. The dealer brought a suit for declaration and injunction restraining Caltex Company from withholding of supplies and also claimed that he was a tenant and not a licensee. The Caltex Company brought a cross suit for a mandatory injunction directing the dealer to vacate the premises.[13] The Court held that a suit for mandatory injunction by Caltex Company was maintainable in view of the terms of agreement which constituted the dealer as a mere licensee.[13]

The plaintiffs claimed to be the owners of the land in dispute and prayed for an injunction restraining the defendant from removing their structures. The suit was held maintainable without a prayer for declaration.[14]

A obtained a motor permit benami in his name although the transport business was carried on by the true owner. They jointly applied for transfer of the permit in the name of the true owner which was refused on the benamidar withdrawing his name and consent.

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8 *Doraiswami Iyengar* v. *United India Life Assurance Co. Ltd.* (1956) A.M. 316; *Kearns* v. *Leaf* (1864) 71 E.R. 299 refd. to.

9 *Karnal Distillery Co.* v. *Ladli Parshad* (1958) A.Puj. 190.

10 *Ithad Motor Transport Ltd.* v. *Karnal Co-operative Transport Society* (1958) A.Puj. 318; *Smt. Parulbala Roy* v. *Srinibash Chowmal* (1950) 1 Cal. 355; (1952) A.Cal. 364; reld. on.

11 *Ithad Motor Transport Ltd.* v. *Karnal Co-operative Transport Society* (1958) A.Puj. 318; *Lahore Electric Supply Co. Ltd.* v. *Secretary of State* (1938) A.L. 585; reld. on.

12 *Ithad Motor Transport Ltd.* v. *Karnal Co-operative Transport Society* (1958) A.Puj. 318; *Cutler* v. *Wandsworth Stadium Ltd.* (1949) A.C. 398; (1949) 1 All E.R. 544 (H.L.) refd. to.

13 *Delhi Gate Service* v. *Caltex (India) Ltd.* (1962) A.Puj. 370; *Prabirendra Nath* v. *Narendra Nath* (1958) A.Cal. 179; 99 CLJ 138 reld. on; *Kandaswami* v. *Vagheesram Pillai* (1942) Mad. 13; (1941) A.M. 822; *Sissir Kumar* v. *Sushil Kumar* 65 CWN 1; (1961) A.Cal. 229; dist.

14 *Muslim Waqf Board* v. *Municipal Board Bhopal* (1960) A.MP. 249.

A mandatory injunction to compel the benamidar to effectuate a document for transfer was refused on the ground of fraud on the authorities under the Motor Vehicles Act having been practised. Section 39 of the Act of 1963 and the amendment made thereby was pointed out.[15] But the motor vehicle was held to remain the property of the true owner who was entitled to the income of the transport business relating to that vehicle.[16]

Prevention of Crimes.—According to English law the Court has no jurisdiction to prevent the commission of acts which are merely criminal or illegal and do not affect the rights of property.[17] If however the criminal or illegal act involves an injury to property the Court can interfere on the ground of injury to property.[18]

By a statute a criminal offence was created making the stirring up of hatred an offence but conferred no legal right on the plaintiff, a person of German origin, who sought an injunction against the B.B.C. restraining its propaganda against persons of German origin. The injunction was refused in the absence of a legal right in the plaintiff.[19]

Multiplicity of judicial proceedings.—Clause (e) has reference to cases where, unless an injunction was granted, the plaintiff would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding his rights, or of preventing the acquisition of rights by the defendant.[20] For instances of this class, see ills. (p) and (q) to this section, above. Neither the text nor the illustrations warrant the supposition that any general jurisdiction for one judicial authority to restrain the proceedings of another is hereby created. In particular a civil Court will not grant a permanent injunction to stay apparently regular proceedings in criminal matters.[21] But in an English case it was held that an injunction will issue to restrain the defendant from proceeding with a criminal proceeding where the matters which involved substantially the same issues in Civil and Criminal Proceedings.[22]

Injunction: Private right versus Public Right.—The plaintiff who purchased a house close to a cricket ground in a village brought an action against the club for injunction on the ground that cricket ball damaged the house and garden of the plaintiff and precautionary measures taken by the club did not give complete protection. The Court of Appeal granted the injunction preventing the club from using the ground for playing cricket [Denning M.R. Diss].[23]

Injunction against winding up petition. — The defendant, a shareholder of 62 shares in a holding company with a large share capital alleged mismanagement and oppressive conduct on the part of the chairman who was a majority shareholder. He asked for certain information

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15 *Viswanathan Pillai* v. *Shanmugum* (1967) A.M. 100; (1966) 2 Mad. 477; *Sajan Singh* v. *Sardar Ali* (1960) 2 W.L.R. 180; (P.C.) & *Kiriri Cotton Co. Ltd.* v. *Ranchhoddas Dewani* (1960) 2 W.L.R. 127; (1960) A.C. 192 dist.

16 *Ibid.*

17 Halsburys: Laws of England Vol. 21 (3rd Ed.) p. 347 referring to *A.G.* v. *Sheffield Gas Consumers Co.* (1853) De G.M. & G. 304, 320; *Emperor of Austria* v. *Day & Kossuth* (1861) De G.F. & J. 217, 250. Kerr: On Injunctions 6th Ed. p. 8.

18 Halsburys: Laws of England Vol. 21 (3rd Ed.) p. 347 quoting also *Macaulay* v. *Shackell* (1827) 1 Bli. N.S. 96 (H.L.); and *Springhead Spinning Co.* v. *Riley* (1868) 6 Eg. 551. Kerr: On Injunctions (6th Ed.)

19 *Thorne* v. *British Broadcasting Corporation* (1967) 2 All E.R. 1225 (C.A.) See ill. (g), p. 954.

20 *Karnadhar* v. *Hariprasad* (1910) 37 Cal. 731, 734; 6 I.C. 444; *Apaji* v. *Apa* (1902) 26 Bom. 735, (repeated trespass); *The Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy* (1884) 8 Bom. 35, 91-92 [nuisance].

21 *Calcutta Port Commrs.* v. *Suraj Mull Jalan* 55 Cal. 978; 112 I.C. 712; 1928 A.Cal. 464. No injunction granted to restrain arbitration under a contract which is challenged as not binding, since, if the contract is of no effect, the arbitration proceedings would be nugatory: *Attar Singh* v. *Vishan Das* (1937) 18 Lah. 345; 171 I.C. 730; 1937 A.L. 545; *Ramdas Khatau & Co.* v. *Atlas Mills Co., supra*, note 46. For temporary injunction to restrain a party from proceeding in another Court, see *Metal Corporation of India* v. *Subbaiyer* 1952 A.Cal. 347.

22 *Thames Launches* v. *Trinity House* (1961) 1 All E.R. 26; *Re Connolly Bros. Ltd. Wood* v. *Connolly Bros. Ltd.* (1911) 1 Ch. 731, 744 applied (a case of 2 civil proceedings).

23 *Miller* v. *Jackson* (1977) 3 All E.R. 338.

and threatened to bring a winding up petition if he failed to get the information. At his instance Inspectors had been appointed to investigate the affairs of the company. The company sued for injunction and also interlocutory injunction for restraining the defendant from presenting a petition for winding up. The judge found that some of the allegations, if substantiated may lead to a winding up order and that a grant of injunction would lead to less damage to the defendant and therefore he granted injunction till judgment or till further orders. The defendant appealed. The Court of Appeal held that injunction restraining the defendant from presenting any petition for winding up on the ground of improper or oppressive conduct, being of too broad a nature, would not be granted as long as the defendant had sufficient ground for making the application. The size of the defendant's shareholding was irrelevant; so was his motive, so long as he had sufficient ground for making the application. Further investigation by inspectors was a different remedy which could not lead to winding up the company or from disposing of its assets nor prevent the continuance of its oppressive conduct. Besides on the evidence it could not be said that a winding up petition could not succeed. Nor had the company made a *prima facie* case for the grant of injunction.[24]

Peering & Besetting.—In a besetting case the Court of Appeal explained the dictum of Lord Diplock in the House of Lords. The plaintiffs sought an injunction and interlocutory injunction against the defendants restraining them from peering and besetting into the plaintiffs premises as that constituted a nuisance which would interfere with the plaintiffs business. This conduct of the defendants was to compel the plaintiffs to accept their demands. The Court of Appeal held that this conduct was a common law tort amounting to a private nuisance and on the material before the court the action was liable to succeed. Accordingly the Court had to consider where the balance of convenience lay since the continuance of the defendants' conduct would seriously affect the plaintiffs business and damages would not be an adequate remedy and the defendants may be unable to pay damages and the defendants could carry on their campaign by other legitimate means. There was no circumstance to take out the case from the general rule that it is not necessary to make out a *prima facie* case. The existence of special factors made it unnecessary to consider the balance of convenience for granting or refusing an interlocutory injunction.[25]

Injunction freezing account & preserving evidence.—Where a defendant by making false representation collects money from innocent parties and then deposits it in his private limited company's bank account, the Court can grant an injunction at the instance of the investigating police, by freezing the account in order to return the money to the rightful owners and also to preserve the evidence.[26]

Damages for future injury.—It is held in England, though not unanimously, that the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended.[27]

A competent officer under the Evacuee Interest (Separation) Act of 1951 has no jurisdiction conferred under that Act to issue an injunction and he has no inherent jurisdiction to do so.[28] A revenue Court has no jurisdiction to grant a permanent injunction under the U.P. Tenancy Act. Therefore when a plaintiff bases his suit merely on possession and that the defendant has no right to disturb his possesion the provisions of Ss. 60-64 of the Act do not afford an adequate remedy and s. 56(j) of the Specific Relief Act is applicable.[29] [S. 41(i) of 1963 Act].

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24 *Bryanston Finance Ltd.* v. *de Vries (No. 2)* (1976) 1 All E.R. 25, 33 & p. 36 (C.A.)
25 *Hubbard* v. *Pitt* (1975) 3 All E.R. 1, 16, 18, 20 (C.A.) (1975) 1 All E.R. 1050 affirmed; *American Cynamid Co.* v. *Ethicon Ltd.* (1975) 1 All E.R. 504 explained.
26 *West Mercia Constabulary* v. *Wagener* (1981) 3 All E.R. 378.
27 *Leeds Industrial Co-operative Society* v. *Slack* (1924) A.C. 851; (1924) All E.R. Rep. 259 (H.L.).
28 *Amritsar Improvement Trust* v. *Custodian Evacuee Properties* (1964) A.Puj. 110; *E.D. Sassoon & Co.* v. *Mangal Chand* 4 I.C. 609 refd. to.
29 *Mula* v. *Baburam* (1967) A.A. 573.

The grant of injunction is not affected by delay where the decree sought to be enforced is without jurisdiction. In this case it was an order granting probate.[30]

Second Injunction.—After a landowner obtained a permanent injunction against the *Kudikidappukaran*, the latter expanded his area. That gave a fresh cause of action to the landowner and he can get a fresh injunction and a temporary injunction, the old decree not being executable under new conditions.[31]

Rule of Natural Justice.—Where there is no immediate danger to a building, the Corporation cannot order demolition of the building without a show cause notice to the owner and the occupiers of the building. The provision of an appeal to the Standing Committee without which the decision of the Corporation Commissioner is final does not oust the jurisdiction of a civil court and a perpetual injunction can be granted.[32]

Contract incomplete.—Where an auction sale of plots by Municipality was not sanctioned by a resolution of the Municipality, the auction purchasers cannot specifically enforce the contract of sale. Hence no injunction restraining the municipality from reauctioning can be granted as the contract was not complete.[33]

Injunction — case of personal injury by foreign company.—In the issue of interlocutory injunction there is no distinction between a commercial action or an action of personal injuries or any other cause of action nor does it depend on the plaintiff's financial standing. In such cases the issue of an injunction depends on the justice and convenience in each case. On the facts the injunction against a foreign company restraining it from transferring assets out of jurisdiction would be continued unless it gave security so that any award made against it will be met. This was an action for personal injury resulting in death.[34]

Injunction against foreign national domiciled in England and even domiciled Englishman.—Even in the case of a foreigner who is based in England, an interlocutory injunction not to transfer assets out of jurisdiction can be granted, if there is a danger of his absconding or removing assets out of jurisdiction or otherwise disposing them of resulting in the plaintiff not being able to satisfy a judgment in his favour. Such an injunction can also be granted against an English national domiciled in England as he has on an earlier occasion absconded when in financial difficulties.[35]

Injunction — power to order tracing, discovery and inspection.—In action for damages for defrauding the plaintiffs of a large sum of money against defendants resident outside jurisdiction, where an injunction was sought restraining the defendants from transferring assets outside jurisdiction the Court can issue such interlocutory injunction and also grant tracing order in regard to money in a bank standing in the name of a third party and also to order discovery of documents against the bank where the account is standing and can also order inspection of bank books and take copies thereof to trace the monies alleged to be taken as a result of defrauding. On the defendant applying for variation of the injunction to pay out the assets the probable legal costs of proceedings, the Court refused to vary it on the ground of the defendants' failure to show that they had no other assets for paying the legal costs.[36]

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30 *Sisir Kumar Chandra* v. *Smt. Monorama* (1975) 1 Cal. 33; (1972) A.Cal. 283, 290.
31 *Paul alias Varkey* v. *Narayanan* (1974) A. Ker. 154.
32 *Commissioner of Bangalore Corporation* v. *Kapoor Chand Brothers* (1982) A.Knt. 23; *Dulabhai* v. *State of Madhya Pradesh* (1969) A.S.C. 78 reld. on.
33 *Doshi Mohanlal Durlabhji* v. *Sarvekanda Municipality* (1982) A. Cong. 6, 8 *H.R. Rekhy* v. *New Delhi Municipality* (1962) A.S.C. 554 reld on.
34 *Allin* v. *Jumbo Holding Ltd.* (1980) 2 All E.R. 502, 506.
35 *Prince Abdul Rahim* v. *Abdul Taha* (1980) 3 All E.R. 409, 412. *Barclay — Johnson* v. *Yuill* (1980) 3 All E.R. 190 appd.
36 *A.* v. *C.* (1980) 2 All E.R. 347, 351-2 (Q.B.D.); *A.* v. *C.* (1981) 2 All E.R. 126.

Mandatory injunctions.

39. [55] When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.[37]

This section is verbatim the same as s. 55 of the repealed Act. The illustrations to that section are set out below and the illustrations to the former s. 54 are set out under s. 38:

(a) *A*, by new buildings, obstructs lights to the access and use of which *B* has acquired a right under the Indian Limitation Act,[38] Part IV. *B* may obtain an injunction, not only to restrain *A* from going on with the buildings, but also to pull down so much of them as obstructs *B*'s lights.

(b) *A* builds a house with eaves projecting over *B*'s land. *B* may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 54, the Court may also order all written communications made by *B*, as patient, to *A*, as medical adviser, to be destroyed.

(d) In the case put as illustration (y) to section 54, the Court may also order *A*'s letters to be destroyed.

(e) *A* threatens to publish statements concerning *B* which would be punishable under Chapter XXI of the Indian Penal Code.[39] The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to *B*'s property.

(f) *A*, being *B*'s medical adviser, threatens to publish *B*'s written communications with him, showing that *B* has led an immoral life. B may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to section 54 and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trade-marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

At interlocutory stage.—Mandatory injunction can be given at interlocutory stage. *Comet Radiovision Services* v. *Farwell-Tandberg* (1971) 3 All. E.R. 230.

Mandatory injunction.—In *Smith* v. *Smith*[40] Sir G. Jessel M. R. said: "As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited. At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another.

"In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage the Court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? In granting a mandatory injunction, the Court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the person injured, the Court said, as in cases of specific perfor-

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37 These words do not authorise the Court to review the decisions of a domestic jurisdiction, such as the regulations and examination lists of a university, made within its competence and in good faith: *Ran Ugrah Singh* v. *Benares Hindu University*, 47 All. 434; 86 I.C. 695; 1925 A.A. 253 (question of retrospective regulations: the Court found that there had been an irregularity, but it was cured by the Visitor's discretion)

38 Act IX of 1908 (36 of 1963).

39 Act XLV of 1860.

40 (1875) L.R. 20 Eq. 500, 504.

mance, 'We will put you in the same position as before the injury was done'. When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it, before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence."

The granting of a mandatory injunction is a matter in the judicial discretion of the Court.[41] It is granted generally upon the same principles and subject to the same conditions as a perpetual injunction.[42]

In an English case where it was refused is *Wright* v. *Macadam*.[43] *P* claimed an easement to store coal in the garden shed of her landlord *D*. *D* succeeded in the County Court, and pulled down the shed. On appeal, the Court of Appeal reversed the lower court decision, but merely awarded damages of £10 to *P*, and refused to issue a mandatory injunction compelling *D* to rebuild, for though *D* acted at his peril in demolishing the shed their Lordships felt that justice was done to *P* by the award of damages. If the Court declines to grant a mandatory injunction it has jurisdiction to award damages even though the plaintiff has not claimed them.[44]

When granted.—When a mandatory injunction is granted under this section, two elements have to be taken into consideration: In the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation; in the second place, the requisite acts must be such as the Court is capable of enforcing.[45] These acts may assume a variety of forms, *e.g.*, the pulling down of a building as in ill. (a) above, the pulling down of eaves as in ill. (b), the destruction of written communications and letters as in ills. (c) and (d), and destruction of copies produced by piracy of copyright and of trade-marks improperly used by the defendant as in ills. (v) and (w) of former s. 54, set out under s. 38 above, and ill. (g) above, the removal of trees on the defendant's land the roots whereof, if the trees be allowed to grow, would inevitably damage the plaintiff's building,[46] the removal of overhanging branches,[47] the closing of a door,[48] the demolition of a wall constructed by the defendant on land belonging to the plaintiff.[49] If the wall is a party wall, the owners are co-sharers, and if one of the co-sharers seeks to oust the other from possession of the top of the wall, by himself building upon it,[50] or by raising its height,[51] the injured party is entitled to a mandatory injunction. An injunction will not be granted directing a person to do repairs, the reason being that the Court will not superintend works of building or of repair;[52] but the Court may order the execution of specific work required for the remedy of a nuisance or the like.[53] The Rangoon High Court refused to grant a mandatory injunction, at the suit of the owner of the land on which a tomb of the ex-King of Delhi was lawfully situated, to compel a member of the family who had erected a kind of shrine over the tomb to remove it.[54] The Lahore High Court granted an injunction against

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41 *Shamnugger Jute Factory* v. *Ram Narain* (1886) 14 Cal. 189, 199-201; *Mt. Bhagwanti* v. *Mohan Singh* 1934 A.L. 847; *Ram Awalamb* v. *Jata Shankar* (1969) A.A. 526, 541; *Chhedilal* v. *Chhoteylal* (1951) A.A. 199.

42 *Smith* v. *Smith* (1875) L.R. 20 Eq. 500.

43 (1949) 2 K.B. 744.

44 *Kalyandas Gokaldas* v. *Hiralal Karsandas* 1954 A.Sau. 139; *Shushilendra Pal* v. *Kailash Chand* 1945 A.A. 395.

45 *Lakshmi* v. *Tara* (1904) 31 Cal. 944, 949; *Khazan Singh* v. *Ralla Ram* 1937 A.L. 839; *Madho Singh* v. *Abdul Qaiyum Khan* 1950 A.A. 505.

46 (1904) 31 Cal. 944, *supra*, note 82.

47 *Vishnu Jagannath* v. *Vasudeo Raghunath* (1919) 43 Bom. 164; 47 I.C. 629; *Putraya* v. *Krishna Gota* 1935 A.M. 31; 67 M.L.J. 442; 152 I.C. 579.

48 *Bhag Singh* v. *Sewa Singh* 1953 A.Peps. 150.

49 *Abdul Hossain* v. *Ram Charan Law* (1911) 38 Cal. 687; 12 I.C. 459. This appears to have been overlooked in *Ewin Shank Wa* v. *U Po Nyun* 5 Rang. 404; 104 I.C. 139; 1927 A.R. 257. The Rangoon case is an odd one: the Court does not consider a trespass a breach of any obligation, though it is clearly within the definition in s. 3.

50 *Ganpat Rai* v. *Sain Das* (1931) 12 Lah. 542, 131 I.C. 233, 1931 A.L. 373, following *Stedman* v. *Smith* (1857) 8 El. & Bl. 1. *Mithoobhai* v. *Omprakash* 1951 A.N. 389.

51 *Durga Parshad* v. *Jheetar Mal* 1954 A.Punj. 125.

52 *Attorney-General* v. *Staffordshire County Council* [1905] 1 Ch. 336, 342; *Kashi Nath* v. *Agra Municipality* (1939) All. 337; 182 I.C. 534; 1939 A.A. 375.

53 *Kennard* v. *Cory Bros.* [1922] 2 Ch. 1, C.A.

54 *Dawson* v. *Rounac Zamani Begum* (1928) 6 Rang. 456; 112 I.C. 431; 1928 A.R. 268, chiefly because definite substantial damage to the plaintiff did not appear.

the discretionary orders of a Municipal Committee on the ground of the orders being an abuse of powers.[55] A suit by a partner against his co-partner to effect a registration under the Partnership Act is not a suit for mandatory injunction.[56]

Party Wall.—A party wall belongs to both parties as tenants in common and if one party puts up a construction on a moiety on his side the other party is entitled to use the entire joint wall and the first party is not entitled to get a mandatory injunction for the removal of such other party's construction.[57]

The discretionary relief of injunction and demolition of a building can be granted if it is equitable in the circumstances of the case.[58] Injunction is a discretionary relief and will not be granted because of the conduct of the plaintiff and also where pecuniary compensation is an adequate relief.[59]

This was in a case where the plaintiff had pledged his shares with a Bank against an overdraft and the Bank had brought a suit for recovery of its debt and threatened to sell the shares if the debt was not paid. The plaintiff brought a suit for injunction restraining the Bank from selling the shares as the Bank had no longer any right to sell the shares in view of the suit brought by it.

Contracts.—A Court would uphold a contract by means of a mandatory injunction; but it would exercise its discretion so as to withhold an injunction more readily if it were mandatory than if it were prohibitive. Even a blameless plaintiff cannot as of right enforce a negative covenant by a mandatory injunction. *Shepherd Homes Ltd.* v. *Sandham.* (1970) 3 All. E.R. 402.

May be granted although act completed.—There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the action is commenced. A mandatory injunction may be granted even after the injury has been completed, provided the plaintiff has not lost his right to relief by delay or acquiescence.[60] As regards mandatory injunction after the act sought to be restrained has been completed, a distinction is drawn between cases of trespass (*e.g.*, laying pipes in the plaintiff's land) on the one hand and cases of ancient lights on the other. In cases of trespass, the fact that the damage suffered by the plaintiff is small is immaterial. In cases of ancient lights the quantum of damage to the plaintiff, as compared with the quantum of loss to the defendant, is a material consideration.[61] Where there is a covenant not to build, and there is a breach of the covenant, the covenantee is entitled to an injunction without the necessity of showing damage,[62] the excuse of ignorance being clearly not available. Generally in cases of this class it is material whether the defendant's encroachment was or was not wilful.[63]

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55 *Administrator, Lahore Municipality* v. *Munir-ud-Din* (1941) Lah. 278; 1941 A.L. 200; 196 I.C. 70, where English and Indian authorities are discussed; *Administrator, Lahore* v. *Abdul Majid* (1945) Lah. 382, 1945 A.L. 81.

56 *Ghellabhai & Co.* v. *Chunilal* (1941) Rang. L.R. 219.

57 *Jagan Nath* v. *Kachhulal* (1971) A.Raj. 112. *Dandhkan* v. *Chandu Lal* (1923) A.B. 310 dissented from.

58 *Ram Awalamb* v. *Jata Shankar* (1969) A.A. 526, 541; (F.B.) *Chhedilal* v. *Chhoteylal* (1951) A.A. 199 reld. on.

59 *Haridas Mundra* v. *National & Grindlays Bank Ltd.* (1963) A.Cal. 132; 67 C.W.N. 58.

60 *Smith* v. *Smith* (1875) L.R. 20 Eq. 500 [ancient lights]; *Durell* v. *Pritchard* (1865) L.R. 1 Ch. 244 [ancient lights]; *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (1875) L.R. 19 Eq. 616 [ancient lights]; *Greenwood* v. *Hornsey* (1886) 33 Ch.D. 471; *Krehl* v. *Burrell* (1877) 7 Ch.D. 551; (1879) 11 Ch.D. 146 [obstruction of right of way]; *Jamnadas* v. *Atmaram* (1878) 2 Bom. 133, 137-139; *Jateendramohan Mitra* v. *Prabodhkumar Datta* (1931) 59 Cal. 260, at p. 270; 138 I.C. 193; 1932 A.Cal. 249 [ancient light]. See *Jagadish Chandra* v. Kanai Lal 1951 A.P. 525; *Manilal* v. *Nanubhai* 1947 A.B. 394, 49 Bom. L.R. 84; *Mithoobhai* v. *Omprakash* 1951 A.N. 389; *Khimji Mulji* v. *Popatlal Bhanji* 1951 A. Sau. 85; *Talakchand* v. *Dhoraji Municipality* (1955) Sau. 63; 1955 A. Sau. 63.

61 *Goodson* v. *Richardson* (1874) L.R. 9 Ch. 221, 224, 225 [trespass]; *Marriott* v. *East Grinstead Gas & Water Co.* [1909] 1 Ch. 70, 79 [trespass]; *Smith* v. *Smith* (1875) L.R. 20 Eq. 500, 505 [ancient lights]; *Senior* v. *Pawson* (1866) L.R. 3 Eq. 330; 336 [ancient lights.]

62 *Lord Manners* v. *Johnson* (1875) 1 Ch.D. 673 [covenant not to erect building]: *Sharp* v. *Harrison* [1922] 1 Ch. 502, seems to disregard this and other like authorities.

63 *Lalji* v. *Visvanath* 31 Bom. L.R. 126; 116 I.C. 234; 1929 A.B. 137. Distinguished in *Chuttanlal* v. *Kailashnarain* 1952 A. Ajm. 56.

"Breach of an obligation."—The obligation should normally be towards the plaintiff[64] but in *Raghunath* v. *Mathura Municipality*[65] a mandatory injunction was exceptionally granted against a defendant, who was under no direct obligation to the plaintiff, but whose performance of an obligation to the Collector, who *did* owe a duty to the plaintiff, was a condition precedent to the enforcement of the plaintiff's right against the Collector.

Employees and partners.—Both an employee and a partner in an architect's firm owe a duty of honesty and good faith to the employer or another partner as the case may be and they are not entitled to take or copy the employer's or the partnership documents, use them or use confidential information. This breach will be restrained by the issue of a mandatory injunction requiring the return of the documents.[66]

Goods not specified.—A purchaser of coal ash paid its price but the seller did not allow him to receive it from its depot; and the purchaser brought a suit for mandatory injunction. The injunction was refused as the purchaser had no title to the unspecified coal ash.[67]

Injunction — breach of confidence.—The plaintiff, a drug manufacturing company employed the first defendant to help them to train three executives to combat the adverse criticism against the plaintiff company. The first defendant in turn employed the second defendant, a journalist and television broadcaster, on a freelance basis to do the training. The plaintiff gave confidential information about the drug to the first defendant who passed on the information to the second defendant. In breach of the confidence the first and the second defendants made a film about the drug in spite of the warning of the plaintiff. The third defendant was the television company. The plaintiff brought an action for injunction restraining the defendants from exhibiting the film which was granted on the ground that the showing of the film was in breach of confidence and Shaw L.J held[68] that the communication in a commercial contract of information regarded by the giver and accepted by the recepient as confidential and which had a material connection with the commercial interest of the giver imposes on the recepient a fiduciary obligation to maintain that confidence unless the giver relaxes it.

Delay and acquiescence. — Delay and acquiescence may deprive a plaintiff of his right to relief by way of mandatory injunction.[69] Relief of mandatory injunction being discretionary will be refused where the plaintiff claiming to use water of a well does nothing for 3 years during which the well had fallen into decay and had dried up.[70] "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence.[71] Mere omission to take any legal proceedings for a time is not in itself an encouragement to the defendant amounting to an equitable bar to relief.[72] The result of authorities on the subject is that where a person had a legal right, it could be destroyed by his acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property. One point for consideration, however, has always been whether the man who did the act knew that he would do the injury.[74] If he did know, and must have known, that he was going to do a wrong, it deprives him of one ground

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64 *Nandalal* v. *Provudayal* 1952 A.Cal. 74.
65 1950 A.A. 505.
66 *Floydd* v. *Cheney* (1970) 1 All E.R. 446, 449-50.
67 *Tej Singh* v. *State of U.P.* (1981) A.A. 103.
68 *Schering Chemicals Ltd.* v. *Falkman Ltd.* (1981) 2 All E.R. 321, 328, 337, 338, 339.
69 *Smith* v. *Smith* (1875) L.R. 20 Eq. 500, 503 [ancient lights]; *Jamnadas* v. *Atmaram* (1878) 2 Bom. 133, 137-139 [ancient lights]: *Haji Abdul Allarakhai* v. *Haji Abdul Bacha* (1882) 6 Bom. 5, 7; *Moolchand* v. *Chhoga* (1963) A.Raj. 25 (delay amounting to waiver.)
70 *Chhedu Singh* v. *Kewal* (1963) A.A. 122.
71 *Duke of Leeds* v. *Earl of Amherst* (1846) 2 Ph. 117, 123; 78 R.R. 47, 51 [equitable waste]; *Abdul Hossain* v. *Ram Charan Law* (1911) 38 Cal. 687, 692-693 [trespass].
72 *Hogg* v. *Scott* (1874) L.R. 18 Eq. 444, 454 [copyright]; *Jamnadas* v. *Atmaram* (1878) 2 Bom. 133, 137-139.
73 Quoted and applied in *Punnamma* v. *Venkata Subba Rao* A.I.R. 1953 Mad. 456, 458.
74 *Smith* v. *Smith* (1875) L.R. 20 Eq. 500, 503.

of defence.[75] It is also to be remembered, where acquiescence is alleged, that where a man has a right to do a thing, and appears to be doing what he has a right to do, you must not assume that he is going to use his right for an unlawful purpose.[76] Finally a party cannot be said to acquiesce in the claims of others unless he is fully cognisant of his right to dispute them.[77] This principle seems to have been lost sight of in *Michael* v. *Krishnaveni.*[78] There the plaintiff sued for possession of land on which the defendant had built a wall. He had raised no objection to the building of the wall as both parties erroneously believed that the defendant was the owner of the site. While dismissing the case on another ground, the Court observed that in view of the acquiescence of the plaintiff, it was a fit case for damages rather than an injunction. It is submitted that in view of the plaintiff's ignorance of his title there was no acquiescence. If the plaintiff had known of his title from the first he would have been restrained by equity from subsequently asserting it.[79] If the defendant had known he had no title he would have had no claim to equitable relief.[80] As both parties were equally ignorant of the true position, it seems to have been a case where equity would leave the parties to their legal remedies.[81] On this basis it is submitted that *prima facie* the plaintiff should recover, as a claim to possession of one's own land, as the plaintiff who was living a mile away stood by and did not take action while the construction was being made.[82]

In a suit for possession of land as owner and for a mandatory injunction to demolish the structure put up by the defendant, the Court awarded compensation, the market value of the land, as the plaintiff who was living a mile away stood byand did not take action while the construction was being made.[82]

Where the plaintiff's exclusive ownership and possesion of the "Sal" is not proved, they cannot maintain a suit for mandatory injunction for removal of a pucca gate constructed in the Sal by the Defendant.[83]

Tenants right against landlord.—Where a landlord is responsible for the destruction of tenanted premises, the Court can grant a mandatory injunction directing him, at the instance of the tenant, to restore the building in its original condition and the cost of reconstruction should not exceed Rs. 1,000/- and restore possession of the premises to the tenant protected under S. 108(c) Transfer of Property Act as S. 108(e) Transfer of Property Act does not apply to such a case.[84]

Trespasser.—Where the plaintiff claimed a mandatory injunction against the defendant to remove the construction put up on the sued land, to level the ground and to quit, it was held that if the defendant is a trespasser the court must automatically grant a mandatory injunction to that effect unless there is acquiescence amounting to estoppel.[85]

Mandatory injunction against co-sharers and tenants.—See notes to s. 38 under the head "Right to or enjoyment of property," sub-head "Co-sharers, landlord and tenant, etc." above.

Where a relief by way of a mandatory injunction lies the Court will not grant a negative injunction. Hence a lessee in an agreement of a lease of a cinema who complains that the lessor is going to lease out the cinema to another person must sue for a mandatory injunction and not a mere negative injunction.[86]

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75 *Ib.*, p. 503.
76 *Attorney-General* v. *Leeds Corporation* (1870) L.R. 5 Ch. 583, 594 [nuisance].
77 *Marker* v. *M.* (1851) 9 Ha. I, 16, 20 L.J.Ch. 246, 251.
78 A.I.R. 1955 Mad. 542, 545.
79 *Ramsden* v. *Dyson* (1866) L.R. I H.L. 129.
80 *Ibid.*
81 *Bankart* v. *Houghton* (1859) 27 Beav. 425.
82 *R.S. Muthuswami Gounder* v. *A. Annamalai* (1981) A.M. 237; *S. Palanivelu* v. *K. Veradammal* (1977) A.M. 342; (1978) 1 M.L.J. 21; *Bakhariya Dhuria* v. *Manak Gangaram* (1954) A.N. 97; *Bodi Reddy* v. *Appu Gounidan* (1970) 2 Mad. L.J. 577 not folld.; *Dr. Atul Khair* v. *Miss Sheila James* (1957) A.P. 308; *Sarjug Devi* v. *Dulhin Kishori Kuer* (1960) A.P. 474 disting.
83 *Narain Das* v. *Atma Ram* (1974) A.Raj. 144, 147.
84 *Smt. Indu Tewari* v. *Ram Bahadur Chaudhari* (1981) A.A. 307.
85 *Chen Chennai Vedantha Sangam* v. *Shanmughasundaram* (1975) 1 Mad. L.J. 435, 438.
86 *Jawahar Theatre* v. *Kasturibai* (1961) A.MP. 102.

Co-owners.—Where one Co-owner without the consent of the other puts up a construction on the joint land and such other brings a suit for mandatory injunction the court will take the following circumstances into consideration in granting or refusing to grant the relief:

1. If the plaintiff comes at the earliest opportunity, then unless there is a special equity in favour of the defendant, the relief will be granted but not if the plaintiff lets the defendant proceed with the construction inducing the defendant to believe that there is no objection. Acquiescence will be a bar.
2. Where the defendant had expended a considerable amount of money the court will take that circumstance into consideration. Where the defendant had spent only Rs. 500/- the court will grant the relief.
3. Whether in the circumstances it will be inequitable to grant a mandatory injunction.
4. Whether the loss to the plaintiff can be compensated by money payment.[87]

Against neighbour — prevent easement.—Where the defendant had deliberately kept the height of his roof at such a level that the water from the front side flowed into the courtyard of the plaintiff, the plaintiff is entitled to a mandatory injunction so as to stop the flow of water which if allowed to continue for the requisite period would become an easement on the plaintiff's property.[88]

Injury to land. — Trees grown on the defendant's land were damaging the crops on the plaintiff's land and affecting its fertility. Therefore a mandatory injunction for their removal was granted.[89]

Owners of land adjoining a public highway having a right of way over lands of others to approach the highway, have a right to maintain a suit for mandatory injunction for removing any obstruction — a wall in this case — in the absence of proof of abandonment.[90]

Damages in lieu of, or in addition to, injunction.

40. [new] (1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:

Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

This is a new section but embodies what has been the law.

It is, however, made clear that the damages must be claimed in the plaint, which may be amended at any stage, and if damages are not claimed in the suit, a subsequent suit for damages will be barred.

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87 *Prabhoo* v. *Doodh Nath* (1978) A.A. 178; *Chhedilal* v. *Chhotey Lal* (1951) A.A. 199 (F.B.) folld.
88 *Mathu Singh* v. *Sanwalla* (1971) A.Raj. 241.
89 *Mahabir Chawdary* v. *Jadu Nandan Tiwari* (1972) A.P. 338; *Lakshmi Narayan Banerjee* v. *Tara Puasonna Banerjee*, 31 Cal. 644; *Bindu Pasini Chandharani* v. *Jamnatri Chandhrani*, 24 Cal. 260 reld. on.
90 *Damodra Naidu* v. *Thirupurasundari* (1972) A.M. 386; *Movva Butchamma* v. *Venkateswar Rao* (1969) A.A.P. 136; *Ganapathi Mudaliar* v. *Ponnusami* (1970) 2 Mad. L.J. 295 disting.

In a proper case the Court may award damages or order an enquiry as to damages.[91] This brings the section in line with s. 21.

Damages for future injury.—In *Leeds Industrial Cooperative Society Ltd.* v. *Slack* the House of Lords held though not unanimously that the Court has jurisdiction to award damages in lieu of a *quia timet* injunction in respect of a tort which had not yet been committed but is only threatened and which was not yet actionable at law; as for instance where the erection of a building has not yet commenced but according to plans prepared when completed it will infringe the right to light enjoyed by a neighbouring tenement.[92]

Conditions for giving damages instead of an injunction.—Conditions for giving damages instead of an injunction are:[93]

(i) Injury to plaintiff's right is small; (ii) is one capable of being estimated in money; (iii) is one which is capable of being compensated by a small money payment; (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction. There may be another condition where the defendant in disregard of the plaintiff's rights hurries up, say a building and has disentitled himself from asking for damages being given.

A mandatory injunction, which did not indicate what was to be done, but left the defendants to carry out the work according to their own methods and to achieve the results to which the plaintiff was entitled is good. In that case the argument that the value of plaintiff's land was £12,000 and the cost of refilling was £35,000 was considered.[94]

The defendants encroached on 3 inches of space belonging to the plaintiff by building his wall on that space but thereby the plaintiff's wall got additional support from the defendant's newly-built wall. In these circumstances the Nagpur High Court in its discretion did not grant a mandatory injunction but granted damages.[95]

A licence of a Municipal stall which is heritable and, subject to certain conditions, transferable, is irrevocable at the will of the grantor but it is revocable if there is a condition that the licensee will quit after notice to that effect. If such a licence is wrongfully terminated the remedy of the licensee is a suit for damages and not injunction under s. 54 (now s. 38 of 1963).[96]

Where the damages are an adequate remedy an injunction will not be granted. Therefore an injunction to restrain a principal from putting an end to an agency agreement will not be granted on the principle that a decree for specific performance cannot be given.[97] The plaintiff claiming the demolition of a wall put up by an educational institution was decreed damages in lieu of mandatory injunction as he would not thereby suffer irrepairable loss.[98]

The plaintiff was the owner of a piece of land through which the defendants constructed a sewer and a manhole. Before the construction the defendants obtained oral consent of the plaintiff, who at the time did not know of his ownership, the title deeds being with the mortgagee. The plaintiff suffered no incon-

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91 *Krishna Aiyar* v. *Shamanna* (1912) 23 Mad. L.J. 610, 617; 17 I.C. 497; *Callianji* v. *Narsi* (1895) 19 Bom. 764, 770; *Arya Pradeshak Pritinidhi Sabha* v. *Ram Chand* (1924) 5 Lah. 509, 83 I.C. 1047; 1924 A.L. 713; *Shushilendra* v. *Kailash* (1945) All. 917, 1945 A.N. 395; *Shakuntla Devi* v. *Haris Chandra* 1952 A.A. 602.

92 (1924) A.C. 851; (1924) All E.R. Rep. 259.

93 *Meux's Brewery Co.* v. *City of London Electric Lighting Co.* (1895) 1 Ch. 287, 322; *Shelfer* v. *City of London Electric Lighting Co.* (1891-4) All E.R. Rep. 838, 847; (1895) 1 Ch. 287, 321-3. Quoted in *Morris* v. *Redland Bricks Ltd.* (1967) 3 All. E.R. 1, 6.

94 *Morris* v. *Redland Bricks Ltd.* (1967) 3 All E.R. 1. *Shelfers Case* (1895) 1 Ch. 287 (1891-4) All E.R. Rep. 838 applied.

95 *Tilokchand* v. *Dhundiraj* (1957) A.N. 2.

96 *Shivadhar* v. *Corporation of Calcutta* 64 CWN 60; *Dominion of India* v. *Sohan Lal* (1950) A.E. Puj. reld. on.

97 *Mac Laboratories (P) Ltd.* v. *V. R. Nathan* (1967) 1 M.L.J. 353; *Brett* v. *East India & London Shipping Co. Ltd.* 10 L.T. 187; and *Morris* v. *Delobbeiflipo* (1892) 2 Ch. 352 (a case of specific performance of agency); *Davis* v. *Foreman* (1894) 3 Ch. 654 (also a case of agency) refd. to.

98 *Ram Shankar* v. *Mahatma Gandhi Higher Secondary School* (1979) A.A. 184, 187.

venience from the construction or user of the sewer. In a suit for damages and injunction, nominal damages were awarded for technical trespass but injunction was refused because the injury if any was trivial.[99]

Information was received by the defendant company from an inventor in confidence and was then used by it although honestly. It was liable for damages as reasonable compensation for the use of confidential information. It was neither an account of profits nor injunction but only reasonable damages for use of confidential information.[1] In case of termination of service of a municipal employee where a declaration with further relief of injunction was asked for because of the contravention of R. 97 under the Bombay District Municipalities Act, 1901, the Court held damages to be adequate relief.[2]

S. 40(2) being mandatory the Court must allow amendment of the plaint for a claim for damages in lieu of or in addition to injunction. If the prayer is belated the Court can impose such terms as it thinks fit.[3]

Injunction when refused.

41. [56] An injunction cannot be granted—

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is neccessary to prevent a multiplicity of proceedings.

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;[4]

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;[5]

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

This section corresponds with s. 56 of the repealed Act, except that cl. (d) has been omitted as it was inconsistent with art. 36(1) of the Constitution. S. 56 had the following illustrations:

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99 *Armstrong* v. *Sheppard & Short Ltd.* (1959) 2 All E.R. 651 (C.A.)

1 *Seager* v. *Copydex Ltd.* (1967) 2 All E.R. 415 (C.A.)

2 *Dahyabhai Bapulal* v. *Patan Municipality* (1967) Guj. 18.

3 *V.R. Nathan* v. *Mac Laboratories (P) Ltd.* (1975) A.M. 189, 191; *Charan Das* v. *Amir Khan* 47 I.A. 255; (1921) A.P.C. 50; *L.J. Leaden & Co. Ltd.* v. *Jardine Skinner & Co.* (1957) S.C.R. 438; (1957) A.S.C. 357; *P.H. Patil* v. *K.S. Patil* (1957) S.C.R. 599; (1957) A.S.C. 367 refd. to.

4 *Essappa Chettiar, in re* (1942) A.M. 756. But see (1949) A.L. 131 F.B.

5 *Sardari Mal* v. *Hirde Nath* (1925) 6 Lah. 384. *S.C. nom Laccha Mal* v. *H.N.*, 87 I.C. 994; 1925 A.L. 459.

(a) *A* seeks an injunction to restrain his partner, *B* from receiving the partnership debts and effects. It appears that *A* had improperly possessed himself of the books of the firm and refused *B* access to them. The Court will refuse the injunction.

(b) *A* manufactures and sells crucibles, designating them as "patent plumbago crucibles," though in fact they have never been patented. *B* pirates the designation. *A* cannot obtain an injunction to restrain the piracy.

(c) *A* sells an article called "Mexican Balm," stating that it is compounded of diverse rare essences, and has sovereign medicinal qualities. *B* commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying *A*'s Mexican Balm. *A* sues *B* for an injunction to restrain the same. *B* shows that *A*'s Mexican Balm consists of nothing but scented hog's lard. *A*'s use of his description is not an honest one and he cannot obtain an injunction.

[See *Perry* v. *Truefitt* (1842) 6 Beav. 66; 63 R.R. 11; the facts as stated here are stronger against the plaintiff.][6]

Scope of the section.— This section gives a list of cases in which a perpetual injunction cannot be granted. It must, however, be remembered that the jurisdiction to grant injunctions is discretionary, and an injunction, therefore, may be refused even if the case be one not covered by the present section. Clauses (a) and (b) are now so expressed as to make it quite clear that the injunction is not directed against a Court but *in personam*. There were conflicting decisions on the point under these clauses but now there is no room for such conflict.

Clause (a): The proviso to clause (a) was applied in *Umapati* v. *Subodh Chandra*.[7]

Clause (b): It is laid down in clause (b) of s. 56 that no injunction *to stay proceedings* could be granted unless the Court in which the proceedings was to be stayed was subordinate to that in which the injunction is sought.[8] In a csae which arose before 1877 it was held by a Full Bench of the Calcutta High Court that an injunction may be issued *against a decree-holder* to restrain him from executing a decree, though the Court granting the injunction and the Court passing the decree are Courts of coordinate jurisdiction. Such an order, it was said, is only binding on the decree-holder personally.[9] See Mulla's Code of Civil Procedure, notes to O. 39, r. 1, "Powers of High Court to stay the hearing of a suit."

In a Madras case the question arose whether an injunction to restrain a decree-holder from executing his decree was an injunction "to stay proceedings" within the meaning of this clause. It was held that it was not, the reason given being that as no application had yet been made for execution, and as none could be made so long as the injunction was in force, there was no pending proceeding that was stayed by the injunction.[10] But this view was dissented from by the High Court of Calcutta,[11] and it was not in accord with later Madras decision.[12] Now the words of cl. (b) are sufficiently ample to bar the jurisdiction of the Court to grant a perpetual injunction in such a case.

Proceedings — Small Causes Court and arbitrator.— Where a declaratory suit under S. 28 of the Bombay Rent, Hotel and Loding House Rates Control Act simultaneously pending in the Small Causes Court with arbitration proceedings under S. 91, Maharashtra Cooperative Act, no interim injunction should be granted by the Small Causes Court restraining the defen-

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6 One might think *Pidding* v. *How* (1837) 8 Sim. 477; 42 R.R. 231, would have furnished an illustration making the point more clear and better suited for exportation to India. There the plaintiff had represented the blend of tea for which he claimed an exclusive trade name as being specially imported from China, whereas in fact it was a mixture of teas purchased in England. Injunction refused with liberty to bring an action at law (the Court of Chancery then and for many years later could not award damages, as explained above in the introduction to the Specific Relief Act).

7 1953 A. Cal. 377.

8 The clause has no application where both the proceedings are pending in the same Court, since the Court itself must always be taken as competent to regulate its own proceedings: *Radha Madhab* v. *Rajendra Prasad* (1933) 12 Pat. 727; 1933 A.P. 250.

9 *Dhuronidhur* v. *Agra Bank* (1880) 5 Cal. 86, on review from (1879) 4 Cal. 380, 396.

10 *Appu* v. *Raman* (1891) 14 mad. 425, 429-430.

11 *Karnadhar* v. *Hariprasad* (1910) 37 Cal. 731, 734; 6 I.C. 444; *Prativa Nath Roy* v. *Benode Behari Ghose* 1936 A. Cal. 181; 61 C.L.J. 75; 162 I.C. 296.

12 *Vankatesa* v. *Ramasami* (1892) 15 Mad. 338, 341-342; *Sethurayar* v. *Shanmugam* (1892) 21 Mad. 353.

dant from proceeding with the arbitration because of S. 41(b) Specific Relief Act and because of its impropriety for the reasons that (i) the long delay in court proceedings; (ii) no injury results if proceeding before the Arbitrator are not stayed (iii) party cannot complain of multiplicity of proceedings in view of multiplicity of judicial opinion on the interpretation of S.91 of the Maharashtra Act and (iv) vexed question of jurisdiction under the two special Acts aforesaid.[13]

Subordinate Court. An officer on Special Duty under the Maharashtra Cooperative Societies Act S. 91 is not a Court subordinate to the Small Causes Court and the latter cannot grant an injunction restraining proceedings before such officer.[14]

A Certificate officer under Public Demands Recoveries Act, not being subordinate to the Court of the subordinate Judge no injunction can issue against him.[15] In Orissa a munsif is not a Court subordinate to the Court of Subordinate Judge.[16]

The English Courts have jurisdiction to restrain by injunction continuance of proceedings in a foreign Court but they would not make such an order unless it is shown that the continued prosecution thereof would be oppressive or vexatious.[17] An injunction would lie against a threatened application for winding up a private company by a minority shareholder whose application for registration of shares in favour of merchant bankers has been refused on the ground that winding up is not the proper remedy as it would inflict irreparabl damage and that the Court will presume good faith in refusal to register.[18]

The rule laid down in cl. (b) does not apply to temporary injunctions which are governed by O. 39 of the Code of Civil Procedure.[19]

Clause (e): Injunction to prevent breach of contract.—See notes to s. 38under the head. "Injunction to prevent breach of contract," above.

Clause (f): Nuisance.—See notes to s. 38 under the head "Right to, or enjoyment of, property," sub-head "Nuisance," above.

Clause (g): Acquiescence.— See notes s. 20 under the head "Delay," above, and notes to s.39 under the head "Delay and acquiescence, above."

Clause (h): Equally efficacious relief.— An injunction will not be granted to restrain an arbitration proceeding on the ground that the plaintiff did not agree to the reference,[20] for if, as the plaintiff pleaded, there was no contract, the award would be a nullity.

The section refers to 'equally efficacious relief' so that it is no escape from the section to argue that the alternative remedy lies before a less illustrious court, such as a special tribunal.[21] If however the plaintiff can establish that, in the circumstances, the special tribunal would have no jurisdiction, his claim to an injunction is not barred under s. 41.[22] Rules of a Trade Union making a person ineligible for election to an office of the Union are subject to challenge in a Court. Besides a Court can grant an injunction even though a plaintiff has not exhausted or embarked on domestic remedies afforded by the rules which cannot oust the Court's juris-

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13 *Udyog Mandir* v. *Centassa Knit Wear* (1975) A.B. 158.
14 *Krishnadevi Gupta* v. *Banwarilal Hanuman Prasad* (1976) A.B. 233.
15 *Narayan Prusti* v. *State of Orissa* (1972) A.Or. 186; *K.C. Nanda* v. *Certificate Officer* (1971) G.L.J. 742 reld. on.
16 *Narayan Mishra* v. *Surendra Nath Das* (1972) A.Or. 115.
17 *Settlement Corporation* v. *Hochshild* (1965) 3 All. E.R. 486; *Cohen* v. *Rothfield* (1919) 1 K.B. 410, 414; (1918-19) All E.R. 260, 262 appd.
18 *Charles Forte Investments* v. *Amanda* (1963) 2 All E.R. 940;*Re Yenidje Tobacoo Co. Ltd.* (1916-17) All E.R. Rep. 1050; (1916) 2 Ch. 426 dist.
19 *Amir Dulhin* v. *Adm.-Gen. of Bengal* (1896) 23 Cal. 351.
20 *Ram Kissen Jyodoyal* v. *Poorun Mall* (1920) 47 Cal. 733; 56 I.C. 571; *Attar Singh* v. *Vishan Das* (1937) 18 Lah. 345, 171 I.C. 780; 1937 A.L. 545; see also *Ramdas Khatau & Co.* v. *Atlas Mills Co.* (1930) 55 Bom. 659, 33 Bom. L.R. 19, 130 I.C. 583. 1931 A.B. 151.
21 *Municipal Committe, Akola* v. *Shrimati Shantarani* (1945) Nag. 670, 1946 A.N. 78
22 *Montgomery Municipal Committee* v. *Sant Singh* (1940) Lah. 707 (F.B.) distinguishing *Ram Kissen* v. *Poorun Mall 47 Cal. 733 (supra), Mathura* v. *Dr. Radha Ballabh* (1949) A.A. 301.

diction. Hence the rejection of the nonimation of a member for election to an office because he belonged to a prohibited political party — the Communists — can be challenged in a Court.[23]

A suit will not lie for an injunction restraining the defendent from acting as *lambardar*, as an application can be made to the Collector.[24]

No injunction can be granted in matters to which s. 36 of the Displaced Persons (Compensation & Rehabilitation) Act applies and which confers powers on authorities under that Act to determine when and how to deal with evacuee property.[25]

Clause (i): Plaintiff's conduct.— An injunction cannot be granted where the plaintiff's conduct is such as to disentitle him to that relief.[26] The plaintiff obtained the sanction of his plans by showing a space of 20 ft. for the street. He cannot then obtain an injunction restraining the Municipal Committee from demolishing any building on that space put up by the plaintiff.[27] The illustrations to the section relate to this clause, but that does not bar the plaintiff's claim for damages, if any. It is only the injunction, a remedy in equity, which is barred, if the plaintiff does not come to Court with clean hands.

Clause (j): Personal interest.— Every taxpayer is directly interested in the proper application of municipal funds. Any tax-payer therefore sue the municipality for an injunction restraining the municipality from misapplying its funds.[28] A suit for injunction is maintainable against an Income-tax Officer restraining him from preceeding with notice under s.34 of the Income-tax Act if issued without jurisdiction.[29]

Injunction is a personal right and a person who has leased out his factory to a third party has no interest left in the continued supply of electricity to the factory.[30]

A right not shown to be *in esse* cannot be protected by injunction. The plaintiff brought a suit for injunction four days before his retirement restraining the Government from relieving him the ground being that his date had been wrongly recorded. Injuctive relief was refused as the contract could not be specially performed.[31]

Injunction to perform negative agreement.

42.[57] Nothwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

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23 *Leigh* v. *National Union of Railwaymen* (1969) 3 All E.R. 1249.
24 *Madhusdan* v. *Sachchidanand* 1951 A.A. 382.
25 *Shree Ambernath Mills* v. *Custodian Evacuee Property* (1957) Bom. 668; (1957) A.B. 119.
26 *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58, 67; *Jao Raj* v. *Municipal Board, Bikaner* (1953) *A. Raj. 130. Hyderabad Stock Exchange Ltd.* v. *Rangnath Rathi & Co.* (1958) A.AP. 43.
27 *Ajudhia Prakash* v. *Administrator Municipal Committee* 64 P.L.R. 982.
28 *Vaman* v. *Municipality of Sholapur* (1898) 22 Bom. 646; *Municipal Corporation, Bombay* v. *Govind Laxman* 1949 A.B. 229. The plaintiff must show some special damage or injury. Mere sanction of a building plan by the Municipality is not enough: *Parakh* v. *Rudra* (1941) Nag. 266; 1941 A.N. 364; 197 I.C. 570.
29 *Kamakshya Narain Singh* v. *Union of India* 40 Pat. 22 (1966) A.P. 305; (1964) 51 I.T.R. 596 (but this was obiter). *Raleigh Investment Co.* v. *Governor General-in-Council* (1947) 15 I.T.R. 332; (1947) A.P.C. 78; and *State of Tripura* v. *Province of East Bengal* (1951) 19 I.T.R. 132; (1951) A.Sc. 26 refd. to. See *K.S. Venkataraman & Co.* v. *State of Madras* (1966) 60 I.T.R. 112, 122.
30 *Jangpal* v. *Western U.P. Electric Supply Co.* (1966) A.A. 117.
31 *Union of India* v. *Bakshi Amrik Singh* (1963) A. Puj. 104.

This corresponds with s. 57 of the repealed Act, and there is no alteration in the law. The following illustrations are from the former s. 57:

(a) *A* contracts to sell to *B* for Rs. 1,000 the good-will of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. *B* pays *A* the Rs. 1,000, but *A* carries on the business in Calcutta. The Court cannot compel *A* to send his customers to *B*, but *B* may obtain an injunction restraining *A* from carrying on the business in Calcutta.

(b) *A* contracts to sell to *B* the goodwill of a business. *A* then sets up a similar business close by *B*'s shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and *B* may obtain an injunction to restrain *A* from soliciting the customers, and from doing any act whereby their goodwill may be withdrawn from *B*.

(c) *A* contracts with *B* to sing for twelve months at *B*'s theatre and not to sing in public elsewhere. *B* cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining *A* from singing at any other place of public entertainment.

[*Lumley* v. *Wanger* (1852) 1 D.M. & G. 604; 91 R.R. 193.]

(d) *B* contracts with *A* that he will serve him faithfully for twelve months as a clerk. *A* is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining *B* from serving a rival house as clerk.

[Later English authorities have distinctly refused to go so far; an affirmative agreement does not of itself imply for this purpose a negative agreement to do nothing inconsistent with it: *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 426, 432. Whether an express agreement is affirmative or negative is a matter of substance and not of verbal form: *Metropolitan Electric Supply Co.* v. *Ginder* (1901] 2 Ch. 799; but there must be a distinct negative stipulation: *Mortimer* v. *Beckett* [1920] 1 Ch. 571. We do not see how *H. Rubenstein & Co.* v. *Gailoud* (1930) 122 I.C. 231, can be reconciled with the present illustration.]

(e) *A* contracts with *B* that in consideration of Rs. 1,000 to be paid to him by *B* on a day fixed, he will not set up a certain business within a specified distance. *B* fails to pay the money. *A* cannot be restrained from carrying on the business within the specified distance. [But s.27 of the Contract Act seems to make the agreement wholly void.]

Injunction to perform negative agreement.— It is provided by s. 38 that in granting an injunction to prevent the breach of a contract the Court is to be guided by the rules contained in Chapter II relating to specific performance. By s. 41, cl. (e), it is enacted, that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specially enforced. The present section provides that notwithstanding s. 41, cl. (e), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.[32]

According to English decisions if an affirmative covenant has a negative element in it or where a covenant is partly affirmative and partly negative the Court will in a proper case enforce the negative portion of the covenant.[33] The Court may also enforce by injunction the negative part of an agreement containing both affirmative and negative covenants although the affirmative part would not be specifically enforced.[34] In India in the case of negative covenants, injunctions even in cases where the service is not of a special or specialised character can be granted in suitable cases.[35] The Gujarat High Court[36] has recently held that a negative covenant must be distinct, mere affirmative stipulation is insufficient to comply with such a negative term. Therefore a term in a contract of employment to serve for a particular number of years does not imply not serving anyone else during that period. But the Madras High Court has held that a positive agreement of exclusive service of an employee with an employer during the period of the agreement would imply a negative convenant not to serve another employer.[37]

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32 *Niranjan S. Golikari* v. *Century Spg. & Wvg. Co. Ltd.* (1967) 2 S.C.R. 378. (1967) A.SC. 1098.
33 *Clegg* v. *Hands* 44 Ch.D. 503; Ker: On Injunctions (6th Ed.) p. 465.
34 *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; (1843-60) All E.R. Rep. 368.
35 *Sunilchand* v. *Aryodaya Spg. & Wvg. Mill Co. Ltd.* (1963) Guj. 891; (1964) A. Guj. 119. *Burn & Co. Ltd.* v. *McDonald* 36 Cal. 354 reld. on. Cf. *Maganlal* v. *Ambika Mills Ltd.* (1964) A. Guj. 215.
36 *Vinod Chandra* v. *Vivekanand Mills* (1967) A.Guj. 255; *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416 applied.
37 *Mac Laboratories (P) Ltd.* v. *V. R. Nathan* (1967) 1 MLJ 353; *Burn & Co.* v. *McDonald* (1909) 36 Cal.

Whether a covenant is negative or affirmative is not a question of form and an affirmative covenant does not mean a negative covenant not to do a thing inconsistent therewith.[38] Thus the contract in ills. (c) and (d) above is one of personal service, and therefore not capable by s. 14 (1) (b), of specific performance, yet the Court may by an injunction restrain the singer from singing at any other place of public entertainment and the clerk from serving a rival house. Similarly, where *A* agrees to sell *B* all the mica produced from his mines during a specific period and not to sell it to any other person, though the Court cannot compel *A* to sell the mica to *B* [s. 14(1)(a)], it may restrain *A* by an injunction from selling the mica to any other person.[39] On the same principle if *A* agrees to serve *B* for a period exceeding three years, and not to serve any other person during that period, though *B* cannot obtain specific performance of the contract [s. 14(1)(d)], he may obtain an injunction restraining *A* from serving elsewhere.[40] But the Court is not bound to grant the injunction. The granting of an injunction under this section is discretionary. Thus where the defendant agreed to serve the plaintiff as a cutter for a period of ten years, and not to serve as a cutter elsewhere during that period, the Court refused to restrain the defendant by an injunction from serving as a cutter elsewhere, it being proved that the circumstances under which the contract was entered into were such as to give the plaintiff an unfair advantage over the defendant within the meaning of s. 20(2)(a).[41]

Negative covenants in an agreement of service operative during the period of contract binding the servant to serve his employer exclusively or that he would not engage himself in a trade or business or would not get himself employed by any other master where he would perform similar duties is not a restraint of trade unless it is unconscionable or excessively harsh or unreasonable or one-sided. It can therefore be enforced by injunction.[42] No injunction will be granted in the case of an express negative covenant relating to contracts for personal service, if its effect is to compel the performance of the service or to remain idle, i.e., preclude him from working in any trade or profession whatsoever.[43] But it will be granted if there are other, though less remunerative, opportunities to him.[44] Even if specific performance is not possible, an injunction can in a proper case be given under s. 42 of 1963, e.g. where an employee undertakes not to take service under another employer or to start his own business during currency of the contract but not where the prohibition is in the widest terms. It must be reasonable in reference to the interest of the parties and to the interest of the public.[45] But a negative covenant which is too wide in terms and is unreasonable and not for the protection of any proprietary interest and a total restraint of trade cannot be enforced by injunction.[46] In the case of personal service by reason of special qualifications, an express negative covenant can be enforced by injunction excepting where it would amount to specific performance or where damages would be an adequate remedy.[47]

354; and *Callianji* v. *Narsi Tricum* 18 Bom. 702, 708; and *Madras Railway Co.* v. *Rust* 14 Mad. 18; reld. on: Modern Equity by H. G. Hanbury (8th Ed.) p. 570 not accepted. *Jairam Valji* v. *Indian Iron & Steel Co.* (1940) A.Cal. 466 folld.

38 *Shree Ambarnath Mills* v. *Custodian of Evacuee Property* (1957) Bom. 668; (1957) A.B. 119.

39 *Subba Naidu* v. *Haji Badsha Sahib* (1903) 26 Mad. 168.

40 *Madras Railway Co.* v. *Rust* (1891) 14 Mad. 18; *Burn & Co.* v. *McDonald* (1909) 36 Cal. 354; *Deshpande* v. *Arvind Mills Co. Ltd.* (1946) Bom. 89, 48 Bom. L.R. 90, 226 I.C. 138, 1946 A.B. 423. See *Warner Bros.* v. *Nelson* (1937) 1 K.B. 209, where the English authorities are reviewed.

41 *Callianji* v. *Narsi* (1895) 19 Bom. 764, affg. (1894) 18 Bom. 702.

42 *Niranjan S. Golikari* v. *Century Spinning & Manufacturing Co. Ltd.* (1967) 2 S.C.R. 378; (1967) A.SC. 1098; but see *W. H. Milsted* v. *Hanis* (1927) W.N. 233, (covenant wholly one sided and unconscionable); refd. to. *Gaumont British Picture Corp. Ltd.* v. *Alexander* (1936) 2 All E.R. 1686; (covenant not against public policy); and *Warner Bros. Pictures* v. *Nelson* (1937) 1 K.B. 209; (1936) 3 All E.R. 160 (covenant not against public policy) reld. on; *Gopal Paper Mills Ltd.* v. *Surendra Malhotra* (1962) A.Cal. 61 dist.

43 *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671.

44 *Warner Bros. Pictures, Inc.* v. *Nelson* (1957) 1 K.B. 209; (1936) 3 All E.R. 160.

45 *Lalbhai Dulpatbhai & Co.* v. *Chittaranjan* (1966) A.Guj. 189; *Maganlal* v. *Ambica Mills Ltd.* (1964) A.Guj. 265; (a case providing against service anywhere in India.)

46 *Shree Gopal Paper Mills Ltd.* v. *S. K. G. Malhotra* (1962) A.Cal. 61.

47 *Sunilchand* v. *Aryodaya Spinning and Weaving Mills* (1964) A.Guj. 115; *Marco Productions Ltd.* v. *Pagola* (1945) 1 All E.R. 155; refd. to.

In *Sunilchand's case* the defendant, a trained textile technician, agreed to serve the plaintiff company for 5 years but left service complaining of bad treatment. The company did not accept the resignation and promised to hold an enquiry into the defendant's complaint but the defendant took employment with another concern and the plaintiff filed a suit for injunction and an interim injunction was granted and appeal against that order was dismissed. Illustrations (c) and (d) above recognise such contracts.[48]

This remedy is not violative of Art. 19(1)(g) or of s. 27 of Contract Act.[49]

Ill. (c) is a reproduction of the decision in *Lumley* v. *Wagner*.[50] But it does not follow therefore that the operation of the section is confined to cases like *Lumley* v. *Wagner*, that is, to cases of contracts which are dependant on the personal qualifications or volition of the parties referred to in s. 14(1)(b). This is borne out by the wide language of the section and by the above illustrations.[51] But the principle of *Lumley* v. *Wagner*[52] will not be extended [53] and will not be applied to an agreement which though negative in form is affirmative in substance[54] (Kerr: On Injunctions, 6th Ed., p. 406). An injunction under this section is obtainable only against a party to the agreement.[55]

Restraint of trade.—Another set of contracts enforceable by injunctions are restraining an employee or a purchaser or other persons from competition. These contracts are invalid unless reasonable or they do not indirectly compel specific performance.[56] There are two lines of cases which are distinguishable: the one which concern the validity of covenants taking effect after employment and the other operating during employment. The latter are valid but sometimes the distinction is hard to draw.[57]

Severence.—A widely expressed negative stipulation may be severed and enforced in part; the question being whether an injunction to enforce such part of the negative stipulation amounts indirectly to specific performance of a positive obligation. In *Warner Brothers Pictures Inc.* v. *Nelson*[57] where an actress undertook to act for the plaintiffs for a fixed period during which she undertook not to act for a third party nor in any other occupation without the consent in writing of the plaintiffs, who claimed an injunction to restrain from acting for other parties. The Court gave a limited injunction which did not compel her to act for the plaintiffs since she could earn her living by working in some other capacity than as an actress.[58]

Breach of confidence.—No person is permitted to divulge to the world information which he has received in confidence unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence he can be restrained from breaking that confidence. But the party complaining must be the person who is entitled to confidence and to have it respected. He must be a person to whom the duty of good faith is owed.[59] A Court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.[60] Injunction has been granted for

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48 *Sunilchand* v. *Aryodaya Spinning and Weaving Mills Ltd.* (1964) A.Guj. 115; (1963) Guj. 891; *Marco Production Ltd.* v. *Pagola* (1945) 1 All E.R. 155. Refd.; *Deshpande* v. *Arvind Mills Co. Ltd.* 48 Bom. L.R. 90; (1946) A.B. 423; and *Burn & Co. Ltd.* v. *McDonald* 36 Cal. 354 F.B. folld.

49 *Sunilchand* v. *Aryodaya Spinning & Weaving Mills Ltd.* (1964) A.Guj. 119; (1963) Guj. 891; *Godavari Sugar Mills Ltd.* v. *K. T. S. Kamgar Sabha* (1961) 3 S.C.R. 342; (1961) A.S.C. 1016; and *Burn & Co.* v. *McDonald, 36 Cal. 354 reld. on.*

50 *(1852) 1 D.M.G. 604; 91 R.R. 93.*

51 *Subba Naidu* v. *Haji Badsha Sahib* (1903) 26 Mad. 168, 171-173.

52 (1852) 1 D.M. & G. 604; (1843-60) All E.R. Rep. 368.

53 *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 428; *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671; *Kitchner* v. *Gruban* (1909) 1 Ch. 413.

54 *Davis* v. *Foreman* (1894) 3 Ch. 654; *Kitchner* v. *Gruban* (1909) 1 Ch. 413.

55 *Sreedhara* v. *Thanumalayan* 1953 A.T.C. 90, 92.

56 See s. 27 contract Act *Supra.*

57 See the terms of the contract in *Warner Bros.* v. *Nelson* (1937) 1 K.B. 209 and *cf. Eastham* v. *Newcastle United Football Club Ltd.* (1964) Ch. 413.

58 (1937) 1 K.B. 209; (1936) 3 All E.R. 160; Contrast *Page One Records Ltd.* v. *Nelson (The Troggs)* (1967) 3 All E.R. 822; (1968) 1 W.L.R. 157.

59 *Fraser* v. *Evans* (1969) 1 All E.R. 8, 11; *Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25; and *Duchess of Argyll* v. *Duke of Argyll* (1967) Ch. 302; (1965) 1 All E.R. 611 refd to.

60 *Argyll* v. *Argyll* (1965) 1 All E.R. 611, 619.

breach of confidence by a servant[61] on the ground of an implied term in a contract[62] but not merely on the ground of confidence.[63] Even where the servant's conduct is not dishonest but is inconsistent with his duty towards the master and with the continuance of the confidential relationship between the master and the servant, the master would be entitled to dismiss the servant summarily.[64]

Confidence—Patent Licensees.—The principle was extended to licensees of patents using information communicated to them by the patentees[65] to secrets between husband and wife[66] and to information given before negotiations.[67] This principle has now been extended to innocent third parties receiving information.[68]

Trade secret — Injunction — confidential information.—If information given to one trader by another in circumstances which make that information confidential then the second trader is disentitled to make use of the confidential information for purposes of trade by way of competition with the first trader and an injunction will be granted.[69]

An American company gave a licence to a British company to use their drawings and technical data for the manufacture of their machines. The information so supplied was confidential. On the termination of the agreement, the British company was restrained by an injunction from using the confidential information and it was held that an inquiry as to damages suffered should cover the same field as the terms of the injunction as in a passing off action and not confined to drawings mentioned in the particulars delivered as in an action for breach of trust.[70]

Confidence between spouses.—An interlocutory injunction will be granted restraining publication by spouses of secrets regarding their private lives disclosed to each other during the marriage because

(i) policy of law is to protect against breach of confidence regarding matters of a confidential nature disclosed during coverture;

(ii) the plaintiff's breach of such confidence is not a ground for breach by the defendant, the other spouse;

(iii) plaintiff's immorality does not end such protection;

(iv) the protection extends against third persons to whom such confidences are disclosed.[71]

Employee. — An employee of an Architect on quitting employment is not entitled to take or copy the employer's documents, use copies for his own purposes or make use of confidential information. An injunction will lie restraining defendant from the user of the documents and requiring their redelivery to the employer.[72]

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61 *Lamb* v. *Evans* (1893) 1 Ch. 218.
62 (1967) N.Z.L.J. 484.
63 See *Cranleigh Precision Engineering Co. Ltd.* v. *Bryant* (1964) 3 All E.R. 289; (1965) 1 W.E.R. 1293; 1311; *Saltman Engineering Co.* v. *Campbell Engineering Co.* (1963) 3 All E.R. 613 (n).
64 *Sinclair* v. *Neighbour* (1966) 3 All E.R. 988.
65 *National Broach & Machine Co.* v. *Churchill Gear Machines Ltd.* (1965) 2 All E.R. 961.
66 *Argyll* v. *Argyll* (1965) 1 All E.R. 611.
67 *Seager* v. *Copydex* (1967) 2 All E.R. 415 (C.A.).
68 *Printers & Publishers Ltd.* v. *Holloway* (1964) 3 All E.R. 731, 739.
69 *Terrapin Ltd.* v. *Builders Supply (Hayes) Ltd.* (1960) R.P.C. 128, 131; *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd*, (1963) 3 All E.R. 413n; quoted in *Peter Pan Corpn.* v. *Corsets* (1963) 3 All E.R. 402, 406.
70 *National Broach & Machine Co. Ltd.* v. *Churchill Gear Machines Ltd.* (1965) 2 All E.R. 961, 965 (C.A.).
71 *Argyll* v. *Argyll* (1965) 1 All E.R. 611. *Rumping* v. *Director of Public Prosecutions* (1962) 3 All E.R. 256 considered.
72 *Floydd* v. *Cheney* (1970) 1 All E.R. 446, 449; *Robb* v. *Green* (1895) 2 QB 315; (1895-99) All E.R. Rep. 1053 reld. on.

Partnership.—A partner in a partnership of Architects cannot behind the back of another partner copy partnership documents and remove those copies from the partnership premises for use in other premises where he intends to carry on his professional work after putting an end to the partnership at will. Such acts are breach of good faith owed between partners. An injunction will therefore lie against the partner so acting requiring the delivery of all such documents.[73]

Negative agreement may be implied.—The negative agreement need not be express, as in *Lumley* v. *Wagner*.[80] It may be implied, as in ills. (b) and (d) above. Ill. (d) shows that it may be implied even in the case of a contract of personal service, which, indeed, has the effect of enforcing indirectly a contract of personal service. Where the defendant agreed diligently and to the best of his ability to devote himself to the duties incumbent on him as a draftsman and general assistant to the plaintiffs for a period of five years, it was held that though there was no negative condition in terms in the contract, a negative covenant could properly be implied under this section and ill. (d), and the defendant was restrained by an injunction from serving any other person during that period.[74] See notes to s. 27 of the Contract Act under the head "Restraint during term of service," above. These provisions of the Act go beyond the English law as now understood. See notes "Introduction to Part III" at the commencement of this Part, and note following ill. (d) to the former s. 57.

Because they may operate as economic pressure Courts issue injunctions if there is an express negative stipulation in contracts. But in cases not arising out of contracts of personal service negative stipulations have been implied and injunctions granted. Thus an injunction was issued to prevent the use of a ship which has been chartered to one person, for the benefit of another;[75] to restrain breach of a promise to give 'first refusal' of purchase of land[76] and to restrain breaches of various exclusive dealing agreements;[77] to restrain a seller of uncut timber from interfering with the buyer to enter the land, cut timber and to take it away[78] but a negative covenant is not implied from a contract to sell unascertained general goods, e.g. 100 tons of coal.[79]

Proviso to the section. — A plaintiff who has failed to perform his part of the contract is not entitled to the benefit of this section.[80] See ill. (e) above.

Liquidation of damages not a bar to an injunction under this section.—It is provided by s. 23 that a contract may be specifically enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same. The same principle applies to injunctions.[81]

Amendment of Act 10 of 1940.

43. In section 32 of the Arbitration Act, 1940, after the words "nor shall any arbitration, agreement or award be", the word "enforced" shall be inserted.

[See s. 14(2) and s. 25]

Repeal.

44. The Specific Relief Act, 1877, is hereby repealed.

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73 *Hoydd* v. *Cheney* (1970) 1 All E.R. 446, 450.

74 *Burn & Co.* v. *McDonald* (1909) 36 Cal. 354. See also *Charlesworth* v. *MacDonald* (1898) 23 Bom. 103, a case from Zanzibar, where the Specific Relief Act is not in force. An agreement for common management of an estate, though affirmative in form, was held to be negative in substance in *Kirtyanand* v. *Ramanand* 1936 A.P. 456; 164 I.C. 220, since the effect of the agreement was that the parties agreed not to do that which ordinarily they would have a right to do.

75 *De Mattos* v. *Gibson* (1859) 4 D. & J. 276; 124 R.R. 250; *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* (1926) A.C. 108.

76 *Manchester Ship Canal* v. *Manchester Racecourse Co.* (1901) 2 Ch. 37.

77 *Donnell* v. *Bennett* (1883) 22 Ch.D. 835; *Metropolitan Electric Supply Co.* v. *Ginder* (1901) 2 Ch. 799; *Cf. Fothergill* v. *Rowland* (1873) 17 Eq. 132, not folld.

78 *Jones* v. *Tankerville* (1909) 2 Ch. 400.

79 *Cf.* Fry: Specific Performance (6th Ed.) § 857.

80 *Subba Naidu* v. *Haji Badsha Sahib* (1903) 26 Mad. 168, 173.

81 *Madras Railway Co.* v. *Rust* (1891) 14 Mad. 18, 22.

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